

The Thin Line Between Love and Hate: Why Affinity-Based Securities and Investment Fraud Constitutes a Hate Crime

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TABLE OF CONTENTS

INTRODUCTION.....	1074
I. AFFINITY FRAUD AND ITS IMPACT.....	1081
A. <i>Typical Affinity Fraud Schemes</i>	1081
B. <i>The Growing Impact of Affinity Fraud</i>	1085
C. <i>Responses to Affinity Fraud</i>	1089
II. APPLYING HATE CRIME STATUTES TO AFFINITY FRAUD.....	1095
A. <i>Covered Offenses</i>	1098
B. <i>Hate by Any Other Name . . . : Examining the Requisite Animus for Hate Crimes</i>	1102
1. <i>Statutory Language</i>	1103
2. <i>Construction of Statutory Language</i>	1104
a. <i>Discriminatory Selection Model</i>	1105
b. <i>Racial Animus Model</i>	1108
C. <i>Intra-Racial/Religious Hate Crimes: An Oxymoron?</i>	1109
D. <i>Mixed or Pure Motives?</i>	1115
E. <i>Conclusions Based on Statutory Analysis</i>	1117
III. ASSESSING THE PARALLELS BETWEEN THE HARMS ASSOCIATED WITH HATE CRIMES AND THOSE ASSOCIATED WITH AFFINITY FRAUD.....	1120
A. <i>Individual Harms</i>	1121

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B. Harms Inflicted on the Target Community	1128
C. Societal Harms Associated with Bias Conduct	1135
D. Are Affinity Fraud Perpetrators More Culpable?	1137
CONCLUSION	1141

INTRODUCTION

Over the past several years, securities regulators have reported a dramatic rise in “affinity fraud”— securities and investment fraud that targets identifiable racial, ethnic, or religious groups perpetrated by members of the group or people claiming to want to assist members of the group.¹ Perpetrators of affinity fraud rely on traditional fraudulent investment schemes,² but instead of choosing victims based primarily on their economic profile, such perpetrators target victims based on their racial, ethnic, or religious affiliation.³ This targeting has proved extremely successful. As compared to previous years, both the number of affinity fraud cases and the amount of money lost in such cases has grown dramatically, both increasing by more than 600%. One nationwide survey found that from 1984 to 1989, perpetrators of affinity fraud scams defrauded 13,000 investors out of \$450 million.⁴ By contrast, securities regulators estimate that, from 1998 to 2001, over 90,000 investors in twenty-eight states lost more than \$2.2 billion in affinity fraud schemes.⁵ Indeed, in 2001 alone, one affinity fraud scam defrauded some 20,000 investors out of approximately \$580 million,⁶

¹ See Lisa M. Fairfax, *With Friends Like These: Toward a More Efficacious Response to Affinity-Based Securities and Investment Fraud*, 36 GA. L. REV. 63, 70 (2001) (defining affinity fraud); *Officials List Most-Common Investment Scams*, HOUS. CHRON., March 30, 1998, at 2 [hereinafter *Officials List*] (same). Although some securities regulators define affinity fraud more broadly to cover all scams that target groups, including those that target lawyers and other professionals, see Fairfax, *supra* at 70, this Article adopts a narrower definition of affinity fraud to include only those investment scams that target racial, religious, and ethnic groups.

² See Fairfax, *supra* note 1, at 72-73 (explaining traditional fraudulent techniques employed by affinity fraud perpetrators).

³ See *id.*

⁴ See Bill Broadway, *Fraud ‘in the Name of God’; Religion-Based Investment Scams are Increasing, Regulators Warn Scams Luring More Investors*, WASH. POST, Aug. 11, 2001, at B9 (citing study by the North American Securities Administrators Association and the Better Business Bureau). This survey marked the first time the North American Securities Administrators Association collected data related to affinity fraud scams. See Don Thompson, *Investment Scams Fleece the Unwary Faithful*, TIMES UNION, Nov. 17, 2001, at E1.

⁵ See Broadway, *supra* note 4, at B9.

⁶ This scheme involved an investment scam conducted by the founder of Tampa-based Greater Ministries International Church who received twenty-seven years in prison for his role in the scam. See *id.* Church officials used biblical quotes to convince investors

while over 13,000 investors lost more than \$590 million in another fraudulent investment scheme.⁷ Hence, each one of these scams produced more loss than the entire number of affinity fraud scams conducted in the preceding five years.

Securities regulators at the federal, state, and international level have expressed concern about the dramatic growth of affinity fraud and its tremendous impact. Since 1998, affinity fraud has been ranked in the top five investment crimes facing their departments.⁸ Since then, affinity fraud has remained a leading investment scam.⁹ International securities regulators also have begun to express concern about the alarming growth of affinity fraud within their borders.¹⁰ In addition, the Securities and Exchange Commission (the "SEC") and several state and international securities agencies have posted websites designed to educate potential investors about the dangers of affinity fraud and ways to avoid falling victim to such fraud.¹¹ Securities regulators believe that affinity fraud's staggering growth will continue as perpetrators use the Internet to target identifiable groups.¹²

to participate in their scheme. See Hal Mattern, *Fleeing the Faithful? Frauds Target Christians*, ARIZ. REP., Oct. 13, 1999, at A1.

⁷ In this scam, the Baptists Foundation of Arizona used more than one hundred shell corporations to defraud investors. See Broadway, *supra* note 4, at B9; Fairfax, *supra* note 1, at 74. The Foundation relied on investors' faith to convince them to invest in their scheme and then used their investment money to pay for personal expenses. See Mattern, *supra* note 6, at A1.

⁸ See *Officials List*, *supra* note 1.

⁹ As of May 2001, the North American Securities Administrators Association ("NASAA") referred to affinity fraud as the second most common investment fraud in the country. See Susan Sachs, *Welcome to America, and to Stock Fraud*, N.Y. TIMES, May 15, 2001, at A1 (noting that only unlicensed sale of securities is more prevalent).

¹⁰ See *infra* Part I (noting responses from Canadian and Australian securities regulators as well as International Chamber of Commerce).

¹¹ For the SEC site, see Securities and Exchange Commission, *Investor Alert: Affinity Fraud* (Feb. 16, 2001), at <http://www.sec.gov/investor/pubs/affinity.htm> [hereinafter *Investor Alert*]. The NASAA, the world's oldest investor protection agency whose membership includes state securities administrators from all 50 states and the District of Columbia also has a website dedicated to affinity fraud. See NASAA, *Affinity Fraud: Beware of Swindlers Who Claim Loyalty to Your Group*, at http://www.nasaa.org/nasaa/scripts/prel_display.asp?rcid=41 [hereinafter *Beware of Swindlers*]. The International Chamber of Commerce's Commercial Crime Bureau posted warnings and information on its web site. See International Chamber of Commerce Commercial Crime Services, *CCS Tolls Multi-billion Dollar Internet Banking Fraud* (Apr. 11, 2001), at http://www.iccwbo.org/ccs/news_archives/2001/fraud.asp (noting warnings issued following "recent spate" of affinity investment cases).

¹² See SEC Commissioner Laura S. Unger, *Investing in the Internet Age: What You Should Know and What Your Computer May Not Tell You*. . . , Remarks at the Association of Retired Persons National Legislative Council Annual Meeting in Washington, D.C. (Feb.

In recent years legislators have similarly expressed concern regarding the number of "hate crime"¹³ incidences within the nation.¹⁴ In response to this growth, the federal government and many states enacted a variety of penalty enhancement statutes. In 1994, Congress passed the Hate Crimes Sentencing Enhancement Act (the "Enhancement Act").¹⁵ The Enhancement Act mandated a revision of the Federal Sentencing Guidelines (the "Federal Guidelines") enabling sentencing judges to increase the sentences of defendants who target their victims because of an identifiable characteristic, such as their race, ethnicity, religion, gender, or sexual orientation.¹⁶ A majority of states and the District of Columbia also have enacted legislation allowing judges to impose

3, 2000), at www.sec.gov/news/speech/spch342.htm (noting, "[i]t seems likely that online communities will be an inviting venue for [affinity fraud] cases to migrate to the Internet."); see also Jay Perlman, *Securities Fraud, Affinity Fraud* (Feb. 23, 2000), available at <http://www.fool.com/specials/2000/sp000223fraud4.htm> (noting that Internet has made affinity fraud "more efficient, more effective, and cheaper").

¹³ For a definition of hate crimes, see *infra* Part I. Some commentators refer to hate crimes as bias or bias-motivated crimes to underscore the fact that such crimes involve discrimination as opposed to or in addition to hate or some other form of animus. See FREDERICK M. LAWRENCE, *PUNISHING HATE: BIAS CRIMES UNDER AMERICAN LAW* 9 (1999) [hereinafter LAWRENCE, *PUNISHING HATE*]. Professor Lawrence notes that the term "bias crime" captures more precisely what is at stake when we analyze so-called hate crimes because even when crimes are motivated by hate, the essential element is that the perpetrator is drawn to the victim because of their race, national origin, ethnicity, or religion. Without this bias motivation, a "hate crime" would not exist. According to Professor Lawrence, this is true regardless of the manner in which one construes these statutes. See Frederick M. Lawrence, *The Punishment of Hate: Toward a Normative Theory of Bias-Motivated Crimes*, 93 MICH. L. REV. 320, 321 n.4 (1994) [hereinafter Lawrence, *A Normative Theory of Bias-Motivated Crimes*]. This Article will use the terms hate crime, bias crime, and bias-motivated crime interchangeably.

¹⁴ See Tanya K. Hernandez, *Bias Crimes: Unconscious Racism in the Prosecution of "Racially Motivated Violence"*, 99 YALE L.J. 845, 846 (1990) (noting rise in bias crimes); Edward M. Kennedy, *Hate Crimes: The Unfinished Business of America*, 44 FEB B. B.J. 6, 6 (2000) (noting growing number of hate crimes). Like affinity fraud, Senator Kennedy notes that the Internet "gives criminals a vastly increased audience that can be reached with very little effort." See Kennedy, *supra* at 6. However, some assert that the empirical evidence does not support claims that there is an "epidemic" of hate crimes within the nation. See John S. Baker, Jr., *U.S. v. Morrison and Other Arguments Against Federal "Hate Crime" Legislation*, 80 B.U. L. REV. 1191, 1201 (2000) ("The FBI's statistics in no manner support the idea of an "epidemic" of "hate crime" which the media, special interest groups, and politicians have been claiming over the last two decades.") Even if the data does not support such an idea, it is clear that proponents of hate crime legislation relied on the perception that the incidents of hate crime were increasing. See *id.* at 1201-02.

¹⁵ The Enhancement Act was passed as part of the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 280003, 108 Stat. 1796 (1994) (codified in part at 28 U.S.C. § 994 (1994)).

¹⁶ See *id.*; see also United States Sentencing Manual Section 3A1.1(a) (mandating three level increase).

sentencing enhancements for crimes that involve such targeting.¹⁷ Legislators believed that these penalty enhancements would deter and combat the growing number of bias crimes.¹⁸ Assuming that such enhancements do curtail bias crimes,¹⁹ this Article examines whether securities regulators can use existing hate crime enhancement laws to undermine the rising number of affinity fraud cases.

Admittedly, the common perception of a hate crime contemplates the defendant's use of violence or intimidation against his victim motivated by the defendant's hatred or prejudice for the victim and his group.²⁰ This perception also contemplates that the defendant and victim are strangers²¹ and belong to two different identity groups.²² Indeed, Americans' current focus on hate crime stems from the highly publicized and brutal murders of people like James Byrd, Jr., who was violently beaten to death because of his race and the defendant's apparent hatred of members of that race.²³ Such hate-induced violence not only shapes

¹⁷ See *infra* note 121. The Anti-Defamation League released a model hate crime statute in 1981. See ANTI-DEFAMATION LEAGUE, HATE CRIMES, available at <http://www.adl.org/99hatecrime/intro.asp>.

¹⁸ See Kennedy, *supra* note 14, at 6; see also Dan M. Kahan, *The Secret Ambition of Deterrence*, 113 HARV. L. REV. 413, 467-68 (1999) (noting legislators belief that hate crime statutes were necessary to counteract growth in hate crimes). However, Professor Kahan also notes that opponents disagree with the notion that increased sanctions will serve to combat hate crimes. See *id.* at 468-69.

¹⁹ Of course not everyone agrees that penalty enhancements serve to deter hate crimes. See *id.* at 467-69 (explaining arguments for and against deterrence as rationale for hate crime legislation).

²⁰ See Martha Chamallas, *Deepening the Legal Understanding of Bias: On Devaluation and Biased Prototypes*, 74 S. CAL. L. REV. 747, 795 (2001) (describing prototypical hate crime as one where perpetrator hates or despises social group in which victim belongs, crime is characterized by extreme, gratuitous violence and nothing of material value is taken from victim); Lu-in Wang, *The Transforming Power of "Hate": Social Cognition Theory and the Harms of Bias-Related Crimes*, 71 S. CAL. L. REV. 47, 50-52 (1997) [hereinafter Wang, *The Transforming Power of Hate*] (describing "prototypical" hate crime involving extreme violence and motivated by perpetrator's attitude towards victim's social group).

²¹ See JACK LEVIN & JACK MCDEVITT, HATE CRIMES: THE RISING TIDE OF BIGOTRY AND BLOODSHED 11-13 (1993) (describing study in which 85% of bias crimes were committed by people who were strangers to their victims); Wang, *The Transforming Power of Hate*, *supra* note 20, at 49.

²² This Article will use the term "identity group" or "social group" to refer to groups whose members share the same distinguishing characteristic such as race, religion, ethnicity, gender, or sexual orientation.

²³ See *infra* note 25 and accompanying text (noting James Byrd, Jr.'s, attack as impetus for federal hate crime legislation). The attack on James Byrd, Jr., an African American, involved several white men who tied James Byrd, Jr., to a pickup truck and dragged him for approximately two miles, severing his head and right arm from his body. See Paul Duggan, *Racist Convicted in Texas Murder; Kidnap Dragging is Death Penalty Case*, WASH. POST, Feb. 24, 1999, at A4. The men, white supremacists, admitted that they selected James

public perception about the nature of a “real” hate crime,²⁴ but also prompted the enactment of hate crime legislation at the federal and state level.²⁵ Affinity fraud strays far from this image because it represents a non-violent economic offense arguably involving neither hate nor any prejudice towards targeted group members. Also, most perpetrators of affinity fraud belong to the same racial or religious group as their targeted victim.²⁶ Based on these differences, it could be asserted that we cannot and should not categorize such conduct as a hate crime, even for the limited purpose of imposing sentencing enhancements on those who commit affinity fraud.

This Article probes the validity of that assertion. In contrast to public perception, both hate crime legislation and scholarship reveal that there is no agreed-upon definition of a hate crime.²⁷ Some states define hate crimes as offenses of ethnic or religious intimidation or otherwise tie hate

Byrd because of his race. *See id.*; *see also* Martha Minow, *Regulating Hatred: Whose Speech, Whose Crimes, Whose Power? — An Essay for Kenneth Karst*, 47 UCLA L. REV. 1253, 1257 (2000) (describing murder of James Byrd); Carol Marie Cropper, *Black Man Fatally Dragged in a Possible Racial Killing*, N.Y. TIMES, June 10, 1998, at A16. Matthew Shepard’s brutal attack as a result of his sexual orientation also served to increase the spotlight on the issue of hate crimes and increase the momentum for a legislative response. *See* Christopher Chorba, Note, *The Danger of Federalizing Hate Crimes: Congressional Misconceptions and the Unintended Consequences of the Hate Crimes Prevention Act*, 87 VA. L. REV. 319, 329, 330 n.50 (2001) (noting comments about need for hate crime bill in wake of Matthew Shepard’s attack). For a description of the attack, *see id.* at 329-30; James Brooke, *Gay Man Beaten and Left for Dead; 2 Men Are Charged*, N.Y. TIMES, Oct. 10, 1998, at A9; Richard Lacayo, *The New Gay Struggle*, TIME, Oct. 26, 1998, at 32.

²⁴ *See supra* note 20.

²⁵ Senators Robb, Reid, and Kennedy submitted a concurrent resolution on the need to pass legislation increasing penalties of perpetrators of hate crimes on the second anniversary of Byrd’s death. *See* 146 CONG. REC. S4694-01 (2000). The senators noted that such a day should strengthen the resolve to enact hate crime legislation and pursue serious punishment against “violent hate mongers.” *See id.* Professor Lu-in Wang also notes that several dramatic and well-publicized cases drew public notice to the attention of hate crimes. *See* Lu-in Wang, *The Complexities of “Hate,”* 60 OHIO ST. L. J. 799, 801-02 (1999) [hereinafter Wang, *Complexities of Hate*] (citing beating of Chinese American by white autoworkers who blamed victim for their economic woes, beating of black men by gang of white youths, and stabbing of rabbinical student by black youths who shouted “Kill the Jews”); *see also* Baker, *supra* note 14, at 1194 (noting that “drum-beat” to pass federal hate crime legislation comes from “march of the mass-media,” which uses horrific nature of crimes like murders of James Byrd, Jr., and Matthew Shepard to draw national attention to problem of hate crimes).

²⁶ *See supra* note 1 (defining affinity fraud perpetrators as belonging to same group as victims).

²⁷ *See* Baker, *supra* note 14, at 1210 (noting “fuzziness” of term “hate crime”); Wang, *Complexities of Hate*, *supra* note 25, at 801 (noting that there is no full or accurate understanding of bias-motivated crimes, even among those who debate and apply hate crime laws).

crime offenses to those involving violence such as assault or battery.²⁸ However, the Federal Guidelines, as well as nearly half of state hate crime provisions, allow sentencing courts to increase the punishment of a defendant convicted of *any crime* if that defendant *intentionally selects* victims or commits a crime *because of* the victim's race, religion, ethnicity, or other designated group membership.²⁹ Such statutes do not limit the nature of the covered offense, do not require a defendant to act with animus, and do not require that the victim and defendant belong to two different identity groups. As the Ninth Circuit has observed, such statutes "sweep more broadly than the common, colloquial meaning of the phrase 'hate crime'."³⁰ The Supreme Court implicitly endorsed such a broad definition of hate crime when it upheld a state hate crime law containing language nearly identical to the Federal Guidelines.³¹ In addition, the House Report accompanying the adoption of the Enhancement Act specifically stated that the Act should be interpreted broadly to include economic offenses such as fraud and money laundering.³² Thus, there is both judicial and legislative support for the proposition that the term hate crime can cover all offenses and apply to defendants who are not motivated by hate as well as those who belong to the same identity group as their victim.³³

Interpreted in this fashion, affinity fraud falls neatly within the confines of hate crime statutes. In fact, affinity fraud essentially constitutes an investment crime pursuant to which perpetrators

²⁸ For a review of the state statutes, see *infra* note 129 and accompanying text describing state hate crime statutes requiring that defendants' engage in violent conduct. The Anti-Defamation League released a model hate crime statute in 1981 that also ties hate crimes to acts of violence or intimidation. See ANTI-DEFAMATION LEAGUE, *supra* note 17.

²⁹ See United States Sentencing Guidelines Manual Section 3A1.1(a) (mandating three level increase when defendant selects victim because of race, religion, national origin, ethnicity, gender or sexual orientation). All hate crime statutes include race, religion, and ethnicity, while some also include gender, sexual orientation, or physical or mental disability.

³⁰ *Winarto v. Toshiba Am. Elec. Components, Inc.*, 274 F.3d 1276, 1289 (9th Cir. 2001) (interpreting California hate crime statute).

³¹ See *Wisconsin v. Mitchell*, 508 U.S. 476 (1993) (finding Wisconsin penalty enhancement statute constitutional). Indeed, Congress drafted the federal statute to mirror the language of the Wisconsin statute. See 139 CONG. REC. H6792-01 (1993) (explaining that concern that bill may be subject to constitutional challenge drove drafters to choose language that paralleled as much as possible statute found to be permissible under *Mitchell*).

³² See H.R. REP. NO. 103-244 (1993).

³³ See *id.* (indicating that Congress intended hate crime to cover economic offenses); *infra* note 149 and accompanying text (describing Supreme Court's endorsement of hate crime statute covering offenses not motivated by animus).

specifically target their victims because of their membership in a given religious, ethnic, or racial group. In this way, affinity fraud combines traditional fraudulent investment practices with a novel twist. On the one hand, perpetrators of affinity fraud rely on garden-variety fraudulent practices such as pyramid schemes, which offer investment opportunities that purport to yield significant returns that either do not exist or are vastly overstated.³⁴ Such fraudulent investment practices constitute a crime under a variety of federal and state laws.³⁵ On the other hand, perpetrators of these fraudulent schemes deliberately target members of an identifiable racial, ethnic, or religious group by relying on the affinity or trust people feel for members of their own group and by appealing to group members' desire to "give back" to their particular community.³⁶ In this way, perpetrators of affinity fraud select their victims "because of" or "based on" their group status. Thus, while it does not comport with the conventional understanding of a hate crime, affinity fraud clearly entails criminal conduct based upon discriminatory selection and in this sense qualifies as a hate crime for purposes of the federal statute and several state penalty enhancement statutes.³⁷

While scholars have debated the appropriate scope and application of hate crime legislation, there has been little to no debate concerning

³⁴ See Fairfax, *supra* note 1, at 72-73 (describing typical investment schemes). See also *infra* note 42 (describing pyramid and "ponzi" schemes). Two of the largest affinity fraud schemes relied on a pyramid scam pursuant to which old investors were paid with funds from new investors. See *Five Guilty in Bilking Based on Ministry*, N.Y. TIMES, Mar. 14, 2001, at A12 (describing pyramid scheme conducted by officials in Greater Ministries International Church based in Tampa, Florida); Mattern, *supra* note 6, at A1 (describing pyramid-like scheme conducted by Arizona Baptist Foundation).

³⁵ For example, Section 17(a) of the Securities Act of 1933, as amended (the "Securities Act") makes it unlawful for any person in the offer or sale of any securities, by use of any means or instruments of commerce, to "employ any device, scheme, or artifice to defraud," or "to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser." 15 U.S.C. § 77q(a) (2000). Section 10(b) of the Securities Exchange Act of 1934, as amended, (the "Exchange Act") and Rule 10b-5 promulgated thereunder contain a similar prohibition against such practices in connection with the purchase or sale of a security. See 15 U.S.C. § 78j(b) (2000); 17 CFR § 240.10b-5 (2000). Under both the Securities Act and the Exchange Act, such conduct constitutes a crime if done willfully or knowingly. See Securities Act § 24, 15 U.S.C. § 77x (2000) (willfully); Exchange Act § 32(a), 15 U.S.C. § 78ff(a) (2000) (willfully and knowingly). Also, if the defendant uses the mail or telephone in connection with her securities scheme, she could be criminally liable for mail or wire fraud. See 15 U.S.C. § 1343 (2000) (wire fraud).

³⁶ See Fairfax, *supra* note 1, at 78-83 (describing targeting of victims for affinity fraud schemes).

³⁷ See *infra* Part IIB (discussing hate crime statutes that cover offenses based on perpetrator's discriminatory selection).

whether such statutes should apply to economic crimes.³⁸ This Article focuses on this issue in the context of affinity fraud and explores the extent to which the plain text of hate crime legislation, its judicial construction, and its legislative history, allow securities regulators to classify affinity fraud as a hate crime. This Article also addresses the extent to which such a classification can be justified based on the social and economic harms associated with affinity fraud. Based on this analysis, this Article concludes that affinity fraud can and should be characterized as a hate crime.

Part I of this Article analyzes the manner in which perpetrators conduct affinity fraud, the growth and impact of such fraud, and the current responses to curbing affinity fraud. This Part also explores a federal district court decision in which prosecutors sought to apply the federal hate crime penalty enhancement provision to a financial fraud, and addresses its implications for affinity fraud. Part II explores whether current hate crime legislation, as drafted and interpreted, allows law enforcers to apply sentencing enhancement provisions to those found guilty of committing an affinity fraud. This Part assesses this issue along several axes, including whether such legislation excludes economic crimes and crimes that do not implicate a defendant's prejudice against his victims. Part III examines whether applying hate crime statutes to affinity fraud can be justified based on the harms associated with affinity fraud and the extent to which such harms parallel those identified with more prototypical violent hate crimes. This Article concludes that applying hate crime legislation to affinity fraud may be an important way to combat its growth and the harms associated with such fraudulent investment schemes.

I. AFFINITY FRAUD AND ITS IMPACT

A. *Typical Affinity Fraud Schemes*

Perpetrators of affinity fraud scams use a variety of different bogus investment opportunities in their schemes. For example, some offer participants the ability to invest in foreign currency,³⁹ while others target

³⁸ Indeed, there is only one federal case applying the federal hate crime statute to an economic offense. See *infra* note 113-21 and accompanying text.

³⁹ See Fairfax, *supra* note 1, at 64 (describing investment scheme related to foreign currency and precious metals).

investment in oil wells or foreign markets.⁴⁰ In each case, although the perpetrators tout the investments as “no-risk,” the opportunities are either non-existent or highly speculative.

Although the type of investment opportunity may vary,⁴¹ most often affinity fraud perpetrators utilize “ponzi,” or pyramid schemes, where they lure investors to pay money into a scam and then pay off old investors with funds contributed by new investors.⁴² Because some initial investors receive a return on their investment,⁴³ such techniques enable perpetrators to continue their scheme without detection for several years. Indeed, many of the recently uncovered affinity fraud schemes have been in existence for several years, with one lasting almost ten years.⁴⁴ Eventually, such scams collapse because the number of new investors dwindles and consequently perpetrators cannot repay old investors.

As with other investment schemes, affinity fraud schemes constitute a crime under a host of federal and state laws. Indeed, under federal securities laws, investment ploys such as pyramid schemes constitute securities fraud because the perpetrators of such schemes attract participants by lying to them or otherwise deceiving investors about the nature and potential return on their investment.⁴⁵ Moreover, this fraud constitutes a crime if conducted willfully or purposefully,⁴⁶ or if the

⁴⁰ See *id.*

⁴¹ See Fairfax, *supra* note 1, at 72 (noting variety of scams such as those related to bogus investment in foreign currencies and those related to oil wells).

⁴² A ponzi scheme, named after Charles Ponzi, refers to a scam whereby people invest in programs that do not exist. See, e.g., Mark A. McDermott, *Ponzi Schemes and the Law of Fraudulent and Preferential Transfers*, 72 AM. BANKR. L.J. 157, 158 (1998). In a pyramid scheme, perpetrators use money from new recruits to pay early investors. See BLACK'S LAW DICTIONARY 863 (6th ed. 1991). Although some pyramid schemes can be ponzi schemes, other pyramid scams may involve some legitimate business venture and hence may not constitute a ponzi scheme. Hence, in describing the initial success of one affinity scheme, an SEC attorney noted that “any money paid that was out was simply other churches’ money.” *Scheme Led Churches Astray, SEC Alleges*, BALT. SUN, Nov. 29, 2002, at A14 [hereinafter *Georgia Scheme*] (describing ponzi scheme aimed at black churches and religious groups nationwide).

⁴³ See Fairfax, *supra* note 1, at 73 (explaining that some investors make large profits from affinity scams).

⁴⁴ See *United States v. Lilly*, 37 F.3d 1222, 1224-25 (7th Cir. 1994) (describing affinity fraud scheme in which defendant defrauded investors from 1980 until 1989); Broadway, *supra* note 4, at B9 (noting that officials with Greater Ministries Church conducted their scam for six years).

⁴⁵ See Fairfax, *supra* note 1, at 63-65 (defining manner in which various perpetrators conduct affinity fraud scams).

⁴⁶ See *supra* note 35 (describing federal criminal violations). These scams also constitute civil violations. See *id.* (describing civil violations of the Securities Act and

defendant used a mail or wire transmission in conjunction with the fraudulent scheme.⁴⁷

Affinity fraud, unlike other forms of investment crime, is typically targeted toward a specific group, generally one in which the perpetrator is also a member.⁴⁸ Unlike other investment scams, perpetrators do not rely primarily on their victims' economic status.⁴⁹ Instead, as the term "affinity" fraud suggests, perpetrators deliberately prey upon people with whom they have an affinity or group connection and aim their fraudulent schemes exclusively towards such people. Thus, perpetrators target potential investors through venues that identifiable groups may frequent. Churches represent the most common venue for such targeting.⁵⁰ However, perpetrators also use Internet sites,⁵¹ ethnically affiliated media,⁵² conferences,⁵³ or other social gatherings of these

Exchange Act). While civil violations are important, this Article focuses on affinity fraud that constitutes a crime and hence may be subject to hate crime provisions. Given that affinity fraud perpetrators intentionally target their victim, it should not be difficult to show that their conduct was done willfully and hence should be subject to criminal sanctions.

⁴⁷ See *id.* (describing federal mail and wire fraud provisions).

⁴⁸ Some perpetrators do not belong to their targeted group and instead pretend to want to advance the interests of the group. See *Fairfax*, *supra* note 1, at 65. These perpetrators often recruit a few members of the group and then use those members to help convince others of the legitimacy of their programs. See *id.* at 75.

⁴⁹ See *id.* at 77-78 (noting that perpetrators appear to target victims irrespective of their economic status).

⁵⁰ See *Fairfax*, *supra* note 1, at 75-76. Indeed, both of the largest affinity fraud scams were religious-based and targeted investors through the church. See *id.* In another example, the SEC alleges that an African American minister defrauded more than 150 other African American in his church out of \$3.5 million. See *Georgia Scheme*, *supra* note 42, at A14 (describing fraud targeting small black churches across country); Reuters, *Securities SEC Accuses Minister of Affinity Fraud*, L.A. TIMES, Sept. 11, 2001, at C3 (describing affinity fraud scam exclusively targeting African American Baptists that sold investors bogus contracts while promising them returns of 7% to 30%); Krissah Williams, *Md. Firm Defrauded Churches*, SEC SAYS, WASH. POST, Sept. 6, 2002, at E1 (describing SEC suit against local company accused of defrauding thousands of black churchgoers out of more than \$1 million).

⁵¹ See Perlman, *supra* note 12 (noting that perpetrators can target specific groups through bulletin boards, websites, and similar devices devoted to specific racial, ethnic, or religious groups).

⁵² For example, two Latinos promoted their scam through advertising on Spanish-speaking or Latin radio stations. See *SEC v. Taalib-Din Hasan*, Lit. Rel. No. 16699, 73 SEC Docket 724, 2000 WL 1292592 (S.D. Tex. Sept. 14, 2000) (describing affinity scam that defrauded Hispanic investors out of \$1.5 million). Similarly, a Hispanic man convinced other Hispanics to participate in his fraudulent investment program by advertising extensively in Spanish-language media. See *United States v. Castellanos*, 81 F.3d 108, 112 (9th Cir. 1996). Perpetrators of an investment scheme in California advertised in Chinese newspapers. See *Beware of Swindlers*, *supra* note 11.

groups.⁵⁴ In this way, affinity fraud perpetrators are able to gain access to members of a specific group. Perpetrators of such scams also design their investment opportunities to appeal to specific groups. Thus, such perpetrators may label their funds with names that have ethnic or religious significance to targeted group members.⁵⁵ In addition, perpetrators design their investment literature or other presentations to stress their shared heritage or identity with other group members. Perpetrators claim that because they are “just like” investors, they have a unique ability to help them.⁵⁶ For example, one scam emphasized the promoter’s desire to create “Black Millionaires,”⁵⁷ while another scam artist boasted of being “proudly Hispanic.”⁵⁸ In another common ploy, investors dramatize the antagonism between their group and other groups, claiming that other groups have kept them out of the capital markets.⁵⁹ Each of these techniques serves to target identifiable group members and prey upon such members’ shared bond. With these techniques, perpetrators use group affinity as a means of legitimizing themselves and their investment programs.

Perpetrators market their scam as an opportunity to give back to particular organizations or communities with ties to their targeted group. In the case of religious-based affinity fraud, perpetrators often

⁵³ See *S.E.C. v. First Zurich Nat’l U.S.A., LLC*, Lit. Rel. No. 15645, 66 SEC Docket 1215, 1998 WL 65654, at *1 (D. Wyo. Feb. 18, 1998) (final order for injunction and \$4 million disgorgement) (explaining that architect of scheme attended conference to solicit investors).

⁵⁴ For example, in one scheme, a New Jersey man held meetings at his home to solicit investors. See *Investor Alert*, *supra* note 11. Another person held meetings at local restaurants to target his investors. See *First Zurich*, 1998 WL 65654, at *1.

⁵⁵ Thus, perpetrators of one scheme gave their investment funds names with biblical connotations such as the Jubilee Trust Fund, the Elkosh Trust Fund, and the Oracle Trust Fund. See *SEC v. Oracle Trust Fund*, Lit. Rel. No. 16355, 71 SEC Docket 211, 1999 WL 1038060, at *1 (D. Kan. Nov. 16, 1999) (describing fraudulent investment schemes whereby members of various churches in Kansas, Nebraska, and Missouri were defrauded out of nearly \$7.4 million after investing in bogus trading programs).

⁵⁶ See Mark J. Griffin, Remarks by NASAA President Mark J. Griffin (Nov. 12, 1997), at http://www.nasaa.org/nasaa/scripts/fu_display_list.asp?ptid=31 [hereinafter *Remarks*] (noting perpetrator’s reliance on notion that investors can trust him because they are alike).

⁵⁷ See Jeanne Dugan, *Broken Trust: A Young Man’s Talk of Stock Riches Lures Host of ‘Regular Folks’*, WALL ST. J., Sept. 12, 2000, at A1 (describing scheme in which African American man convinced churchmembers to invest in partnerships and defrauded investors out of close to \$1 million).

⁵⁸ See *United State v. Castellanos*, 81 F.3d 108, 112 (9th Cir. 1996).

⁵⁹ See *id.*; see also *SEC v. Chelsea Assocs., Inc.*, Lit. Rel. No. 16312, 70 SEC Docket 1684, 1999 WL 760650, at *1 (D.N.J. Sept. 28, 1999) (noting that promoter stressed his ability to enable investors to take advantage of capital markets); *Williams*, *supra* note 50, at E1 (noting that perpetrators sold their investments by claiming that blacks had been left out of lucrative capital markets).

use biblical quotes, such as “give and it shall be given unto you,” to prompt investor participation.⁶⁰ Perpetrators of these scams claim that part of investors’ funds will be used to do “God’s work” by providing resources to the church, local community, and other charitable endeavors.⁶¹ Scams aimed at racial or ethnic groups rely on a similar ploy. Thus, one scam artist promised black investors that some of their money would fund efforts to rebuild war-torn African nations.⁶² This practice enables affinity fraud perpetrators to prey upon identifiable group members for their fraudulent conduct.

B. *The Growing Impact of Affinity Fraud*

This intentional targeting of victims has proven extremely successful. Indeed, securities regulators warn that affinity fraud is on the rise. In 1998, state securities regulators ranked affinity fraud as the number one investment crime facing their organization.⁶³ In 2001, securities regulators ranked affinity fraud second in order of prevalence or concern.⁶⁴ Within the United States, both the SEC and state securities officials have expressed concern about the growth of affinity fraud, with one securities official calling it a “widespread pernicious problem.”⁶⁵ Outside the United States, international securities regulators also have sounded the alarm. The International Commercial Crime Bureau issued a warning about the new surge in affinity fraud.⁶⁶ Similarly, Canadian and Australian securities officials alerted their populace about the

⁶⁰ See Mattern, *supra* note 6, at A1. In another example, promotional literature for the Baptist Foundation of Arizona claimed that investors could “do good while doing good.” See Randall Smith, *Loss-Plagued Baptist Foundation of Arizona Undergoes Investigation by Regulators in State*, WALL ST. J., Sept. 1, 1999, at C1.

⁶¹ See Broadway, *supra* note 4, at B9 (explaining that organizers of Baptist Foundation scam claimed that their investments supported church building efforts, retirement homes, and extended health care programs).

⁶² See NASAA, *Investment Frauds Using Religion on the Rise, State Regulators Warn* (Aug. 7, 2001), at http://www.nasaa.org/nasaa/abtnasaa/display_top_story.asp?stid=185 [hereinafter *Investment Frauds*] (describing affinity scam that convinced investors to invest \$3.9 million in bogus partnerships). Similarly, an African American claimed that part of investor funds would be used to provide health and social services to people within the community. See *Beware of Swindlers*, *supra* note 11.

⁶³ See *supra* note 8.

⁶⁴ See *supra* note 9.

⁶⁵ See *Remarks*, *supra* note 56; see also David Robinson, *Investment Schemes on the Rise, Spitzer Says*, BUFFALO NEWS, July 11, 2001, at E1 (quoting New York State attorney general who warned of “discernible increase in the number of affinity fraud cases”).

⁶⁶ See International Commercial Crime Services, *Fraud Can Sometimes Begin at Home*, available at http://www.iccwbo.org/ccs/news_archives/2001/fraud_home.asp.

“alarming growth” of affinity fraud within their borders.⁶⁷ Securities regulators note that such fraud grows even when the stock market does poorly because people look for ways to recoup their losses.⁶⁸

This growth represents a source of significant concern given the widespread and significant economic impact of affinity fraud. Affinity fraud scams defrauded investors out of thousands and sometimes millions of dollars, accounting for the more than \$2 billion in losses over the last three years.⁶⁹ As the introduction pointed out, in 2001 alone, one affinity scheme scammed 13,000 investors out of \$590 million,⁷⁰ while another defrauded 20,000 investors out of nearly \$580 million.⁷¹ These scams represent some of the largest affinity frauds. However, others also involve significant amounts of money, ranging from several thousand to more than \$20 million.⁷² These amounts clearly highlight the severity of the economic impact of affinity fraud. Moreover, affinity fraud impacts a variety of different groups. Religious-based affinity scams have targeted church groups including fundamentalist Christians, Baptists, Quakers, and Catholics.⁷³ Other perpetrators have targeted a variety of different racial and ethnic groups from blacks to Indians and Asian Americans.⁷⁴ Thus, affinity fraud has a significant impact both because of the amount of money involved and because of the multitude of different groups it affects.

In addition, affinity fraud scams pose unique social harms. First, while people invest in these programs to make money, affinity fraud also relies on and exploits people’s charitable impulses,⁷⁵ often leading to damaging consequences. Indeed, our society relies on charity for critical economic and social services, particularly services to people who are less

⁶⁷ See Australian Securities and Investments Commission, *Affinity Fraud: Can it Happen to You?*, available at <http://www.asic.gov.au/fido/fido.nsf/byheadline/affinity+fraud+can+it+happen+to+you?opendocument>; Canadian Securities Administrators, *Regulators Sound Alarm on Affinity Scams* (Jan. 29, 2002), available at <http://www.msc.gov.mb.ca/news/affinityscams.html>.

⁶⁸ See *Beware of Swindlers*, *supra* note 11.

⁶⁹ See *supra* note 5.

⁷⁰ See *supra* note 7.

⁷¹ See *supra* note 6.

⁷² One scheme defrauded investors out of \$7.4 million, while another cost investors \$5.8 million. See Fairfax, *supra* note 1, at 63-64. Still others range from \$2.3 million to \$26 million. See *Investment Frauds*, *supra* note 62 (describing affinity scams).

⁷³ See *Investment Frauds*, *supra* note 62; *Beware of Swindlers*, *supra* note 11.

⁷⁴ See *supra* note 73.

⁷⁵ See Fairfax, *supra* note 1, at 93-94.

fortunate.⁷⁶ Thus, crimes like affinity fraud, that potentially undermine people's willingness to make charitable contributions, may have a widespread impact on society's ability to deliver these services. Also, because many organizations rely on charity for their existence, crimes that exploit donative impulses threaten the existence of such organizations.⁷⁷ Indeed, the United States Sentencing Commission (the "Sentencing Commission") recognizes that people who exploit charitable impulses "create particular social harm."⁷⁸ Because affinity fraud perpetrators often exploit such impulses, their crimes poses social harms distinct from other investment crimes.

Second, affinity fraud may prove socially damaging because it exploits the special trust among group members. Some laws, particularly fiduciary laws, recognize that relationships involving a heightened level of trust deserve special protections because people within those relationships tend to be less cautious and hence more vulnerable to abuse.⁷⁹ Moreover, the federal securities laws impose special sanctions on those who breach a fiduciary relationship or a relationship of special

⁷⁶ See Nina J. Crimm, *An Explanation of the Federal Income Tax Exemption for Charitable Organizations: A Theory of Risk Compensation*, 50 FLA. L. REV. 419, 430 (1998) (explaining that "charitable organizations relieve the government of burdens by providing essential goods and services that the government otherwise would be responsible for delivering"); Mark Gergen, *The Case for a Charitable Contributions Deduction*, 74 VA. L. REV. 1393, 1397-98 (1988) (explaining that charities provide services that society believes should be provided without cost); Henry Hansmann, *The Role of Nonprofit Enterprise*, 89 YALE L.J. 835, 848 (1980) (explaining that nonprofit organizations produce important public goods); see also H.R. REP. NO. 75-1860, at 19 (indicating that government should provide tax exemption for charitable organizations because government should compensate these organizations for providing services for which it would otherwise have to allocate financial resources).

⁷⁷ See Fairfax, *supra* note 1, at 96-97.

⁷⁸ See U.S. SENTENCING GUIDELINES MANUAL § 2F1.1, cmt. n.23 (2000) (commentary). This provision enables sentencing courts to increase the penalty of anyone who occupies or pretends to occupy a position within a charitable organization and uses that position to exploit people.

⁷⁹ See Gregory S. Alexander, *A Cognitive Theory of Fiduciary Relationships*, 85 CORNELL L. REV. 767, 777-78 (2000) (noting that difficulties with uncovering abuses reveals need for more stringent standards of liability); Deborah A. DeMott, *Beyond Metaphor: An Analysis of Fiduciary Obligation*, 1988 DUKE L.J. 879, 902 (noting vulnerability of people within fiduciary relationships); Tamar Frankel, *Fiduciary Law*, 71 CAL. L. REV. 795, 812 (1983) (discussing increased sanctions for fiduciaries); Ellen A. Scallen, *Promises Broken vs. Promises Betrayed: Metaphor, Analogy and The New Fiduciary Principle*, 1993 U. Ill. L. Rev. 897, 913 (noting unique vulnerability of people within fiduciary relationships). In the famous case of *Meinhard v. Salmon*, Judge Cardozo stressed the difference between fiduciaries and others outside of a high trust relationship. "A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior." *Meinhard v. Salmon*, 249 N.Y. 458, 464 (App. Div. 1928).

trust.⁸⁰ While the trust relationships targeted for affinity fraud are not the typical fiduciary ones like that between an attorney and client,⁸¹ they have many characteristics of a high-trust relationship. Some scholars maintain that high-trust relationships differ from other relationships because of the high degree of reliance and discretion afforded those within the trust relationship.⁸² This characteristic describes the relationships targeted in connection with affinity fraud scams. Indeed, securities regulators observe that the success of affinity fraud stems from the higher degree of trust and reliance associated with many of the groups targeted for such conduct.⁸³ This observation is consistent with other scholars who note that the shared history, culture, and experience within many groups foster a heightened reliance among group members.⁸⁴ Such reliance produces increased trust that may make group members especially susceptible to appeals from others within their group.

Several courts and scholars note that another key element of a high-trust relationship is that it enables participants to commit a wrong that is difficult to detect.⁸⁵ The SEC and other securities regulators note that

⁸⁰ See, e.g., *United States v. O'Hagan*, 521 U.S. 642 (1997) (adopting misappropriation theory which holds non-insiders liable for breaches of trust and confidence owed to people who entrust such person with confidential information); *Dirks v. S.E.C.*, 463 U.S. 646 (1983) (noting that for purpose of securities fraud violation, special confidential relationship could be basis for recognizing that accountants and other "outsiders" such as an underwriter or consultant have fiduciary relationship to company when they are given access to information and expected to hold such information in confidence); *Chiarella v. United States*, 445 U.S. 222 (1980) (holding that corporate insiders can be liable for trading on basis of material inside information only if they do so in violation of fiduciary duty).

⁸¹ See Frankel, *supra* note 79, at 795-96 (describing traditional fiduciary relationships as those between trustee and beneficiary, principal and agent, attorney and client, and corporate director and corporation); Scallen, *supra* note 79, at 905 n.22.

⁸² See Scallen, *supra* note 79, at 917-18 (noting that some scholars emphasize one party's reliance on another to characterize fiduciary relationship).

⁸³ See *Beware of Swindlers*, *supra* note 11 (noting perpetrators ability to overcome investor skepticism by appealing to increased trust within groups); *Investor Alert*, *supra* note 11 (noting that affinity scams exploit increased trust that exists within groups with common ties).

⁸⁴ See, e.g., *United States v. Castellanos*, 81 F.3d 108, 110 (9th Cir. 1996) (noting that cultural affinity may increase likelihood that members of the same group fall victim to fraudulent schemes); FRANCIS FUKUYAMA, *TRUST: THE SOCIAL VIRTUES AND THE CREATORS OF PROSPERITY* 296 (1995) (noting reliance among members of ethnic, racial, and religious groups stronger than reliance among other groups); Lan Cao, *Looking at Communities and Markets*, 74 NOTRE DAME L. REV. 841, 882 (1999) (noting that preexisting social ties among certain groups increase levels of trust); *Investor Alert*, *supra* note 11 (noting that tight knit structure of certain ethnic and religious groups makes trust greater).

⁸⁵ See Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169, 174 (1968) (stating that difficulty to detect crime warrants more severe sanctions). The

because of the trust within many of the groups targeted for affinity fraud, it is more difficult to uncover and prosecute such offenses.⁸⁶ These characteristics reveal that the relationships exploited by affinity fraud involve heightened levels of trust and, consequently, violating them may be more reprehensible than crimes that target strangers. As one federal circuit judge noted, “people who violate a trust placed in them often do more damage to the social fabric and are more culpable than those who steal outright.”⁸⁷

C. Responses to Affinity Fraud

The sharp increase in affinity fraud, coupled with its tremendous economic and social impact, has prompted regulators to take a variety of actions aimed at curbing the fraud. Securities regulators nationwide have issued warnings about affinity fraud.⁸⁸ Thus, the SEC has created a website dedicated to warning investors about affinity fraud.⁸⁹ In addition, the North American Securities Administrators Association (“NASAA”) has created a website for the same purpose.⁹⁰ Moreover, states across the country have issued press releases and posted websites

Federal Guidelines contain an abuse of trust provision. See UNITED STATES SENTENCING GUIDELINES § 3B1.3. (2000). The Commentary to the provision states “[f]or this enhancement to apply, the position of trust must have contributed in some significant way to facilitating the commission or concealment of the offense (e.g., by making the detection of the offense or the defendant’s responsibility for the offense more difficult).” See *id.* In defining a position of trust, courts have focused on the extent to which a given relationship or position enables someone to commit a difficult-to-detect crime. Cf. *United States v. Iannone*, 184 F.3d 214, 223 (3d Cir. 1999) (noting that ability to commit difficult-to-detect wrong can determine position of trust); *United States v. Garrison*, 133 F.3d 831, 838 (11th Cir. 1998) (stating that abuse of trust provision penalizes defendants who take advantage of position that provides them freedom to commit or conceal difficult-to-detect wrong); *United States v. Queen*, 4 F.3d. 925, 928 (10th Cir. 1993) (noting that position of trust may be characterized as ability to commit difficult-to-detect wrong); *United States v. Hill*, 915 F.2d 502, 506 (9th Cir. 1990) (“the primary trait that distinguishes a person in a position of trust from one who is not is the extent to which the position provides the freedom to commit a difficult to detect wrong”).

⁸⁶ See *Blind Faith in Friendship Is Promoting “Affinity Fraud,” State Regulator Says*, SEC. WEEK, Feb. 7, 2000, at 9 [hereinafter *Blind Faith*] (noting that affinity perpetrators can operate their schemes longer because of higher trust); *Investor Alert*, *supra* note 11 (noting that it is more difficult for regulators to detect an affinity scam because of trust within groups); see also *Fairfax*, *supra* note 1, at 112-13 (same).

⁸⁷ *United States v. Isaacson*, 155 F.3d 1083, 1089-90 (9th Cir. 1998) (Fernandez, J., dissenting).

⁸⁸ See *infra* notes 90-91.

⁸⁹ See *supra* note 11.

⁹⁰ See *id.*

designed to inform investors about affinity fraud and ways to detect it.⁹¹ Even other countries have begun to warn their citizens about affinity fraud. For example, the Canadian Securities Administrators, the umbrella organization for provinces and territories in Canada, posted a warning to investors about affinity fraud and its alarming growth in Canada, claiming that more and more people are falling prey to affinity fraud.⁹² Also, the Australian Securities and Investors Commission issued a statement related to the harms associated with affinity fraud.⁹³

Securities regulators also have increased their investigation and prosecution of these kinds of scams.⁹⁴ For example, the New York Attorney General's Office won thirty convictions for affinity fraud scams in the year 2000 and expected to win forty by the end of 2001.⁹⁵ In Texas, the state securities commissioner claims that Texas is on the front lines of affinity fraud cases, prosecuting more cases than any other state.⁹⁶ The Maryland Attorney General claims that prior to 2001, he did not recall any instances of affinity fraud during his thirteen-year tenure.⁹⁷ Yet

⁹¹ See, e.g., Alabama Securities Commission, *Affinity Fraud: Beware of Swindlers Who Claim Loyalty to Your Group*, available at <http://asc.state.al.us/InvestorED/Affinity%20Fraud.htm> (Alabama); Arizona Corporations Commission, Securities Division, *Affinity Fraud*, available at http://www.ccsd.cc.state.az.us/investor_education/invest-affinity.asp (Arizona); California Department of Corporations, *Top 10 Investment Scams for Investors to Avoid*, available at <http://www.corp.ca.gov/pub/tips10att.htm> (California) (listing affinity fraud fifth out of list of top ten investment scams for 2002); State of Connecticut, Banking Division, *Banking Commissioner Warns Against Affinity Fraud*, available at <http://www.state.ct.us/dob/newsrsls/affinrls.htm> (Connecticut); Indiana Secretary of State Todd Rokita, *Secretary of State Gilroy Warns of Rise in Affinity Fraud and Other "Trust Me, I'm Like You" Scams*, available at <http://www.in.gov/sos/securities/RELEASE2.html> (Indiana) (noting that it joined thirteen other states that were together warning investors to be on guard against affinity fraud); Iowa Insurance Division, *Affinity Fraud*, available at <http://www.iid.state.ia.us/division/securities/InvestorEd/afffraud.asp?linksback=investored> (Iowa); *What is Affinity Fraud?*, available at <http://www.oag.state.ny.us/investors/affinity.html> (New York); Oregon Department of Consumer & Business Services, *Affinity Fraud*, available at <http://oregondfcs.org/investor/article4.pdf> (Oregon); Pennsylvania Securities Commission, *Securities Commission Warns About Religious 'Affinity Fraud'* available at, http://sites.state.pa.us/PA_Exec/Securities/releases/nr9199.html (Pennsylvania); Washington State Department of Financial Institutions, *Investor Alert: Affinity Fraud: Beware of Swindlers Who Claim Loyalty to Your Group*, available at <http://www.dfi.wa.gov/sd/affinityfraud.htm> (Washington).

⁹² See *supra* note 67.

⁹³ See *id.*

⁹⁴ See Fairfax, *supra* note 1, at 84.

⁹⁵ See Robinson, *supra* note 65, at E1.

⁹⁶ See Pamela Yip, *Scam Artists Preying on Faithful*, DALLAS MORNING NEWS, Aug. 13, 2001, at 1D (quoting state securities commissioner and district administrator for SEC's Fort Worth office).

⁹⁷ See Broadway, *supra* note 4, at B9 (quoting Maryland attorney general J. Joseph

during the first few months of 2001, his securities division investigated three affinity fraud cases involving 550 investors and \$7.3 million.⁹⁸

In an effort to combat and deter the increases in affinity fraud,⁹⁹ securities regulators also have sought additional penalties for those found guilty of such scams.¹⁰⁰ Securities officials have sought to impose enhanced civil and criminal penalties on affinity fraud perpetrators. On the civil side, securities regulators have discretion to impose increased monetary sanctions on affinity fraud perpetrators,¹⁰¹ and reported cases reveal that regulators have indeed imposed such increased sanctions.¹⁰² Such discretion is not present with respect to criminal violations. Instead, the United States Attorney General or the state equivalent

Curran, Jr., who took office in 1987).

⁹⁸ *See id.*

⁹⁹ Securities regulators also have used other methods to respond to affinity fraud. Thus, many agencies have launched educational campaigns within communities that may be susceptible to affinity fraud. For example, in 1998, in order to highlight the dangers of affinity fraud, state and federal securities regulators held discussions regarding such fraud in nationally televised town hall meetings, investment seminars, and at shopping malls. *See* NASAA, "Top 10 Investment Scams" List Released by State Securities Regulators (Apr. 23, 2001), available at http://www.nasaa.org/nasaa/scripts/prel_display.asp?rcid=153.

¹⁰⁰ Reported cases reveal that law enforcers have applied civil penalties for perpetrators of affinity fraud. *See, e.g.*, *S.E.C. v. Taalib-Din Hasan*, Lit. Rel. No. 16699, 73 SEC Docket 724, 2000 WL 1292592, at *1 (S.D. Tex. Sept. 14, 2000) (settlement consenting to permanent injunction and final judgment ordering disgorgement); *World Financial and Investment Company*, 1999 WL 1059799 (seeking permanent injunctions, disgorgement, and civil penalties); *S.E.C. v. First Zurich Nat'l U.S.A., LLC*, Lit. Rel. No. 15645, 66 SEC Docket 1215, 1998 WL 65654, at *1 (D. Wyo. Feb. 18, 1998) (final order for injunction and four million disgorgement). There also have been reported cases of prosecutors seeking, and judges applying, enhanced criminal penalties for affinity fraud perpetrators. *See, e.g.*, *United States v. Medrano*, 241 F.3d 740 (9th Cir. 2001) (upholding enhancements for defendant who targeted Hispanic and Spanish-speaking customers); *United States v. Luca*, 183 F.3d 1018 (9th Cir. 1999) (upholding enhancement for religious-based affinity scam); *United States v. Omori*, 107 F.3d 18 (9th Cir. 1996) (upholding enhancement of defendant who conducted affinity scam targeted at Japanese-Americans); *United State v. Castellanos*, 81 F.3d 108 (9th Cir. 1996) (seeking enhancement for affinity scam aimed at Hispanics); *United States v. Lilly*, 37 F.3d 1222, 1222 (7th Cir. 1994) (upholding enhancement for religious-based affinity scam).

¹⁰¹ The Securities Enforcement Remedies and Penny Stock Reform Act of 1990 ("Penny Stock Act"), Pub. L. No. 101-429, 104 Stat. 931 (codified in scattered sections of 15 U.S.C. (2000)) allows the S.E.C. to impose various monetary penalties on those who violate the federal securities laws. *See* Securities Act § 20(d), 15 U.S.C. § 77t(d) (2000); Exchange Act § 21(d)(3), 15 U.S.C. 78u(d)(3) (2000); Investment Company Act § 9(d), 15 U.S.C. § 80a-9(d); Investment Advisers Act § 203(I), 15 U.S.C. § 80b-3(I) (2000). The Penny Stock Act also enables the S.E.C. to order disgorgement in an administrative proceeding. *See* Exchange Act § 21C(e), 15 U.S.C. § 78u-3(e) (2000); Securities Act § 8A(e), 15 U.S.C. § 77h-1(e) (2000); Investment Company Act § 9(e), 15 U.S.C. § 80a-9(e) (2000); Investment Advisers Act § 203(j), 15 U.S.C. § 80b-3(j) (2000).

¹⁰² *See supra* note 100.

prosecutes criminal violations of securities laws.¹⁰³ While some prosecutors have sought to increase the criminal sanctions of affinity fraud perpetrators, whether these perpetrators actually receive enhancements depends upon whether sentencing courts determine that a given defendant's behavior merits enhancement under an applicable sentencing provision.¹⁰⁴ Because some courts believe that sentencing enhancements can be applied to affinity fraud and other courts do not, securities officials have not had uniform success in getting courts to impose increased criminal sanctions on affinity fraud perpetrators.¹⁰⁵

This inability to impose additional sanctions may undermine efforts to curtail affinity fraud. At the federal level, there has been an increasing perception amongst the judiciary, prosecutors, and other commentators that the Federal Guidelines fail to provide adequate sanctions for economic fraud.¹⁰⁶ Prosecutors note that many economic crimes are on the rise, and believe that enhanced prison sentences are necessary to "stem the flood" of that rise.¹⁰⁷ Prosecutors point out that many economic crimes are difficult to prosecute, often involving lengthy investigations and utilizing tremendous resources.¹⁰⁸ In their view, this difficulty makes it important that each case carry significant deterrence

¹⁰³ See, e.g., 28 U.S.C. § 515(a) (1994) (Justice Department authorization for criminal proceedings).

¹⁰⁴ Compare *Medrano*, 241 F.3d at 740 (finding that federal sentencing enhancements applied to a Hispanic bank teller who embezzled money from her Hispanic and Spanish-speaking customers), with *Castellanos*, 81 F.3d at 108 (rejecting enhancement for Hispanic defendant who convinced other Hispanics to participate in fraudulent investment program).

¹⁰⁵ See *supra* note 103; see also Fairfax, *supra* note 1, at 87-88.

¹⁰⁶ See, e.g., Clifton Leaf, et al., *Enough is Enough, White Collar Criminals: They Lie, They Cheat, They Steal & They've Been Getting Away With It For Too Long*, FORTUNE, Mar. 18, 2002, at 60-63 (noting that criminal sanctions for economic frauds fall short of those for other conduct even though such sanctions could serve to deter such frauds). The authors claimed that a disproportionately small number of cases even receive criminal prosecution. Thus, of the 609 referrals meriting criminal charges, U.S. attorney's disposed of 525, prosecuted 187, 142 were found guilty, and only 87 went to prison for terms less than three years. See *id.*; see also Michael Goldsmith, *A Former Sentencing Commissioner Looks Forward*, 12 FED. SENT. R. 98 (Sept./Oct. 1999) (noting judiciary concern with economic crime sentencing levels); Catherine Goodwin, *The Case for New Loss Tables*, 13 FED. SENT. R. 7 (July/Aug. 2000) (noting increasing perception that Federal Guidelines fail to provide adequate sanctions for economic fraud); Jerry Seper, *Panel Requests Longer Jail Terms*, WASH. TIMES, Apr. 17, 2001, at A5 (noting that increased penalties for high-dollar fraud cases are necessary to correct disparities).

¹⁰⁷ See Steve Ellman, *Tougher Federal Sentences Loom for White Collar Crime*, MIAMI DAILY BUS. REV., May 10, 2001, at 12 (quoting Paul Pelletier, chief of economic crimes section of U.S. Attorney's Office in Miami, who noted prosecutors' frustration when courts impose low jail times for economic crimes).

¹⁰⁸ See Goodwin, *supra* note 106, at 7.

value in the form of heightened penalties.¹⁰⁹

Advocates of increased sanctions also maintain that the losses attributed to economic crimes inflict tremendous damage on society, and sentencing levels need to reflect the relative seriousness of such offenses.¹¹⁰ These concerns led the Sentencing Commission to amend the Federal Guidelines in order to provide stiffer economic crime penalties.¹¹¹ Supporters of these amendments maintain that they are necessary to curb the rise in economic and investment-related crimes.¹¹² Affinity fraud surely is one such crime on the rise, and like other investment crimes, may need additional sanctions for deterrence. Unfortunately, although affinity fraud may inflict more harm than many other investment crimes, the new amendments do not address affinity fraud. This Article thus explores the extent to which hate crime provisions can serve as a tool in combating and deterring affinity fraud.

While there are no cases that have considered directly whether hate crime statutes apply to affinity fraud, one federal district court has suggested that the federal hate crime provision does not apply to a financial fraud targeting a particular group of women.¹¹³ In *United States v. Boylan* a municipal judge pled guilty to wire fraud in connection with a scheme in which he solicited sexual favors from female defendants in return for reducing their traffic violation fines and penalties.¹¹⁴ While not the primary conduct, the scheme constituted a financial fraud because Jersey City lost over ten thousand dollars in traffic fines and penalties as a result of the judge's actions.¹¹⁵ After he was convicted, prosecutors recommended that the court apply the federal hate crimes provision to

¹⁰⁹ See *id.*; see also Frank O. Bowman, III, *The 2001 Federal Economic Crime Sentencing Reforms: An Analysis and Legislative History*, 35 IND. L. REV. 5, 29 (2001) (noting that longer sentences are justified because of moral seriousness of economic crimes and damage they do to society).

¹¹⁰ See Goodwin, *supra* note 106, at 7.

¹¹¹ See *id.*

¹¹² See *id.*

¹¹³ See *United States v. Boylan*, 5 F. Supp. 2d 274 (D.N.J. 1998).

¹¹⁴ See *id.* at 277. The case involved a former municipal court judge for Jersey City who presided over cases involving minor traffic and motor vehicle violations. In order to reduce their fines, the judge coached the defendants to lie in open court about the circumstances of their offenses. He also used the mails and wires to further his scheme. See *id.*

¹¹⁵ While the scheme costs the City of Jersey over ten thousand dollars in fines, the court said such a loss was secondary in comparison to his solicitation of sexual favors. See *id.* at 279. The court noted that if the scheme had been primarily about defrauding the city, the judge would not have solicited sexual favors and would not have reduced his scheme for women only. See *id.*

increase the defendant's sentence because the judge appeared to select victims of his crime based on a prohibited characteristic.¹¹⁶ Indeed, the defendant generally selected single, poor, Hispanic, or light-skinned black females for his scheme.¹¹⁷ The district court concluded that the federal hate crime provision did not apply because the defendant was not motivated by hatred.¹¹⁸

The district court's conclusion in *Boylan* might suggest that affinity fraud cannot fall within the confines of the federal hate crime provision because affinity fraud targets a particular group without regard to any hatred for that group. However, such a suggestion is premature. Indeed, the *Boylan* court appeared to recognize that the defendant's conduct might be covered under a literal interpretation of the Federal Guidelines and expressed some concern about whether courts could adequately determine the difference between selection of a victim because of some prohibited characteristic versus being motivated by that characteristic.¹¹⁹ This concern strikes at the core of assessing the application of hate crime statutes to affinity fraud, and hence by failing to directly resolve it, the *Boylan* court's decision also fails to resolve whether affinity fraud should be construed as a hate crime. More importantly, the court noted that, while the defendant selected females only, he chose his victims based primarily on their marital and economic status, rather than their race, religion, or ethnicity.¹²⁰ This reveals that the defendant did not target his victim based on a prohibited characteristic as defined by the Federal Guidelines. Consequently, *Boylan* may not apply to cases involving affinity fraud in which perpetrators deliberately target their victims based on a prohibited group status. Thus, *Boylan* fails to resolve this issue.¹²¹ Given the lack of cases directly on point, this Article seeks to determine if the federal and state hate crime statutes can and should be used as part of the response to the explosive growth in

¹¹⁶ See *id.* at 283. Although prosecutors later stepped back from this adjustment, the court addressed its application to the defendant's conduct. *Id.*

¹¹⁷ See *id.*

¹¹⁸ See *id.*

¹¹⁹ See *id.* at 283 n.8. The court explained the intentional selection model would cover a defendant who intentionally selected women as targets of fraud. However, such selection appeared to be motivated primarily by greed as opposed to gender. The court dealt very briefly with the issue because it decided that the vulnerable victim adjustment was more appropriate. See *id.* at 283.

¹²⁰ See *id.* at 283.

¹²¹ In addition, even if the *Boylan* court had definitively determined whether or not an affinity fraud could constitute a hate crime, its decision would not serve as binding law for other higher courts.

affinity fraud crimes.

II. APPLYING HATE CRIME STATUTES TO AFFINITY FRAUD

Although the term “hate crime” has become part of the national public discourse, there is no uniform definition of the term. Indeed, the problem of precisely defining the term is exacerbated by the fact that there are several forms of legislation aimed at combating hate crime, each of which defines hate crime differently.¹²² Thus, one must examine the various legislation relating to the term “hate crime” to determine the proper definition of such a crime. There are three forms that are most prevalent: (1) substantive hate crime statutes creating a new crime or civil violation for acts involving “hate” or bias; (2) penalty enhancement provisions enabling courts to augment the sentences of those found guilty of a given crime if the crime involves hate or bias; such provisions do not create new law, but depend on defendants violating some existing law; and (3) reporting statutes requiring law enforcement officials to collect data with respect to the commission of hate crimes. At the federal level, there is no substantive hate crime statute.¹²³ Rather there is a

¹²² See Anti-Defamation League, Text of ADL Model Legislation, available at <http://www.adl.org/99hatecrime/text%5Flegis.asp> In this article, hate crime legislation refers only to those laws that relate to criminal activity in which the defendant either selected a victim because of some prohibited characteristic or was motivated by the victim’s group identity.

¹²³ See Frederick M. Lawrence, *The Case for a Federal Bias Crime Law*, 16 NAT’L BLACK L.J. 144, 144 (1999-2000) [hereinafter *The Case for a Federal Bias Crime Law*]. Legislators tried, but failed to pass a federal substantive hate crime bill. Lu-in Wang, *Recognizing Opportunistic Bias Crimes*, 80 B.U. L. REV. 1399, 1401 (2000) [hereinafter Wang, *Opportunistic Bias Crimes*]; see also The Hate Crime Prevention Act of 1999, H.R. 1082, 106th Cong. (1999). While some scholars supported such legislation, see *The Case for a Federal Bias Crime Law*, *supra*; Wang, *Opportunistic Bias Crimes*, *supra*, others expressed reservations regarding a federal bias crime law. See, e.g., Baker, *supra* note 14, at 1193 (challenging constitutionality of federal bias crime law); Sara Sun Beale, *Federalizing Hate Crimes: Symbolic Politics, Expressive Law, or Tool for Criminal Enforcement?*, 80 B.U. L. REV. 1227, 1245-47 (2000) (expressing concern that federal bias crime law may nullify state policy).

Supporters of the bill complain that the lack of a federal substantive hate crime bill significantly narrows the reach of the Enhancement Act. See *The Case for a Federal Bias Crime Law*, *supra* note at 144; see also Kennedy, *supra* note 14, at 6; Wang, *Opportunistic Bias Crimes*, *supra* at 1405. In order for the Enhancement Act to apply, prosecutors must find a federal act under which to charge the defendant. The federal government prosecutes most bias crime cases under 18 U.S.C. § 245. See Lawrence, *The Case for a Federal Bias Crime Law*, *supra* note 123, at 144; Wang, *Opportunistic Bias Crimes*, *supra* at 1401. That statute prohibits the use of force to injure, intimidate, or interfere with a person (a) because of their race, color, religion, or national origin, and (b) because of that person’s participation in any one of six enumerated federally protected activities. See Lawrence, *The Case for a Federal Bias Crime Law*, *supra* note 123, at 144; Wang, *Opportunistic Bias Crimes*, *supra* at 1401. Under this

penalty enhancement provision, which provides additional punishment for violations of existing federal laws,¹²⁴ and the Hate Crime Statistics Act ("Statistics Act"), which mandates federal reporting of statistics related to the number of hate crimes committed within the United States.¹²⁵ Currently, forty-seven states and the District of Columbia have some form of hate crime legislation.¹²⁶ Thirty-three of these states and the District of Columbia have enacted a penalty enhancement statute.¹²⁷

statute, a prosecutor must prove that the crime was motivated by bias and that the crime was committed because the victim was engaged in a federally protected activity. *See id.* Because of the difficulty of establishing this latter element, federal prosecutors have experienced difficulty with successfully prosecuting bias-related crimes. *See id.* This in turn significantly narrows the reach of the Enhancement Act. Then too, section 245 does not enable prosecutors to prosecute crimes motivated by bias related to gender, disability, or sexual orientation even though the Enhancement Act applies to such crimes. *See Kennedy, supra* note 14, at 21. The Hate Crime Prevention Act of 1999 would have amended section 245 to delete the requirement that crime victims engage in federally protected activities. *See Lawrence, The Case for a Federal Bias Crime Law, supra* note 123, at 144; Wang, *Opportunistic Bias Crimes, supra* at 1405. This coverage problem does not exist with affinity fraud because perpetrators of such fraud clearly violate a host of federal substantive laws. *See supra* note 35.

¹²⁴ *See* UNITED STATES SENTENCING GUIDELINES MANUAL § 3A1.1(a) (1987).

¹²⁵ *See* Hate Crimes Statistics Act, 28 U.S.C. § 534 (2003).

¹²⁶ Currently, only New Mexico, South Carolina, and Wyoming have yet to pass some form of hate crime legislation. South Carolina has a statute making it unlawful to conspire to deprive someone of free exercise of speech or other constitutional rights. *See* S.C. CODE ANN. § 16-17-560 (2002). However, that state has yet to pass a law aimed directly at offenses involving hate or bias. In January of 2001, the South Carolina Senate unsuccessfully introduced a bill providing for a penalty enhancement for those found guilty of an offense if the defendant's actions were motivated in whole or part by a prohibited characteristic. *See* 2001 SC S.B. 178 (SN).

Of these three exceptions, Wyoming is the most notable because it is the state in which Mathew Shepard was brutally murdered. *See* Minow, *supra* note 23, at 1272 ("The memory of Mathew Shepard — tied to a fence, beaten, burned, and left to die in Laramie, Wyoming — helped to animate [hate crime laws] as a federal strategy, as did the fact that Wyoming subsequently refused to adopt its own hate crime legislation in response."); *see also* James Brooke, *Gay Man Beaten and Left for Dead; 2 Men Are Charged*, N.Y. TIMES, Oct. 10, 1998, at A9 (describing Mathew Shepard murder); Richard Lacayo, *The New Gay Struggle*, TIME, Oct. 26, 1998, at 32 (describing Mathew Shepard murder in Wyoming). Ironically, although Shepard's attack spurred other states and the federal government to pass hate crime legislation, his home state has yet to even introduce such a measure. In fact, because there is not substantive federal law criminalizing actions aimed against a person because of his sexual orientation, if Mathew Shepard's murder were to take place today, his murderers would not be subject to any of the hate crime laws drafted in Mathew Shepard's memory. *See Kennedy, supra* note 14, at 21.

¹²⁷ *See* ALA. CODE § 13A-5-13 (2001); ALASKA STAT. § 12.55.155 (Michie 2001); ARIZ. REV. STAT. ANN. § 13-702 (West 2001); CAL. PENAL CODE § 422.75 (West 2001); CONN. GEN. STAT. ANN. § 53a-40a (West 2002); DEL. CODE ANN. tit. 11, § 1304 (2001); D.C. CODE ANN. § 23-3703 (2001); FLA. STAT. ANN. § 775.085 (West 2001); GA. CODE ANN. § 17-10-17 (2001); HAW. REV. STAT. ANN. §§ 706-662, 846-51 (Michie 2001); 730 ILL. COMP. STAT. ANN. § 5/5-5-3.2 (West 2001); IOWA CODE ANN. §§ 708.2C, 712.9 (West 2001); KAN. STAT. ANN. § 21-4716

While this Article focuses on the application of penalty enhancement provisions to affinity fraud, it is first important to analyze all of the relevant hate crime legislation to obtain a more thorough understanding of the kinds of conduct legislators intended hate crime statutes to cover.

Determining if affinity fraud constitutes a hate crime requires analyzing four distinct, yet intertwined questions. First, do hate crimes refer only to crimes of violence or do they include economic offenses? Second, do legislators and courts require defendants to be motivated by ill will towards their targeted victim's group or is it sufficient that defendants have targeted a particular victim because of her group membership regardless of the motivation? Third, can hate crimes involve victims and defendants who share the same group characteristic? Fourth, must defendants' discriminatory motive constitute the dominant or sole reason for their actions or can defendants have "mixed motives"? Of these issues, legal discourse has focused almost exclusively on a defendant's motivation for committing a hate crime, with little to no discussion of whether hate crimes must include violent acts toward a member of a different group.¹²⁸ However, all of

(2001); LA. REV. STAT. ANN. § 14:107.2 (West 2002); ME. REV. STAT. ANN. tit. 17-A, § 1151 (West 2001); MINNESOTA SENTENCING GUIDELINES II, subd. D, MINN. STAT. ANN. Ch. 244 App. (West 2001); MISS. CODE ANN. § 99-19-307 (2001); MONT. CODE ANN. § 45-5-222 (2001); NEB. REV. STAT. § 28-111 (2001); NEV. REV. STAT. ANN. 193.1675 (Michie 2001); N.H. REV. STAT. ANN. § 651:6 (2001); N.J. STAT. ANN. § 2C:16-1(c) (West 2001); N.Y. PENAL LAW § 485.05 (McKinney 2001); N.C. GEN. STAT. § 15A-1340.16 (2001); OHIO REV. CODE ANN. § 2927.12 (West 2001); 18 PA. CONS. STAT. ANN. § 2710 (West 2001); R.I. GEN. LAWS § 12-19-38 (2001); TENN. CODE ANN. § 40-35-114 (2001); TEX. PENAL CODE ANN. § 12.47 (Vernon 2001); TEX. CODE CRIM. PROC. ANN. art. 42.014 (Vernon 2001); UTAH CODE ANN. § 76-3-203.3 (2001); VT. STAT. ANN. tit. 13, § 1455 (2001); VA. CODE ANN. § 18.2-57 (Michie 2001); W. VA. CODE § 61-6-21(d) (2001); WIS. STAT. ANN. § 939.645 (West 2001). In February of 2001, the Arkansas Senate passed a law providing for enhanced penalties for criminal offenses committed because of the victim's race, color, religion, or other prohibited characteristics, but the law failed to pass the House. See 2001 AR S.B. 35 (SN); 2001 AR H.B. 2509 (SN). In January of 2001, the South Carolina Senate unsuccessfully introduced a bill providing for a penalty enhancement for those found guilty of an offense if the defendant's actions were motivated in whole or part by a prohibited characteristic. See 2001 SC S.B. 178 (SN).

¹²⁸ At least one scholar has noted the application of hate crime laws to economic offenses. While she does not discuss the issue in depth, Professor Wang does note that certain profitable crimes such as robbery may be prosecuted as bias crimes if a particular jurisdiction's hate crime law covers the underlying property offenses. See Wang, *Complexities of Hate*, *supra* note 25, at 883 n.532. A few other scholars' work support distinguishing between bias crimes committed by whites and such crimes committed by other historically oppressed group members. Thus, Professor Marc Fleischauer has argued that courts should only apply hate crime penalty enhancements to white offenders in order to avoid the possibility that law enforcement may subject minorities to hate crime enhancements at a rate disproportionate to whites. See Marc Fleischauer, *Teeth for a Paper*

these issues must be addressed to determine the appropriateness of characterizing affinity fraud as a hate crime.

A. Covered Offenses

Twenty-four states and the District of Columbia specifically tie the definition of a hate crime to an offense involving actual or threatened physical bodily injury, necessarily excluding offenses of an economic nature.¹²⁹ For example, an Illinois statute provides:

A person commits a hate crime when, by reason of the actual or perceived race, color, creed, religion, ancestry, gender, sexual orientation, physical or mental disability, or national origin of another individual or group of individuals, he commits assault, battery, aggravated assault [or] misdemeanor theft. . .¹³⁰

Similarly, the New York legislature refers to a hate crime as a criminal act "involving violence, intimidation and destruction of property based upon bias or prejudice."¹³¹ Indeed, many states refer to their hate crime statutes as "ethnic or religious intimidation" laws or "malicious

Tiger: A Proposal to Add Enforceability to Florida's Hate Crimes Act, 17 FLA. ST. U. L. REV. 697, 706 (1990). Along these same lines, Professor Mari Matsuda, in her discussion of racist or "hate speech," has argued that while legislators may justifiably tolerate hate speech, such speech by whites is more harmful because it reinforces historically oppressive relationships. See Mari Matsuda, *Legal Storytelling: Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320, 2364 (1989).

¹²⁹ See D.C. CODE ANN. § 22-3701 (2001); ARK. CODE ANN. § 16-123-106 (Michie 2001) (intimidation, harassment, or violence); COLO. REV. STATE. ANN. § 18-9-121 (West 2002) (ethnic intimidation); CONN. GEN. STAT. ANN. §§ 53a-181j, 53a-181k, 53a-181l (West 2003) (intimidation based on bias or bigotry); IDAHO CODE § 18-7092 (Michie 2000) (malicious harassment); 720 ILL. COMP. STAT. ANN. 5/12-7.1 (West 2001); IND. CODE ANN. § 5-2-5-1 (West 2002) (bias crime); IOWA CODE ANN. § 729A.2 (West 2001); KY. REV. STAT. ANN. § 532.031 (Michie 2001); LA. REV. STAT. ANN. § 14:107.2 (West 2002); MD. CODE ANN., art. 27 § 470A (2001); MASS. GEN. LAWS ANN. ch. 265, § 39 (West 2001); MICH. COMP. LAWS ANN. § 750.147b (West 2001) (ethnic intimidation); MO. ANN. STAT. § 557.035 (West 2001); NEB. REV. STAT. § 28-111 (2001); NEV. REV. STAT. ANN. 193.1675 (Michie 2001); N.J. STAT. ANN. § 2C:16-1 (West 2001) (bias intimidation); N.Y. PENAL LAW § 485.05 (McKinney 2001); N.D. CENT. CODE § 12.1-14-04 (2001) (intimidation); OKLA. STAT. ANN. tit. 21, § 850 (West 2001) (malicious intimidation or harassment); OR. REV. STAT. §§ 166.155, 166.165 (2001) (intimidation); S.D. CODIFIED LAWS § 22-19B-1 (Michie 2001) (harassment); UTAH CODE ANN. § 76-3-203.3 (2001); VA. CODE ANN. § 18.2-57 (Michie 2001) (assault and battery); WASH. REV. CODE ANN. § 9A.36.080 (West 2001) (malicious harassment).

¹³⁰ See 720 ILL. COMP. STATE. ANN. 5/12-7.1 (West 2001). Though not relevant for purposes of this Article, most hate crime statutes, including Illinois' statute, also include conduct directed against personal or real property.

¹³¹ N.Y. PENAL LAW § 485.00 (McKinney 2001).

harassment" laws,¹³² reflecting the belief that a hate crime involves some measure of physical intimidation either through actual or threatened physical injury. Because investment crimes such as affinity fraud scams do not involve such conduct, all of these statutes would exclude affinity fraud crimes.

This exclusion certainly is consistent with the public perception of a hate crime. Because such assaults generate a spotlight on the problem of bias-motivated crimes, Americans link the term "hate crime" with brutal assaults.¹³³ As a result, the American public sees a clear link between the term "hate crime" and violence, particularly extreme and gratuitous violence. Moreover, because these violent crimes spurred the passage of hate crime legislation at the federal and state level, legislators appear to recognize a link between such crimes and violence.¹³⁴ In fact, the federal Congressional Record recommending the passage of hate crime legislation is replete with references to crimes of violence.¹³⁵ Presumably, Congress used such references not only to describe the problem of hate crime, but also to highlight the need for hate crime legislation. These references, and the public perceptions from which they stem, negate the notion that an economic offense could qualify as a hate crime.¹³⁶

However, not all statutes reflect the public perception. Indeed, the federal statute makes the hate crime enhancement available for any defendant, regardless of the crime he committed.¹³⁷ Because securities fraud and several other economic crimes constitute federal offenses, this provision would apply to affinity fraud.¹³⁸ Mirroring this result, nearly half the state statutes define the term hate crime broadly enough to cover

¹³² See *supra* note 123.

¹³³ See Wang, *Complexities of Hate*, *supra* note 25, at 801-02 (noting America's view of hate crimes shaped by publicized crimes involving violent and deadly attacks).

¹³⁴ See H.R. REP. NO. 103-244 (1993) (describing, among other incidents, beating of one Chinese American by two white men who claimed not to like "Orientals" and beating of gay man by skinheads who were yelling "kill the faggot").

¹³⁵ See *id.*

¹³⁶ It is possible that some "economic" offenses include both violent and non-violent elements, such as a robbery or blackmail pursuant to which the perpetrator desires some material gain and threatens his victim with physical violence. In fact, most hate crime statutes include robbery, which arguably may be considered an economic crime, but also includes an element of violence. See *State v. Hatcher*, 524 S.E.2d 815 (N.C. Ct. App. 2000) (applying hate crime provision to defendant convicted of robbing two Hispanic men). However, this Article explores whether "pure" economic crime, that involves neither violence nor the threat of violence, can be included under the definition of a hate crime.

¹³⁷ See UNITED STATES SENTENCING GUIDELINES MANUAL § 3A1.1 (2001).

¹³⁸ See *supra* note 35 (describing criminal violation for securities fraud, mail fraud, and wire fraud).

all offenses.¹³⁹ For example, Alabama's hate crime statute allows courts to impose a sentencing enhancement on any person convicted of any felony or misdemeanor.¹⁴⁰ Under Alabama law, securities fraud represents a Class C felony,¹⁴¹ and could extend to affinity fraud. Alabama's statute is typical of other broad state statutes that cover all crimes and provide that securities fraud represents a crime.¹⁴² Such statutes, by their very terms, include affinity fraud.

Federal legislators reveal that this kind of inclusion is not accidental. The House Report accompanying the Enhancement Act states, "any federal offense can constitute a hate crime."¹⁴³ Because securities fraud can constitute a federal offense, there should be no question that legislators intended the Enhancement Act to apply to such conduct. Moreover, the Report explicitly endorses the inclusion of economic crimes. The Report states that fraud crimes constitute hate crimes¹⁴⁴ and emphasizes that the legislation should not exclude "victimless crimes" such as money laundering offenses.¹⁴⁵ Accordingly, affinity fraud, for which there is clearly a victim, ought to be included. Thus, these legislative statements strongly support applying the federal sentencing enhancement provision to defendants who commit affinity fraud.

¹³⁹ See ALA. CODE § 13A-5-13 (2001); ALASKA STAT. § 12.55.155 (Michie 2001); ARIZ. REV. STAT. ANN. § 13-702 (West 2003); CAL. PENAL CODE § 422.75 (West 2003); DEL. CODE ANN. tit. 11, § 1304 (2001); FLA. STAT. ANN. § 775.085 (West 2001); GA. CODE ANN. § 17-10-17 (2001); HAW. REV. STAT. ANN. §§ 706-662; 846-51 (Michie 2001); KAN. STAT. ANN. § 21-4716 (2001); ME. REV. STAT. ANN. tit. 17-A, § 1151 (West 2001); MINNESOTA SENTENCING GUIDELINES II, subd. D, MINN. STAT. ANN. ch. 244 App. (West 2001); MISS. CODE ANN. § 99-19-307 (2001); MONT. CODE ANN. § 45-5-222 (2001); N.H. REV. STAT. ANN. § 651:6 (2001); N.C. GEN. STAT. § 15A-1340.16 (2001); OHIO REV. CODE ANN. § 2927.12 (West 2002); 18 PA. CONS. STAT. ANN. § 2710 (West 2001); R.I. GEN. LAWS § 12-19-38 (2001); TENN. CODE ANN. § 40-35-114 (2001); TEX. PENAL CODE ANN. § 12.47 (Vernon 2001); TEX. CRIM. PROC. CODE ANN. art. 42.014 (West 2001); VT. STAT. ANN. tit. 13, § 1455 (2001); W. VA. CODE § 61-6-21(d) (2001); WIS. STAT. ANN. § 939.645 (West 2001).

¹⁴⁰ ALA. CODE § 13A-5-13 (2001).

¹⁴¹ § 8-6-18(a) (felony for willful violation of securities laws).

¹⁴² For example, Arizona's enhancement applies to all felonies, see ARIZ. REV. STAT. ANN. § 13-702 (C)(14) (West 2003), and the fraudulent sale of securities constitutes a class 4 felony, see § 44-1995. Also, Florida's penalty enhancement provision applies to any felony or misdemeanor, see FLA. STAT. ANN. § 775.085 (West 2003), and fraud in connection with a securities transaction constitutes a felony in the third degree, see § 517.302. Similarly, Rhode Island's enhancement covers any crime, see R.I. GEN. LAWS § 12-19-38 (2001), and makes the willful violation of its securities laws a felony, see § 7-11-604.

¹⁴³ H.R. REP. NO.103-244 (1993).

¹⁴⁴ See *id.*

¹⁴⁵ See *id.*

Additionally, the *Boylan* case implies that hate crime statutes may be extended to economic offenses.¹⁴⁶ Indeed, in that case the defendant was found liable for wire fraud and at least a portion of his conduct involved financial fraud.¹⁴⁷ Although the court ultimately refused to apply the Federal Guideline's hate crime provision to the defendant's conduct, its refusal was not based on the nature of the defendant's crime.¹⁴⁸ By considering applying the hate crime enhancement to a financial fraud, the district court implicitly endorsed the inclusion of economic conduct with such an enhancement.

In this same vein, the Supreme Court upheld a penalty enhancement statute that covered all criminal offenses.¹⁴⁹ In *Wisconsin v. Mitchell*, the Supreme Court examined the validity of a Wisconsin statute that enabled judges to increase the sentence of defendants found guilty of *any crime* if the defendant intentionally selected his victim on account of race or some other prohibited characteristic.¹⁵⁰ The Wisconsin trial court in that case increased the sentence of a defendant found guilty of aggravated battery upon proof that the defendant targeted his victim based on the victim's race.¹⁵¹ A unanimous Supreme Court upheld the enhancement, finding that the statute was constitutional.¹⁵² While the case dealt with a

¹⁴⁶ See *United State v. Boylan*, 5 F. Supp. 2d 274, 277 (D.N.J. 1998) (applying hate crime provision to economic offense involving defrauding Jersey City out of traffic fines and penalties).

¹⁴⁷ See *id.* at 279 (explaining that judge defrauded city out of thousands of dollars, though this was not primary result or intention of his conduct).

¹⁴⁸ See *id.* at 283 (noting that defendant's offense was not hate crime because it did not involve hatred).

¹⁴⁹ See *Wisconsin v. Mitchell*, 508 U.S. 476 (1993).

¹⁵⁰ See *id.* at 481 n.1 (describing statute). The Wisconsin statute applies to any felony or misdemeanor under Wisconsin law. See WIS. STAT. ANN. § 939.645 (West 2001).

¹⁵¹ A group of black boys, including defendant Mitchell, severely beat a white boy after discussing scenes from the movie "Mississippi Burning," which depicts, among other things, white men severely beating young black women and boys. See *Mitchell*, 508 U.S. at 480.

¹⁵² See *id.* at 490. The statute was challenged on First Amendment grounds. The Wisconsin Supreme Court found the statute to be unconstitutional based on the Supreme Court's decision in *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992). That decision involved a statute criminalizing the use of "fighting words" — words designed to arouse anger, alarm, or resentment in the victim based on race, religion, or some other characteristic. The Supreme Court held that the statute in *R.A.V.* violated the First Amendment because it regulated speech. See *id.* at 391. However, the *Mitchell* court distinguished between statutes aimed at conduct and those aimed at speech, reasoning that Wisconsin's penalty enhancement statute regulated bias-inspired conduct. See *Mitchell*, 508 U.S. at 487-88. The defendant in *Mitchell* also attempted to challenge the statute on equal protection grounds, but the court did not address such a challenge because the issue had not been developed sufficiently in the lower courts. See *id.* at 482 n.2.

violent crime, the Court clearly acknowledged that the statute applied to any criminal act, including minor non-violent misdemeanor offenses.¹⁵³ If the Court recognized that a non-violent *misdemeanor* fell within the rubric of an enhancement statute, then surely the Court would not object to the inclusion of a non-violent *felony* such as securities fraud. Moreover, the Supreme Court cited three other state statutes that defined hate crimes broadly enough to include all offenses,¹⁵⁴ even though at the time a majority of state statutes defined hate crimes with reference to violent criminal conduct.¹⁵⁵ By sanctioning these statutes, the Supreme Court appeared to spur the proliferation of hate crime laws that did not limit the nature of hate crimes to those involving violence.¹⁵⁶ This de facto endorsement of broad enhancement provisions suggests the appropriateness of applying hate crime provisions to affinity fraud.

B. Hate by Any Other Name . . . : Examining the Requisite Animus for Hate Crimes

Even if hate crime statutes apply to economic offenses, the most significant hurdle that must be overcome in classifying affinity fraud as a hate crime may be the apparent requirement that hate crimes be motivated by animus or malice.¹⁵⁷ However, a textual analysis of most hate crime legislation reveals that this requirement may be illusory. In fact, most statutes, including the federal statute, do not require that a defendant act with prejudice or bias toward his victim.¹⁵⁸ Despite this

¹⁵³ See *id.* at 488-89 (noting that statute could apply to minor misdemeanor offenses such as negligent operation of motor vehicle).

¹⁵⁴ The Court cited four statutes and of those, every one but California's covered all criminal conduct. See *Mitchell*, 508 U.S. at 483 n.4 (citing CAL. PENAL CODE ANN. § 422.7 (West 1988 & Supp. 1993); FLA. STAT. ANN. § 775.085 (West 1991) (any felony or misdemeanor); MONT. CODE ANN. § 45-5-222 (1992) (any offense); VT. STAT. ANN. tit. 13, § 1455 (Supp. 1992) (any crime)). Since then, California has adopted a penalty enhancement statute that applies broadly to all felonies. See § 422.75.

¹⁵⁵ As of 1993, a much narrower definition of hate crime dominated such legislation. See Lawrence, *A Normative Theory of Bias-Motivated Crime*, *supra* note 13, at n.73-76. Professor Lawrence cites twenty-nine hate crime statutes of which twenty-three contain ties to violent conduct. Currently, more than half of hate crime statutes do not tie the definition of such crimes to violent behavior. See *supra* note 139.

¹⁵⁶ Congress specifically linked the federal statute to the Supreme Court's decision, noting that the decision left "no doubt as to the authority of Congress" to mandate penalty enhancements for hate crimes. See H.R. REP. NO. 103-244 (1993). Moreover, most of the statutes passed after 1993 do not limit the nature of covered offenses to those involving violence.

¹⁵⁷ As used herein, the term "animus" refers to animosity or ill will.

¹⁵⁸ Only the statutory language of the District of Columbia and fourteen states specifically require that some bias or animus towards the victim motivates the defendant's

fact, the legal debate regarding hate crime legislation centers on whether courts should construe such statutes to require some form of animus-driven conduct.

1. Statutory Language

The plain text of most statutes suggests that a defendant commits a hate crime warranting enhancement if they intentionally select a victim “because of” or “based on” the victim’s group identity, irrespective of any animus they feel toward the victim’s group. Section 3A1.1(a) of the Federal Guidelines provides:

If the finder of fact at trial or . . . the court at sentencing determines beyond a reasonable doubt that the defendant intentionally selected any victim or any property as the object of the offense of conviction because of the actual or perceived race, color, religion, national origin, ethnicity, gender, disability, or sexual orientation or any person, increase by three levels.¹⁵⁹

Similarly, thirty-three states (constituting nearly three quarters of those states with hate crime legislation) provide that a sentencing court may enhance a defendant’s sentence if he commits an act “because of” or “based upon” a prohibited characteristic.¹⁶⁰ Taken literally, such statutes

conduct. *See* ARIZ. REV. STAT. ANN. § 13-702 (West 2001) (malice); ARK. CODE ANN. § 16-123-106 (Michie 2001) (defendant must be motivated by animosity); CONN. GEN. STAT. ANN. §§ 53a-181j, 53a-181k, 53a-181l (West 2001) (conduct based on bigotry or bias); DC CODE ANN. § 22-3701 (2001) (defendant must demonstrate prejudice); FLA. STAT. ANN. § 775.085 (West 2001) (evidence of prejudice); GA. CODE ANN. § 17-10-17 (2001) (bias or prejudice); HAW. REV. STAT. ANN. §§ 706-662; 846-51 (Michie 2001) (hostility); MASS. GEN. LAWS ANN. Ch. 265 § 39 (West 2001) (conduct motivated by bigotry or bias); MISS. CODE ANN. § 99-19-307 (2001) (malicious); N.H. REV. STAT. ANN. § 651:6(I)(g) (2001) (hostility); OHIO REV. CODE ANN. § 2927.12 (West 2001) (prejudice); 18 PA. CONS. STAT. ANN. § 2710 (West 2001) (malicious intent); R.I. GEN. LAWS § 12-19-38 (2001) (hatred or animus); TEX. PENAL CODE ANN. § 12.47; TEX. CRIM. PROC. CODE ANN. art. 42.014 (Vernon 2001) (bias or prejudice); VT. STAT. ANN. tit. 13, § 1455 (2001) (malicious motivation).

¹⁵⁹ *See* UNITED STATES SENTENCING GUIDELINES MANUAL § 3A1.1 (2001).

¹⁶⁰ *See* ALA. CODE § 13A-5-13 (2001); ALASKA STAT. § 12.55.155 (Michie 2001); CAL. PENAL CODE § 422.75 (West 2001); COLO. REV. STATE. ANN. § 18-9-121 (West 2002); DEL. CODE ANN. tit. 11, § 1304 (2001); IDAHO CODE § 18-7092 (Michie 2000); 720 ILL. COMP. STATE. ANN. 5/12-7.1 (West 2001); IND. CODE. ANN. § 5-2-5-1 (West 2002); IOWA CODE ANN. § 729A.2 (West 2001); KAN. STAT. ANN. § 21-4716 (2001); KY. REV. STAT. ANN. § 532.031 (Michie 2001); LA. REV. STAT. ANN. § 14:107.2 (West 2002); ME. REV. STAT. ANN. tit. 17-A, § 1151 (West 2001); MD. CODE ANN. art. 27, § 470A (2001); MICH. COMP. LAWS ANN. § 750.147b (West 2001); MINNESOTA SENTENCING GUIDELINES II, subd. D, MINN. STAT. ANN. ch. 244 app. (West 2001); MO. ANN. STAT. § 557.035 (West 2001); MONT. CODE ANN. § 45-5-222 (2001); NEB. REV. STAT. § 28-111 (2001); NEV. REV. STAT. ANN. 193.1675 (Michie 2001); N.J. STAT. ANN. § 2C:16-1 (West 2001); N.Y. PENAL LAW § 485.05 (2001); N.C. GEN.

do not require defendants to exhibit any discriminatory motive beyond the discrimination involved in selecting a victim. Instead, prosecutors need only prove that the victim's membership in a given group formed the basis for the defendant's selecting the victim.

Because affinity fraud perpetrators deliberately select their victims based on their race, religion, or ethnicity, a literal construction of these statutes would enable prosecutors to apply them to such perpetrators. The Supreme Court's endorsement of such an open-ended statute in *Mitchell* supports this result.¹⁶¹ The federal government's adoption of a broadly applicable statute further supports the inclusion of defendants who commit crimes without regard to their actual animus. Indeed, Congress intentionally re-drafted the Enhancement Act to mirror the language in the Wisconsin statute upheld by the Supreme Court, excluding any reference to animus or bias.¹⁶² This might suggest that courts should apply hate crime statutes to all conduct falling within the literal confines of the statute, including affinity fraud.

2. Construction of Statutory Language

While most hate crime statutes do not specifically address a defendant's motive, courts and commentators have been divided about whether judges nevertheless should construe these statutes as requiring the defendant to exhibit prejudicial motive. This division has generated two methods of analyzing hate crime legislation: the "discriminatory selection" model and the "racial animus" model.¹⁶³ The discriminatory selection model rests on the defendant's intentional selection of the

STAT. § 15A-1340.16 (2001); N.D. CENT. CODE § 12.1-14-04 (2001); OKLA. STAT. ANN. tit. 21, § 850 (West 2001); OR. REV. STAT. §§ 166.155, 166.165 (2001); S.D. CODIFIED LAWS § 22-19B-1 (Michie 2001); TENN. CODE ANN. § 40-35-114 (2001); UTAH CODE ANN. § 76-3-203.3 (2001); VA. CODE ANN. § 18.2-57 (Michie 2001); WASH. REV. CODE ANN. § 9A.36.080 (West 2001); W. VA. CODE § 61-6-21(d) (2001); WIS. STAT. ANN. § 939.645 (West 2001). While most states do not require intentional selection, commentators agree that those statutes providing that a hate crime is committed "on the basis of" or "because of" someone's group identity are most consistent with the federal statute. See Lawrence, *A Normative Theory of Bias-Motivated Crime*, *supra* note 13, at 339; Wang, *Opportunistic Bias Crimes*, *supra* note 123, at 1406.

¹⁶¹ See *Mitchell*, 508 U.S. at 476.

¹⁶² See 139 CONG. REC. H6792-01 (1993) (remarks of Sensenbrenner) (noting that hate crime legislation was amended to make it more similar to Wisconsin law).

¹⁶³ See Wang, *The Transforming Power of Hate*, *supra* note 20, at 65-78 (describing two theories); Lawrence, *A Normative Theory of Bias-Motivated Crime*, *supra* note 13, at 326-40 (describing two models). Professor Wang also refers to the discriminatory selection model as the "discriminatory victim selection model." Although commentators refer to the latter model as a "racial" animus model, it is applied to animus based on race, gender, and any other group characteristic identified by a given statute.

victim based on a prohibited characteristic, while the racial animus model requires that some additional prejudice or animus towards the victim motivate the defendant's selection.¹⁶⁴ In many circumstances, the method of analysis largely determines the scope of a statute's application. Consequently, the application of such statutes to affinity fraud may depend upon which model a particular court adopts.

a. Discriminatory Selection Model

Several courts have adopted the discriminatory selection model, which only requires that the defendant deliberately select his victim based on a prohibited characteristic. Because the reasons behind the defendant's selection do not matter, this model does not require prosecutors to prove that hatred or animus motivated the defendant's actions.¹⁶⁵ Instead, prosecutors must prove that the victim's membership in a given group formed the basis for the defendant's selection of the victim. To illustrate, imagine that a defendant assaulted a victim who walked out of a store and who belongs to a different race than the defendant. In Scenario A, the defendant assaulted the victim because he was angry and the victim was the first person the defendant saw walking out of the store. In Scenario B, the victim was not the first person out of the store. Instead, the defendant waited and assaulted the victim because the defendant did not like members of the victim's race. In Scenario C, the defendant also waited until the victim came out of the store and assaulted the victim because he believed that members of the victim's race were less likely to report crimes. Scenario A would not constitute a hate crime under the discriminatory selection model because the defendant did not choose the victim because of his race. Both Scenarios B and C would constitute a hate crime because the defendant chose his victim based on the victim's race. Scenario B represents the prototypical hate crime where the

¹⁶⁴ See *supra* note 163 and accompanying text.

¹⁶⁵ See, e.g., *United States v. Woodlee*, 136 F.3d 1399, 1413 (10th Cir. 1998) (finding that defendant's actions were "racially motivated" when he selected victim because of their race); *People v. McCall*, No. D035520, 2001 Cal. App. Unpub. LEXIS 2639, at * 11 (Oct. 16, 2001) (stating that hate or animus may or may not be component of defendant's actions); *State v. Choppy*, 539 S.E.2d 44, 51 (N.C. Ct. App. 2000) (noting that defendant must target victim because of race, animus not required); *State v. Hatcher*, 524 S.E.2d 815, 817 (N.C. Ct. App. 2000) (finding no need to prove that defendant harbors animosity toward race or ethnic group); *In re Joshua H.*, 17 Cal. Rptr. 2d 291, 302 (Cal. Ct. App. 1993) (stating that selection of victim, not reason for selection, triggers additional punishment under hate crime statute); *Oregon v. Plowman*, 838 P.2d 558, 563 (Or. 1992) (noting that defendant "need not hate at all" to commit hate crime; defendant must hold no opinion other than his perception of victim's characteristic).

perpetrator selected his victim because of his race *and* because he felt hostile towards members of that race. Scenario C does not correspond to the prototypical image, but nevertheless constitutes a hate crime under the discriminatory selection model because the defendant intentionally selected his victim based on a prohibited trait. As Scenario C reveals, the discriminatory selection model would apply to the “rational” or “opportunistic” defendant who selected a victim based on the perception that it was easier or more profitable to commit a crime against a member of a given group, yet did not manifest feelings of hostility or prejudice towards the victim or his group.¹⁶⁶ In such a case, the defendant is motivated by a desire to maximize his potential for success and the defendant uses a person’s group membership as a proxy for the relative likelihood of that success. In fact, a North Carolina appeals court upheld a penalty adjustment against a defendant who selected two Hispanic men because he thought that Hispanics carried a lot of cash and were less likely to report crimes.¹⁶⁷ While the crime does not involve animus, the defendant’s purposeful, indeed biased, selection of his victim qualifies the defendant for a penalty enhancement under the discriminatory selection model.¹⁶⁸

This model supports extension of hate crime statutes to affinity fraud. Perpetrators of affinity fraud certainly intentionally select their victims because of their group membership. As securities regulators point out,

¹⁶⁶ Legal discourse on the proper construction of hate crime legislation focuses on this so-called “opportunistic criminal” and the extent to which hate crime statutes should accommodate such a perpetrator. See Lawrence, *A Normative Theory of Bias-Motivated Crime*, *supra* note 13, at 377-78. Professor Lawrence refers to a purse snatcher who preys on women because of his perception about the manner that women hold their valuables. In Professor Lawrence’s view, the purse snatcher’s level of culpability is not as high as those who commit crimes because of hostility towards the victim and hence the purse snatcher’s conduct does not warrant enhancement as a hate crime. See *id.* In contrast, Professor Lu-in Wang refers to a “Calculating Discriminator” who acts out of rational self-interest, selecting victims of a particular group because he believes they will be easier targets. See Wang, *The Transforming Power of Hate*, *supra* note 20, at 57-58. Professor Wang believes that such perpetrators deserve to be included within the confines of hate crime legislation because their behavior produces the same harmful results as crimes motivated by animus and because the perpetrator is more blameworthy than those who commit crimes that do not involve intentional targeting of the victim. See *id.* at 108-27.

¹⁶⁷ See *Hatcher*, 524 S.E. 2d at 815.

¹⁶⁸ See *infra* Part III (explaining harms of crimes that target members of particular racial or religious group, but do not involve animus). As that Part reveals, even when such crimes are not animus-driven, individual victims may experience a greater sense of vulnerability because they are selected based on a characteristic they cannot alter. In addition, individuals who target various groups for crime, even when not inspired by hate, take advantage of the social vulnerability of such groups and hence may be viewed as more culpable.

the characteristic that distinguishes an affinity fraud from other securities and investment schemes is the perpetrator's deliberate targeting of affinity group members.¹⁶⁹ Indeed, these perpetrators seek out venues where they believe particular groups are located¹⁷⁰ and purposefully design their crime to appeal to identifiable group members.¹⁷¹ Hence, there is no question that these perpetrators select victims based on their group identity, and on that basis would warrant a sentencing enhancement under the discriminatory selection model.

More specifically, this model would apply to affinity fraud perpetrators because it accommodates their opportunistic behavior. No evidence has been gathered regarding the affinity fraud perpetrator's motives for targeting particular groups. Regardless, affinity fraud perpetrators appear to select their victims not because of any prejudice or animus towards them, but because of a "rational" assessment of the relative ease of defrauding victims of a particular group. Securities regulators believe that perpetrators recognize that crimes aimed at members of their own affinity group will be easier to commit and more difficult to detect.¹⁷² Also, perpetrators of affinity fraud schemes may choose victims based on their assessment of the likelihood of being detected. Securities officials note that often members of particular racial or religious groups perceive law enforcement personnel as hostile to their group.¹⁷³ Perpetrators of affinity fraud rely upon and exploit this

¹⁶⁹ See *Fairfax*, *supra* note 1, at 73.

¹⁷⁰ See *id.* at 75-77 (noting that perpetrators of affinity fraud schemes reach their victims by making pitches to church congregations, ethnic radio stations, word of mouth, or other venues); see also *Georgia Scheme*, *supra* note 42, at 14A (noting that affinity scam perpetrators traveled across country to meet pastors in various churches).

¹⁷¹ Perpetrators give their investment funds names with ethnic or religious significance to make investment opportunities more appealing to their target audience. See *Fairfax*, *supra* note 1, at 79. Such perpetrators also claim that some of the invested funds will be used to assist charitable organizations or endeavors with ties to the group. See *id.* at 82.

¹⁷² Securities regulators point out that such crimes are easier to commit because of group members' greater susceptibility to appeals from others within their group. See *United States v. Luca*, 183 F.3d 1018, 1027 (9th Cir. 1999) (noting that victims of affinity fraud crime lowered their guard); *United States v. Castellanos*, 81 F.3d 108, 110 (9th Cir. 1996) (noting that cultural affinity increases susceptibility to affinity fraud scam); *Beware of Swindlers*, *supra* note 11 (noting that affinity fraud perpetrators overcome investors natural skepticism); *Blind Faith*, *supra* note 86, at 9 (noting victims increased susceptibility to affinity fraud). Also, both the SEC website and NASAA website warn that affinity crimes are more difficult to detect. See *Beware of Swindlers*, *supra* note 11; *Investor Alert*, *supra* note 11; see also *Blind Faith*, *supra* note 86, at 9 (noting that affinity fraud allows perpetrators to operate scams for longer period of time).

¹⁷³ See *Investor Alert*, *supra* note 11.

perception.¹⁷⁴ In addition, the insular nature of some groups makes some victims reluctant to contact police and instead group members seek to resolve problems within their group.¹⁷⁵ Based on these perceptions of their group, perpetrators of affinity fraud may believe that their conduct will go undetected because their victims will not seek out the police and/or because the police will not provide assistance to group members. In this respect, perpetrators of affinity fraud use group status as a proxy for determining the relative ease of committing a fraudulent investment, or in avoiding detection once such a fraud has been committed. Because the discriminatory selection model does not require proof of animus, reliance on the model means that such opportunistic actions can be used to increase the punishment of those convicted of affinity fraud.

b. Racial Animus Model

Unlike the discriminatory selection model, the racial animus model requires not only that the defendant uses biased criteria to select his victim, but also that he does so because of some animus felt towards the victim's group. Proponents assume that the model will apply to defendants who engage in the prototypical image of a hate crime, while excluding opportunistic defendants.¹⁷⁶ This model requires prosecutors to prove that bias, prejudice, or hostility motivated the defendant's conduct.¹⁷⁷ Without such motivation, sentencing courts cannot use the hate crime provisions to enhance a defendant's sentence.

The immediate supposition may be that the racial animus model necessarily excludes affinity fraud. Indeed, the label "affinity fraud" suggests that it is a crime based on affection, or at the very least trust, rather than animosity or hate. The fact that perpetrators and victims belong to the same identity group underscores the perception that such crimes do not involve hatred or ill will. Indeed, securities officials appear to believe that perpetrators of affinity fraud have opportunistic

¹⁷⁴ See Michael Fechter and Morris Kennedy, *Ministries Program Pitched Scripture*, TAMPA TRIB., Mar. 14, 1999, at 1 (noting that perpetrators use group members' distrust of police as rallying tool).

¹⁷⁵ According to the SEC, "once a victim realizes that he or she has been scammed, too often the response is *not* to notify the authorities, but instead to try to solve the problems within the group." *Beware of Swindlers*, *supra* note 11.

¹⁷⁶ See Lawrence, *A Normative Theory of Bias-Motivated Crime*, *supra* note 13, at 378; Lawrence Crocker, *Hate Crime Statutes: Just? Constitutional? Wise?*, 1993 ANN. SURV. AM. L. 485, 489.

¹⁷⁷ See Wang, *Complexities of Hate*, *supra* note 25, at 812-14.

motives, not those based on animus.¹⁷⁸ Moreover, law enforcement personnel who embrace the racial animus model recognize only a narrow set of cases as “real” hate crimes.¹⁷⁹ Such cases involve brutal or dramatic facts and exclude even those racially motivated crimes that involve less violent assaults.¹⁸⁰ If law enforcement agents do not view such assaults as hate crimes, they certainly will not be inclined to seek enhancements under hate crime legislation for affinity frauds. This suggests that if courts adopt the racial animus model, there is little possibility that affinity fraud would constitute a hate crime. However, the racial animus model might apply if affinity group members could demonstrate and act upon feelings of animus towards one another. For example, if an African American resents or hates other African Americans, and therefore targets members of her own group as a result of such feelings, then the racial animus model might apply to her behavior. In this sense, applying this model may turn on resolving the extent to which perpetrators can experience and act upon negative feelings aimed at members of their own group. The next section explores this issue.

C. *Intra-Racial/Religious Hate Crimes: An Oxymoron?*

Generally, hate crime statutes do not specifically address the issue of intra-group crime. The federal statute and all but one state statute do not explicitly require that a defendant belong to a social group different than the victim.¹⁸¹ The same is true with respect to both models of analyzing hate crime statutes. The discriminatory selection model suggests that the characteristics of defendants are irrelevant so long as the defendants intentionally select their victim. Also, a literal construction of the racial animus model appears to apply to defendants even if they have the same characteristics as their victims.

¹⁷⁸ See *supra* note 83 (noting that perpetrators take advantage of trust among group members).

¹⁷⁹ See Elizabeth Boyd et al., “Motivated by Hatred or Prejudice”: *Categorization of Hate Motivated Crimes in Two Police Divisions*, 30 *LAW & SOC’Y REV.* 819, 828 (1996); Chamallas, *supra* note 20, at 797; Wang, *Complexities of Hate*, *supra* note 25, at 814 (noting that law enforcement officers and prosecutors recognize narrow set of cases of true bias crimes because they believe such cases are driven by hatred condemned under laws); Wang, *Opportunistic Bias Crimes*, *supra* note 123, at 1410.

¹⁸⁰ See Wang, *Complexities of Hate*, *supra* note 25, at 814; Wang, *Opportunistic Bias Crimes*, *supra* note 123, at 1410.

¹⁸¹ See *infra* note 182 (citing Nevada statute which is only one that specifically requires that defendant and victim belong to two different identity groups).

Despite this apparent application, some may conclude that because most perpetrators of affinity fraud crimes belong to the same racial, religious, or ethnic group as their victims, such perpetrators' conduct cannot fall under the scope of hate crime laws. In fact, one state hate crime statute specifically requires that a defendant's race, religion, sexual orientation, or national origin be different than the victim's.¹⁸² Federal regulations mirror this preference for inter-group crimes. The Department of Justice's regulations for the Federal Bureau of Investigation (the "FBI") include a list of indicators for determining the existence of a bias crime. The first indicator is that the offender and victim were of different racial, religious, ethnic/national origin, or sexual orientation groups.¹⁸³ This indicator reflects the presumption that crimes committed by defendants who belong to the same group as their victims are not really hate crimes. Also, most scholars who have considered this issue appear to agree with this presumption, suggesting that same race or group crimes cannot be hate crimes.¹⁸⁴ Moreover, the general perception of a hate crime involves inter-group targeting.¹⁸⁵ Certainly, if hate crime statutes do not permit intra-race or intra-religion "hate," then affinity fraud would not be eligible for inclusion within these statutes.

¹⁸² See NEV. REV. STAT. ANN. § 193.1675 (2001) (applying additional penalty for any person who commits crime because of "actual or perceived race, color, religion, national origin, physical or mental disability or sexual orientation of the victim was different from that characteristic of the perpetrator").

¹⁸³ See FED. BUREAU OF INVESTIGATION, U.S. DEPT. OF JUSTICE, HATE CRIME DATA COLLECTION GUIDELINES 2 (1990) [hereinafter HATE CRIME DATA]. Other indicators are that the incident occurred on a date with particular significance to the targeted group such as Rosh Hashanah or that the community perceived the incident was motivated by bias. See *id.* at 2-3. In fact, the FBI bias indicators do leave open the possibility that members of the same race can be subject to hate crimes. Thus, one indicator is that a victim, although not a member of the targeted group, is a member of an advocacy group supporting the precepts of the targeted group. See *id.* at 5.

¹⁸⁴ See Lawrence Bradfield Hughes, *Can Anyone be the Victim of a Hate Crime?*, 23 U. DAYTON L. REV. 591, 603 (1998) ("An instinctive reaction to the statutory language indicates that a hate crime would not occur when a perpetrator simply uses the phrase 'I hate you' while committing a predicate offense against someone just like him."). Professor Matsuda addresses this issue in the context of hate speech and suggests that we should not prohibit a non-white person's hateful racist language directed at a member of her own group, because it may not be harmful. See Matsuda, *supra* note 128, at 2364. However, Professor Matsuda notes the extent to which such language is degrading must be judged by community standards and leaves open the possibility that, under such standards, some intra-group speech may be harmful and hence may warrant prohibition. See *id.* at 2365. In this sense, Professor Matsuda does not negate the possibility that members of oppressed groups can feel and express racism towards members of their own group.

¹⁸⁵ See *supra* note 20.

Yet at least one court has upheld a conviction under a hate crime statute for a person who belonged to the same identity group as the victim of the crime.¹⁸⁶ In *In re Vladimir P.*, the defendant, a Jewish boy, assaulted another Jewish boy after a group of his friends shouted offensive religious slurs at the victim.¹⁸⁷ The trial court convicted the defendant of aggravated assault and enhanced his sentence under Illinois' hate crime statute.¹⁸⁸ On appeal, the defendant argued that he could not be found guilty of a hate crime because he belonged to the same religion as his victim.¹⁸⁹ The court rejected the argument, suggesting that the harms associated with hate crimes were no less severe when committed by someone of the same religion as his victim, and hence there was no reason to differentiate between the two perpetrators.¹⁹⁰

The court's reasoning in *In re Vladimir* suggests that the defendant's behavior would constitute a hate crime under either analytical model of hate crime statutes. Similar to the federal statute, the applicable Illinois statute required that a defendant commit a crime "by reason of" a prohibited characteristic.¹⁹¹ Because the defendant and his friends identified the victim as Jewish and yelled offensive religious slurs at him, the defendant specifically selected the victim because of his race.¹⁹² This selection makes the defendant's conduct a hate crime under the

¹⁸⁶ See *In re Vladimir P.*, 670 N.E.2d 839, 845 (Ill. App. 1996) (finding that Jewish boy assaulted orthodox Jewish boy because of his religion).

¹⁸⁷ In the case, three boys saw a Jewish boy walking home. See *id.* at 841. After one or more of the boys repeatedly shouted "Fuck you Jew," the defendant threw a knife at the boy and was found guilty of aggravated assault. See *id.*

¹⁸⁸ The lower court enhanced the defendant's penalty under an Illinois hate crime statute that allowed enhancements for crimes committed "by reason of" a person's religion. See *id.*

¹⁸⁹ See *id.* at 845. In this case, the victim was an Orthodox Jew. While it is possible that one could argue that the defendant and the victim did not belong to the same identity group because one was Jewish and the other an Orthodox Jew, the court and the defendant appeared to concede that both the defendant and victim belonged to the same identity group for purposes of the hate crime statute. Thus, the court appeared to suggest that even if both the defendant and victim were Orthodox Jews, that fact would not preclude the defendant's enhancement under the hate crime statute.

¹⁹⁰ See *id.* The court explained that the State of Illinois was justified in passing its hate crime statute upon the basis that victims of bias-motivated crimes suffered a greater degree of harm. See *id.* By refusing to exclude same religion crimes, the court implied that the defendant actions inflicted the harm the state was seeking to redress.

¹⁹¹ See *id.*

¹⁹² See *In re Vladimir P.*, 670 N.E.2d 839, 841 (Ill. App. 1996).

¹⁹² See *id.*

¹⁹² See *id.* at 841.

discriminatory selection model.

The racial animus model may also apply to the defendant's behavior. The Illinois statute on its face did not require the defendant to exhibit any animus towards his victim,¹⁹³ and the court did not address the issue of animus directly. However, the defendant claimed that he and his friends were bored and decided to pick on the victim because his yarmulke (head covering) and tzitzit (prayer tassels) "looked funny."¹⁹⁴ The court stated that even if there was insufficient evidence to prove that the defendant uttered offensive religious slurs, the trial court could infer that the defendant was not acting independently because he failed to disassociate himself from the group of boys, at least one of whom did utter such slurs.¹⁹⁵

The defendant's failure to disassociate himself from the group may be sufficient to apply an enhancement under the racial animus model. Indeed, the defendant in *In re Vladimir* is similar to the hypothetical "Violent Show Off" criminal described by Professor Frederick Lawrence.¹⁹⁶ The Violent Show Off selects and assaults his victim in order to impress friends, but otherwise bears no ill will towards the victim.¹⁹⁷ As Professor Lawrence points out, the Violent Show Off may be subject to the racial animus model because his knowledge of his friends' animus ultimately drives his attack against the victim even if the perpetrator bears no hostility towards the victim.¹⁹⁸ As a consequence, the defendant may be seen as animus driven. Similarly, the racial animus model may apply to the Violent Show Off because he knows of his friends' hostility yet proceeds with the crime. In this sense, the Violent Show Off shows a reckless disregard for the consequences of this action, and therefore may be as culpable as those who commit animus driven crimes.¹⁹⁹ To the extent the defendant in *In re Vladimir* was a Violent Show Off, the racial animus model would define the defendant

¹⁹³ *See id.*

¹⁹⁴ *See id.* The court pointed out that the victim knew what his clothing represented because he was Jewish. *See id.*

¹⁹⁵ *See id.* at 845.

¹⁹⁶ Professor Lawrence uses this case to illustrate the difference between the discriminatory selection model and the racial animus model. *See* Lawrence, *A Theory of Bias Motivated Crime*, *supra* note 13, at 378. However, the hypothetical originates from the oral argument of the Wisconsin State Attorney General in *Mitchell* who claimed that the Wisconsin statute would have applied to Mitchell's conduct even if his sole motivation had been to impress his friends. *See id.* at 332 n.57.

¹⁹⁷ *See id.* at 378.

¹⁹⁸ *See id.*

¹⁹⁹ *See id.*

as a hate crime perpetrator. This is true despite the fact that the victim and defendant shared the same identity group. Thus, the defendant classifies as a hate crime perpetrator under the discriminatory selection model because he selected the victim because of race, and under the racial animus model because he commits the crime with full awareness of the hostility such act generates towards the victim.

The case negates the presumption that affinity fraud cannot constitute a hate crime solely because perpetrators of such crime belong to the same identity group as their victim. Since affinity fraud perpetrators intentionally select members of their own group for a crime, *In re Vladimir* suggests that such intra-group targeting may constitute a hate crime under the discriminatory selection model. The case also suggests that the racial animus model could be applied to intra-group crimes, at least when the defendant acts in concert with others who demonstrate animus towards the victim.

However, this construction of the racial animus model may not apply to affinity fraud. Indeed, it does not appear that perpetrators of affinity fraud act in order to "show off" for animus-driven friends. Thus, perpetrators of affinity fraud would need to reveal some personal animus towards their victims to fall under the racial animus model. As the discussion above regarding the presumptions against intra-group animosity indicates, this may prove more difficult.

Despite this difficulty, the conclusion that members of the same race or religion cannot "hate" for purposes of hate crime laws discounts the fact that such members can experience feelings of prejudice towards members of their own group. In the context of race for example, several studies reveal that members of minority groups can internalize feelings of racial inferiority.²⁰⁰ This fact was dramatized in Kenneth Clark's doll study, which revealed that young black girls believed white dolls to be prettier and smarter than black dolls, and served to support the Supreme Court's decision in *Brown v. Board of Education*.²⁰¹ More importantly,

²⁰⁰ See, e.g., TONY BROWN, *BLACK LIES, WHITE LIES: THE TRUTH ACCORDING TO TONY BROWN* 121-22 (1995) (noting that blacks internalize feelings of inferiority); REGINALD L. JONES, *BLACK PSYCHOLOGY* (1970) (describing internalized racism and its impact); BEVERLY DANIEL TATUM, "WHY ARE ALL THE BLACK KIDS SITTING TOGETHER IN THE CAFETERIA?" AND OTHER CONVERSATIONS ABOUT RACE 52-59 (1997) (explaining process of racial identity pursuant to which black children internalize feelings of inferiority); Richard Delgado, *Words that Wound: A Tort Action for Racial Insults, Epithets, and Name Calling*, 17 HARV. C.R.-C.L. L. REV. 133, 137-40 (1982) (noting arguments based on notion that harms from speech are different in kind and seriousness); Marc Elrich, *Stereotype Within*, WASH. POST, Feb. 13, 1994, at C4 (pinpointing black students' unfavorable opinions regarding themselves).

²⁰¹ See Kenneth B. Clark & Mannie P. Clark, *Racial Identification And Preference In Negro*

these feelings can cause people to react negatively and even violently towards members of their own group. For example, Professor Taunya Banks discusses the phenomenon of light-skinned blacks discriminating against black people with a darker hue.²⁰² Professor Banks argues that blacks internalize white racial attitudes and redeploy structures of oppression against members of their own race.²⁰³ Such attitudes then lead to discriminatory behavior against group members.²⁰⁴ Other scholars have documented this phenomenon within other minority communities.²⁰⁵ Moreover, it is possible that in addition to exclusionary practices, these negative feelings can lead to violence. In an example

Children, in READINGS IN SOCIAL PSYCHOLOGY 169 (Theodore M. Newcomb et al., eds., 1947). In the study, black children were asked to choose dolls with varying skin color and the children identified the white dolls as the "prettiest" and "smartest." The study was used to support arguments in favor of dismantling segregation by showing that segregation inflicted harm on black children. See *Brown v. Bd. of Educ.*, 347 U.S. 483, 494 n.11 (1954); see also Darlene Powell-Hopson & Derek S. Hopson, *Implications of Doll Color Preferences Among Black Preschool Children and White Preschool Children*, 14 J. OF BLACK PSYCHOLOGY 57, 57-63 (1988) (conducting more modern doll test suggesting that black children continue to learn to reject their own racial or ethnic group and adopt negative judgements regarding that group).

²⁰² See Taunya L. Banks, *Colorism: A Darker Shade of Pale*, 47 UCLA L. REV. 1705, 1716 (2000). This practice dates back to the post-civil war era when lighter skinned blacks created separate social clubs, churches, and professional and business associations that excluded darker skinned blacks. See Trina Jones, *Shades of Brown: The Law of Skin Color*, 49 DUKE L.J. 1487, 1515-16 (2000). Later in the 1960s, dark skinned blacks ostracized lighter skinned blacks and questioned their loyalty. See *id.* at 1518.

²⁰³ See Banks, *supra* note 202, at 1716; Jones, *supra* note 202, at 1530 (discussing socialization's impact).

²⁰⁴ See Jones, *supra* note 202, at 1530 (noting practice of blacks excluding other blacks from organizations and associations); see also KATHY RUSSELL ET AL., *THE COLOR COMPLEX: THE POLITICS OF SKIN COLOR AMONG AFRICAN AMERICANS* 41-61 (Russell ed., 1992) (discussing manner in which internalized racism leads blacks to discriminate in favor of blacks with light skin who are able to gain better privileges and power than their darker skinned counterparts); *id.* at 124-34 (noting that attitudes among blacks about skin color also lead to discriminatory behavior in workplace); Verna M. Keith & Cedric Herring, *Skin Tone & Stratification in the Black Community*, AM. J. OF SOCIOLOGY 760, 760-68 (1991) (noting that lighter skinned blacks face less discrimination and enjoy more privileges even within black community because of internalized racism); Verna M. Keith & Maxime S. Thompson, *The Blacker the Berry: Gender, Skin Tone, Self-Esteem, and Self-Efficacy*, 15 GENDER & SOC'Y 336, 337 (2001) (noting status advantages that stem from intra-racial discrimination, and that such advantages are more pronounced for black women than men).

²⁰⁵ See John M. Kang, *Deconstructing the Ideology of White Aesthetics*, 2 MICH. J. RACE & L. 283, 334-35 (1987) (noting internalized racism within Asian communities); Laura M. Padilla, *"But You're Not a Dirty Mexican:" Internalized Oppression, Latinos & Law*, 7 TEX. HISP. J.L. & POL'Y 59, 67-73 (discussing internalized racism within Latino community); Edward E. Telles & Edward Murguia, *Phenotypic Discrimination and Income Differences Among Mexican Americans*, 71 SOCIAL SCIENCE QUARTERLY 682, 682-95 (1990) (noting impact of internalized racism on Mexican Americans).

from popular culture, the film "Boyz in the Hood"²⁰⁶ depicts a black police officer harassing a young black boy while using racial epithets and claiming to hate black people. This phenomenon suggests that we cannot reject the possibility that racial animus impacts same race or religion crimes.

Nor can we reject the possibility that affinity fraud may reflect more than defendants' rational calculation that their crimes may be more successful. In this respect, "affinity" fraud is something of a misnomer. Indeed, while it may be difficult to argue that perpetrators of affinity fraud "hate" their victims, perpetrators' actions do not reflect love or even warmth towards their victims. To the extent that such actions involve some level of dislike, the racial animus model may accommodate such feelings. In fact, while proponents of the racial animus model believe that some form of animosity should motivate a defendant's conduct, statutes and commentators make no distinction between defendants whose actions reflect a negative opinion about their victims and those who manifest more intense dislike akin to hatred.²⁰⁷ Thus, the Department of Justice Guidelines for interpreting the federal hate crime statutes define hate as a "negative opinion or attitude" toward a group.²⁰⁸ Interpreted in this fashion, affinity fraud perpetrators may exhibit "hate." Indeed, it seems entirely possible that perpetrators of such fraud have a negative opinion about the group, and that such an opinion motivates their crime. If the racial animus model accommodates this broader range of discriminatory motives, then affinity fraud may be eligible for enhancement as a hate crime even when the defendants do not exhibit the intense dislike typically associated with a hate crime.

D. Mixed or Pure Motives?

Whether affinity fraud qualifies as a hate crime also turns on the part a prohibited motive must play in the commission of a crime. Some

²⁰⁶ BOYZ IN THE HOOD (Columbia Pictures 1991).

²⁰⁷ Ironically, even amongst those statutes specifically requiring some discriminatory motive, only Rhode Island actually uses the term "hatred." The Rhode Island enhancement statute requires a defendant to select a victim because of "hatred of or animus toward" the victim's group. R.I. GEN. LAWS § 12-19-38 (2001). All other statutes that require a motive refer only to bias, bigotry, prejudice, or malice as the kind of animus necessary for a hate crime. See *supra* note 158. Similarly, as applied to statutes that do not address motive, proponents of the racial animus model use broad terminology when referring to the kind of animus a defendant must exhibit. See Lawrence, *The Case for a Federal Bias Crime Law*, *supra* note 123, at 157 (noting that bias crime is act of prejudice).

²⁰⁸ See Hate Crime Data, *supra* note 183, at 4.

maintain that such a motive must be the sole or dominant force behind the defendant's conduct.²⁰⁹ Several law enforcement agencies have adopted guidelines that support this position.²¹⁰ Others explain that hate crime laws must allow for defendants with mixed motives.²¹¹ Supporters of this approach claim that all crimes reflect some level of mixed motives and consequently a rejection of such motives would fail to cover those crimes that should fall under hate crime statutes.²¹² While several courts have sanctioned the mixed motives tests, there is no clear statutory guidance on this issue.²¹³ Illustrative of this point, the Ninth Circuit notes that it is often unclear whether statutes require bias to be "the sole

²⁰⁹ See Wang, *Complexities of Hate*, *supra* note 25, at 825-27 (explaining assumption that bias motivation must be sole or most significant one).

²¹⁰ See *id.* at 825 (noting, for example, that Los Angeles and Baltimore County guidelines state that bias must be central or sole motive for particular crime).

²¹¹ Supporters of the mixed-motive model maintain that requiring that the defendant's actions are motivated by "pure hate" fails to account for the reality of the mixture of factors impacting a defendant's conduct. These commentators point out that most crimes are "mixed-motive" crimes, pursuant to which many factors govern the defendant's actions. Indeed, even crimes typically understood to be pure hate crimes may involve other motivations. Thus, a person who violently assaults an individual may do so both because of his stated dislike of the individual's group and because he believes that the crime will be easier to commit or less likely to be investigated. For example, while an assault against a gay person may demonstrate a defendant's dislike of gay people in general, it may also reflect a belief that gay people will not fight back, as well as the assumption that law enforcement agents will devote fewer resources to finding the perpetrator of crimes against gay people. These latter assumptions demonstrate an opportunistic motive behind the defendant's actions, while revealing that more than one impulse prompted the defendant's behavior. See, e.g., *In re M.S.*, 896 P.2d 1365, 1377 (Cal. 1995) (finding that prohibited motive need not be predominant, exclusive, or "but for" cause of defendant's actions); *People v. Nitz*, 674 N.E.2d 802, 806-07 (Ill. App. Ct. 1996) (noting that bias motivation need not be sole motivation).

²¹² Indeed, Professor Wang points out that even lynching, a prototypical hate crime, involved mixed motives, including economic ones. See Wang, *Complexities of Hate*, *supra* note 25, at 837-43 (explaining economic rationales underlying lynching); see also James Morsch, *The Problem of Motive in Hate Crimes: The Argument Against Presumptions of Racial Motivation*, 82 J. CRIM. L. & CRIMINOLOGY 659, 668 (1991) (noting that existing hate crime legislation incorrectly assumes that prosecutors can distinguish defendant's racial motive from other possible motivations). Professor Wang notes that white people used racial violence as a means of controlling black labor. See Wang, *Complexities of Hate*, *supra* note 25, at 848; see also STEWARD E. TOLNAY & E.M. BECK, *A FESTIVAL OF VIOLENCE: AN ANALYSIS OF SOUTHERN LYNCHINGS 1882-1930*, at 127-28 (1995) (finding relationships between economic distress in cotton market and lynching of blacks by whites).

²¹³ See, e.g., *In re M.S.*, 896 P.2d at 1377 (finding that prohibited motive need not be predominant, exclusive, or "but for" cause of defendant's actions); *Nitz*, 674 N.E.2d at 806-07 (noting that bias motivation need not be sole motivation); *In re Vladimir P.*, 670 N.E. 2d 839, 844 (Ill. App. Ct. 1996) (nothing in statute prohibits prosecution of people with mixed-motives); *Matter of Welfare of S.M.J.*, 556 N.W.2d 4, 6-7 (Minn. Ct. App. 1996) (noting that group identity need only play causal role in crime).

motivation, a substantial part of motivation, or an incidental motivating factor."²¹⁴

A rejection of mixed motives probably would exclude affinity fraud schemes. Under either model, it is clear that a particular victim's association with an identifiable group plays a substantial role in the defendant's decision to target him for crime. It is equally clear that the defendant's desire to make money also motivates his crime. As previously noted, defendants who commit affinity fraud swindle their victims out of thousands, and even millions of dollars.²¹⁵ Hence, even if a defendant has negative feelings toward his victim's group, opportunism inevitably plays a role in his crime. This duality undermines the potential that affinity fraud offenses qualify as hate crimes if courts do not employ a mixed-motives standard. In fact, this duality would appear to undermine the potential for any economic crime to constitute a hate crime given that all such crimes must involve some degree of economic motivation. Underscoring this concept, scholars who reject mixed motives explain that a criminal who discriminates in pursuit of personal gain cannot be considered a bias crime perpetrator.²¹⁶ Consequently, only if courts allow mixed motives will affinity fraud fall under hate crime provisions.

E. Conclusions Based on Statutory Analysis

As a crime that involves the deliberate targeting of particular groups, affinity fraud falls within the plain text of the Federal Guidelines and many state statutes.²¹⁷ This literal fit strongly suggests that perpetrators should receive sentencing enhancements under those statutes.

Ultimately, however, whether affinity fraud constitutes a hate crime may turn on the manner in which courts construe hate crime legislation. If courts prefer the mixed motives and discriminatory selection models, then affinity fraud can fall under the scope of these hate crime provisions. Even if courts adopt the racial animus model, the possibility remains that affinity fraud can be viewed as a hate crime if prosecutors can establish that the perpetrator felt some level of ill will towards

²¹⁴ See *Winarto v. Toshiba Am. Elecs. Components, Inc.*, 274 F.3d 1276, 1260 n.15 (9th Cir. 2001) (interpreting California statute).

²¹⁵ See *supra* notes 72-74.

²¹⁶ See *Wang, Opportunistic Bias Crimes*, *supra* note 123, at 1410 (noting that law enforcement offices eliminate from category of bias crimes those crimes motivated by combination of bias and monetary gain).

²¹⁷ See *United States Sentencing Guidelines Manual* § 3A1.1 (2001) (defining hate crime as one where defendants targeted their victims based on identifiable characteristic).

members of his race or religious group, and that such ill will guided his behavior. If courts adopt a more restrictive view of the racial animus model and reject the mixed-motives model, then affinity fraud will not be eligible for enhancement under hate crime statutes.

Currently, it is unclear which statutory interpretation will dominate hate crime jurisprudence. As the foregoing discussion reveals, courts and commentators are divided about the proper construction of hate crime statutes. Unfortunately, although the Supreme Court's *Mitchell* decision upheld the validity of hate crime statutes generally, that opinion failed to resolve many of the issues germane to this division.²¹⁸ In fact, the Court did not assess specifically whether courts could adopt a mixed motives test or include either economic or intra-group crimes under hate crime statutes. Similarly, the Court did not address directly the animus issue, and its dictum is somewhat contradictory. On the one hand, the *Mitchell* Court pointed out that motive was an important factor for sentencing judges to consider when applying hate crime statutes and determining the proper sentence under such statutes.²¹⁹ The Court also referred to hate crime as a bias-motivated offense.²²⁰ Such dicta may reveal the Court's preference for construing hate crime statutes to require defendants to exhibit some form of bias or discriminatory motive beyond mere selection.²²¹

On the other hand, the Court implicitly endorsed the discriminatory selection model when it upheld the Wisconsin statute.²²² The *Mitchell* decision forced the Supreme Court to resolve conflicting interpretations of Wisconsin's hate crime statute. Initially, the Wisconsin appeals court maintained that the statute only required prosecutors to prove that a victim was selected on account of a prohibited trait, and emphasized that prosecutors did not have to account for the defendant's motives.²²³ In

²¹⁸ See *Wisconsin v. Mitchell*, 508 U.S. 476, 487-88 (1993) (finding Wisconsin's hate crime statute constitutional).

²¹⁹ See *id.*

²²⁰ The Court stated that the State's desire to address the greater harms associated with a defendant's biases provides an adequate explanation for its penalty enhancement provisions. See *Mitchell*, 508 U.S. at 487-88.

²²¹ See Lawrence, *A Normative Theory of Bias-Motivated Crimes*, *supra* note 13, at 332. Professor Lawrence notes that the Court described Wisconsin's statute as one involving an enhancement for conduct motivated by a discriminatory view point and that this description "turns less on the strict discriminatory selection of a victim than on the point of view that underpins that selection." *Id.*

²²² See *id.*

²²³ See *State v. Mitchell*, 473 N.W.2d 1, 5 (Wis. Ct. App. 1991) (noting that operative part of statute is whether defendant intentionally selects his victim on account of race).

this regard, the Wisconsin appeals court appeared to sanction the discriminatory selection model. However, the Wisconsin Supreme Court disagreed, finding that although the statute itself did not require any animus, it nevertheless was designed to punish bigoted motives, and thus violated the First Amendment.²²⁴ From this perspective, the Wisconsin Supreme Court's construction of the statute appeared to rest on the racial animus model, creating a conflict for the Supreme Court. Indeed, in its arguments before the Supreme Court, the State of Wisconsin emphasized that its statute only required discriminatory selection to negate concerns that the statute impermissibly regulated motive in violation of the First Amendment.²²⁵ While the Supreme Court did not confront this conflict directly, its approval of the statute may be viewed as implicit approval of the appeals court's construction of the statute. At the very least, the decision does not reject the discriminatory selection model. As a consequence, lower courts as well as commentators remain divided on this issue.²²⁶ The division related to animus and other issues reflects the difficulty with determining how courts will apply hate crime statutes.

More significantly, regardless of which model a court or state selects, the current paradigm may not fit crimes of an economic nature. Indeed, Congress has expressed a preference for the racial animus model.²²⁷ However, Congress' clear intention to include economic crimes such as fraud and money laundering under hate crime legislation may not be reconcilable with a narrower construction of the racial animus model, particularly if it entails rejecting mixed motives. As previously noted, economic crimes inevitably involve mixed motives because there is an underlying opportunistic rationale to any crime committed for economic gain.²²⁸ Thus, a model that fails to accommodate this rationale could not cover economic offenses. Hence, while the racial animus model may

²²⁴ See *State v. Mitchell*, 485 N.W.2d 807, 812-14 (Wis. 1992).

²²⁵ See Lawrence, *A Normative Theory of Bias-Motivated Crimes*, *supra* note 13, at 331.

²²⁶ See, e.g., *United States v. Woodlee*, 136 F.3d 1399, 1413 (10th Cir. 1998) (finding that defendant's actions were racially motivated when he selected victim because of victim's race); *In re Joshua H.*, 17 Cal. Rptr. 2d 291, 300 (Cal. Ct. App. 1993) (stating that selection of victim, rather than reason for selection, triggers additional punishment under hate crime statute); *State v. Choppy*, 539 S.E.2d 44, 51 (N.C. Ct. App. 2000) (stating that defendant must target victim because of race, animus not required); *State v. Hatcher*, 524 S.E.2d 815, 815 (2000) (finding no need to prove that defendant harbored animosity toward race or ethnic group); *State v. Plowman*, 838 P.2d 558, 563 (Or. 1992) (stating that defendant "need not hate at all" to commit hate crime).

²²⁷ See HATE CRIMES SENTENCING ENHANCEMENT ACT OF 1993, H.R. REP. NO. 103-244 (1993).

²²⁸ See *supra* Part II.D.

help distinguish between violent crimes, its wholesale rejection of economic crimes makes it an inadequate model for these offenses. This Article's purpose is not to further the general debate amongst hate crime scholars about the appropriateness of one kind of model over the other.²²⁹ Therefore, instead of focusing on the proper model of statutory construction, it may be more appropriate to assess the suitability of characterizing affinity fraud as a hate crime by referring to the policy reasons underlying adoption of hate crime statutes.

III. ASSESSING THE PARALLELS BETWEEN THE HARMS ASSOCIATED WITH HATE CRIMES AND THOSE ASSOCIATED WITH AFFINITY FRAUD

While scholars do not agree on how the term "hate crime" should be construed, they do agree that hate crimes warrant enhanced sentencing because they cause greater harms than "parallel" crimes — the same crimes that do not involve hate.²³⁰ Lawmakers and scholars maintain that such crimes inflict greater harm to: (1) the immediate victim; (2) members of the victim's group; and (3) society as a whole.²³¹ The Supreme Court explained that legislators' desire to redress the increased harms associated with hate crimes justifies applying penalty-enhancement provisions to perpetrators of such crimes.²³² Therefore, whether a person's criminal behavior qualifies as a hate crime should depend primarily upon whether the behavior caused the increased harms identified by the legislator and endorsed by the Supreme Court.²³³ If affinity fraud creates the same or similar harms as those associated with hate crimes, then it may be appropriate to apply hate crime penalty enhancement provisions to such fraud.

²²⁹ Such a debate is better furthered through other scholarship. See, e.g., Wang, *Complexities of Hate*, *supra* note 25; Lawrence, *A Normative Theory of Bias-Motivated Crimes*, *supra* note 13.

²³⁰ See Lawrence, *A Normative Theory of Bias-Motivated Crimes*, *supra* note 13, at 363. Professor Lawrence explains that a parallel crime involves an identical criminal conduct, but without the bias motive. *Id.* This parallel crime exists within the bias crime, while the bias crime is a two-tiered offense, comprised of the parallel crime and the civil rights crime or the crime involving the bias motivation. See *id.* at 363-64. In the context of affinity fraud, a parallel crime is investment or securities fraud that does not target any particular religious, ethnic, or minority group.

²³¹ See H.R. REP. NO. 103-244, at 4; Lawrence, *A Normative Theory of Bias-Motivated Crimes*, *supra* note 13, at 348; Wang, *Complexities of Hate*, *supra* note 25, at 800.

²³² See *Wisconsin v. Mitchell*, 508 U.S. 476, 488 (1993).

²³³ See Wang, *Complexities of Hate*, *supra* note 25, at 805 ("Whether a case qualifies as a bona fide bias crime therefore ought to depend upon whether it causes those greater harms, and not upon how closely it resembles the prototype.").

A. Individual Harms

Scholars agree that bias-motivated crimes inflict greater harm on their immediate victims than parallel crimes. Specifically, bias crime victims experience a heightened sense of vulnerability beyond that found in other crime victims.²³⁴ Of course, every victim of a traumatic event experiences feelings of vulnerability after the event.²³⁵ The principle distinction between victims of hate crimes and victims of parallel crimes lies in each victim's perception about their relative control over the crime, and hence their ability to prevent recurrences.²³⁶ The fact that hate crime perpetrators choose their victims based on an immutable characteristic causes victims to believe that they could not have prevented the perpetrator's actions because they could not have changed the characteristic that prompted the action.²³⁷ For this same reason, victims believe that they cannot prevent or reduce the risks of future violence.²³⁸ Thus, these victims cannot reduce their apprehension, anxiety, and fear related to future actions, and consequently may be more likely to engage in avoidance behavior such as withdrawal or

²³⁴ See 139 CONG. REC. H6792-01, H6793 (1993) (noting that attacks resulting from hate or bigotry create additional sense of apprehension upon victims); Lawrence, *A Normative Theory of Bias-Motivated Crimes*, *supra* note 13, at 343 (noting heightened sense of vulnerability of bias crime victims beyond that found in other crime victims); *In re Joshua H.*, 13 Cal. Rptr. 2d 291, 300 n.9 (Cal. Ct. App. 1993) (stating that crimes committed on basis of immutable characteristic are more debilitating because victims fear recurrence and experience increased vulnerability).

²³⁵ See Wang, *The Transforming Power of Hate*, *supra* note 20, at 84-97. Professor Wang explains that people conduct their lives within an "assumptive world" and that crimes shatter victims basic assumptions about the nature of the world and themselves. *See id.* at 85-86. One of the assumptions shared by all nonvictims is a belief in their own invulnerability to harm. *See id.* Traumatic crimes undermine this belief. *See id.*

²³⁶ *See id.* at 102. Professor Wang explains that some crime victims view themselves as uniquely vulnerable while others view themselves as universally vulnerable. *See id.* at 99. Those who see themselves as universally vulnerable believe that the world is equally threatening to others while the uniquely vulnerable victim sees herself as more likely than others to suffer negative events. *See id.* Ultimately, the critical difference between the two victims rests in their perceived controllability of the factors to which their crime is attributed. *See id.* at 102. The uniquely vulnerable person attributes the crime to traits over which he has no control and the universally vulnerable person focuses on behavior which he can modify. *See id.* at 101-02.

²³⁷ *See id.* at 102; *see also* Lawrence, *The Case for a Federal Bias Crime Law*, *supra* note 123, at 120 (noting that bias crimes strike at very core of person's identity).

²³⁸ See Lawrence, *The Case for a Federal Bias Crime Law*, *supra* note 123, at 150 (noting that victims of bias crimes cannot reasonably minimize potential for recurrences); Kristin L. Taylor, *Treating Male Violence Against Women as a Bias Crime*, 76 B.U. L. REV. 575, 583-84 (1996) (noting that victims attempt to deal with their fear by changing their behavior, but fear remains because reason for attack — their group membership — also remains).

depression.²³⁹ These reactions differ from those of victims of parallel crimes who attribute their crimes to uncontrollable behavioral factors outside of themselves.²⁴⁰ As compared to victims of hate crimes, these victims experience less apprehension and tend to believe that they have greater control over recurrences.²⁴¹ Therefore, instead of withdrawing, such victims are more likely to participate in activities that re-establish their sense of control and autonomy.²⁴² In this way, because the crime against them was not committed on the basis of an immutable characteristic, victims of parallel crimes experience less vulnerability. As a consequence, parallel crimes generate less harm to their immediate victims than hate crimes.

Arguably, if the distinction between the harms associated with a hate crime and a parallel crime is that victims of a hate crime attribute their vulnerability to factors over which they have no control, then affinity fraud may not generate the kind of harm associated with a hate crime. Indeed, many may assert that victims of affinity fraud have significant control over the factors that lead to their crime. Like most investment crimes, affinity fraud requires the victim's active participation in the crime. The victim must make a decision about the investment program and the people to whom she will give her money. Thus, while the victim may feel vulnerable once the crime has occurred, her vulnerability can be explained in terms of behavioral factors over which she has control. In other words, such a victim should recognize that if she had been more cautious or had properly investigated the investment opportunities and the people who presented them, then her crime could have been avoided. The victim also should appreciate her ability to implement measures that can significantly reduce, and even eliminate, her potential for falling victim to affinity fraud in the future. Along these lines,

²³⁹ See Wang, *The Transforming Power of Hate*, *supra* note 20, at 118 (noting that victims cannot re-establish their control and hence frequently use withdrawal or avoidance as way of coping). The impact of bias crime on victims has been compared with that of rape victims who also experience greater psychological trauma that leads to depression and withdrawal. See Lawrence, *The Case for a Federal Bias Crime Law*, *supra* note 123, at 151.

²⁴⁰ See Wang, *The Transforming Power of Hate*, *supra* note 20, at 99 (explaining differences between those who perceive themselves as uniquely vulnerable such as bias crime victims and those who see themselves as universally vulnerable).

²⁴¹ See *id.* at 102. Professor Wang notes, "a person who believes that her behavior led to her victimization believes she can affect future outcomes by changing her behavior." *Id.* This perceived controllability differentiates bias crimes from parallel crimes. See *id.*

²⁴² See *id.* at 103 (noting that victims of parallel crimes tend to recover more quickly and respond in active instrumental way to their crimes). Professor Wang further notes that bias crime victims exhibit a marked resistance to taking steps that would restore their control. See *id.* at 117.

securities regulators explain that investor education programs can significantly reduce the number of affinity fraud cases by equipping targeted communities with the skills necessary to identify and protect themselves against affinity fraud scams.²⁴³ These programs reflect the belief that victims of affinity fraud can control the incidences of such fraud, thus reducing the victim's sense of vulnerability. In this respect, individuals targeted for affinity fraud may not be vulnerable to the same extent and degree as those targeted for violent bias crimes.

However, the fact that victims may have the ability to control past and even future criminal conduct may not alleviate their sense of vulnerability. As with violent hate crimes, victims of affinity fraud are targeted because of an immutable characteristic. Hence, such victims may experience greater fear that they cannot control recurrences because they cannot change the characteristics that make them more likely to be targeted for the crime. This makes the crime distinct from parallel investment crimes where victims are not selected based on an immutable characteristic. Indeed, while victims of investment crimes may be able to control their destiny by educating themselves and altering their behavior, the same could be said of violent crime victims, at least to a certain degree. Thus, one may argue that victims of violent hate crimes have the ability to prevent their crime from reoccurring by, for example, avoiding particular places or taking self-defense classes. Yet the fact that perpetrators single out victims based upon their race or other immutable

²⁴³ See *Investor Alert*, *supra* note 11 (suggesting ways that investors can educate themselves and thus prevent being victims of affinity fraud); *Beware of Swindlers*, *supra* note 11 (discussing tips to avoid affinity fraud such as seeking professional advice or requesting written information on an investment). Indeed, one concern with focusing on increased sanctions for affinity fraud crimes is that it may divert resources from campaigns designed to educate investors about how to avoid affinity fraud scams. It is clearly important to educate communities so that they understand the difference between legitimate and illegitimate investment opportunities and know the manner in which to investigate the opportunities as well as those who present them. Educational campaigns may also be necessary to ensure that such crimes do not undermine group members' desire to participate in legitimate investment opportunities or decrease the number of people willing to offer such opportunities.

However, increased sanctions can serve as a source of education, signaling the government's stance on the kind of conduct that is criminal. Also, like the federal government's response to hate crime, the response to affinity fraud must involve a variety of components. Indeed, in connection with hate crime, the federal government not only gathered and continues to gather statistical evidence on these crimes, but also federal legislation focuses lawmakers' attention on the need to educate law enforcement officers on determining a hate crime. These actions reflect a recognition that hate crimes needed a multi-tiered response. The same is true for affinity fraud crimes. Certainly we need to increase investor education in this area, but we also need to respond with additional sanctions.

characteristics means that there is at least some portion of the crime over which all of these victims have no control.²⁴⁴ Hence, regardless of the kind of crime, the targeted nature of the crime makes victims feel more vulnerable than victims of parallel offenses even when there may be some factors associated with the crime that they can control.

Regardless, some may contend that the nature of the harms associated with an investment crime are less serious than those inflicted by a violent crime, and thus do not warrant additional sanctions as a hate crime. In fact, the Supreme Court has stated that violent crimes constitute more serious offenses than non-violent crimes.²⁴⁵ If the seriousness of a crime corresponds to the amount of penalties imposed for such crime, it appears that society does not view the harms associated with economic crimes in the same light as those associated with violent crimes.²⁴⁶ Indeed, on average, perpetrators of violent crimes face more serious penalties than those convicted of an economic crime, with the most severe sanctions of life imprisonment and death reserved almost exclusively for perpetrators of violent crimes.²⁴⁷ To the extent that the differences in the punishment associated with violent and non-violent crimes reflect the relative seriousness of the two categories of crime, economic crimes may be viewed as less serious. In turn, this may suggest that such crimes should not be included in hate crime legislation.

²⁴⁴ See Lawrence, *The Case of a Federal Bias Crime Law*, *supra* note 123, at 150-51 ("It is one thing to avoid the park at night because it is not safe. It is quite another to avoid certain neighborhoods because of, for example, one's race or religion."). While the former may be random, the other is quite personal and strikes at a person's very identity.

²⁴⁵ See, e.g., *Solem v. Helm*, 463 U.S. 277, 292-93 (1983). In examining whether or not a crime violates the Eight Amendment's ban against cruel and unusual punishment, the Supreme Court noted that sentencing courts should consider the fact that violent crimes were more serious than non-violent crimes. See *id.*

²⁴⁶ One method of measuring a crime's seriousness is through the harm it causes to society. See Lawrence, *A Normative Theory of Bias-Motivated Crimes*, *supra* note 13, at 354. Indeed, an important tenet underlying the imposition of criminal penalties is that the punishment must be consistent with or proportional to the relative seriousness of the crime. In order to determine the appropriate penalty for a given crime we must judge its relative seriousness. Conversely, one may argue that the penalty society imposes on given criminal conduct reflects its relative seriousness. Hence, examining such penalties may help determine which criminal behavior society understands to be more serious than another.

²⁴⁷ Indeed, the Supreme Court overturned a defendant's sentence of life imprisonment. See *Solem*, 463 U.S. at 292. The defendant had been convicted of several non-violent offenses and sentenced to a term of life imprisonment under a recidivist statute. See *id.* at 282. The Supreme Court reasoned that the severity of the punishment did not fit the seriousness of the crime. See *id.* However, in *Rummel v. Estelle*, 445 U.S. 263, 264-65 (1980), the Court upheld a sentence of life imprisonment against a person convicted of non-violent offenses such as obtaining money by false pretenses. Hence, the Court's position on this issue is not entirely clear.

Differences in the nature of harms associated with violent and non-violent offenses strengthen this suggestion. Violent crimes instill fear in the victim and potentially deprive victims of their most cherished liberty — life. This harm is not present in purely economic crimes, thereby suggesting that they should be treated differently and excluded from hate crime legislation. If legislators reserve hate crime statutes for more serious crimes, then perhaps economic crimes like affinity fraud do not merit inclusion.

Yet this argument overlooks the seriousness of investment crimes like affinity fraud. While such crimes do not deprive their victims of life and do not instill fear of physical harm, investment crimes can have tremendous ramifications on a person's quality of life, depriving him of the ability to obtain basic necessities such as a home or sustenance. Thus, some victims of affinity fraud lost significant amounts of money, often putting themselves in a precarious financial position.²⁴⁸ In this way, economic crimes are "serious." Moreover, some existing penalties reflect this fact. Certainly, the amendments to the Federal Guidelines providing for increased sanctions for some economic crimes reflect the Sentencing Commission's view that judges should take economic crimes more seriously.²⁴⁹ Furthermore, some crimes included within the definition of a hate crime involve penalties less severe than those associated with some investment crimes.²⁵⁰ For example, the underlying assault at issue in *Mitchell* only carried a maximum sentence of two years.²⁵¹ By contrast, a criminal violation of the federal securities laws can carry up to a maximum twenty year sentence.²⁵² These penalties undermine the notion that society views all economic crimes as less serious than violent crimes, and thus counsels against a categorical rejection of investment offenses like affinity fraud.

²⁴⁸ See *Broadway*, *supra* note 4, at B9 (noting that thousands of investors lost their life savings and depleted money from their retirement accounts); Julia Levy, *Putting Faith into Investments: 'Affinity Fraud' Scams Growing in the United States*, NAT'L POST, Aug. 8, 2001, at C8 (noting that investors lost all of their life savings and even mortgaged their homes); Thompson, *supra* note 4, at E1 (noting that some investors lose their life savings).

²⁴⁹ See *supra* note 110.

²⁵⁰ Some states only make hate crimes a civil violation, while categorizing economic offenses as criminal violations. See ARK. CODE ANN. § 16-123-106 (Michie 2001) (creating action for civil damages and injunctive relief).

²⁵¹ See *Wisconsin v. Mitchell*, 508 U.S. 476, 480 (1993) (describing WIS. STAT. §§ 940.19(1m), 939.50(3)(e) relating to convictions for aggravated battery). As another example, Virginia's hate crime statute includes simple assault, which carries a prison term as low as six months. See VA. CODE ANN. § 18.2-57 (Michie 2001).

²⁵² See Securities Act § 24, 15 U.S.C. § 77x (2000) (five years); Exchange Act § 32(a), 15 U.S.C. § 78ff(a) (2000) (twenty years).

Even if economic crimes may be serious, some may exclude affinity fraud on the basis that crimes committed within the same group may not be as serious as inter-group crimes. In the context of hate speech, Professor Mari Matsuda has argued that when a non-white person utters racist speech to a member of his own racial or ethnic group, such speech may not be as harmful as racist speech coming from a white person and directed towards a non-white person.²⁵³ In Professor Matsuda's view, the harm of racist or hate speech stems from reinforcing historically oppressive relationships.²⁵⁴ When members of an oppressed community use racist language towards one another, such speech may have a different meaning and may be less damaging.²⁵⁵ By comparison, because affinity fraud perpetrators target members of their own group, their conduct may not be as harmful as criminal behavior targeting members of different groups.

While Professor Matsuda's observations may be sound in the context of speech, they have less force when applied to conduct. As many commentators have pointed out, speech harms differ from non-speech harms.²⁵⁶ Indeed, Professor Matsuda's observations appear to rest on the notion that the harmful impact of some speech depends upon the

²⁵³ See Matsuda, *supra* note 128, at 2364.

²⁵⁴ See generally RANDALL KENNEDY, *NIGGER: THE STRANGE CAREER OF A TROUBLESOME WORD* (2002). Professor Kennedy notes that many blacks believe that the word "nigger" has a different connotation when uttered by a white person, than when uttered by a black person. He notes that black comedians and hip-hop artists use the term in an almost affectionate manner. See *id.* at 34-37, 43-45. At the same time, most object to its use by non-blacks. See *id.* at 45.

²⁵⁵ See *id.*

²⁵⁶ Some people claim that the difference between speech and non-speech is that speech harms are mainly psychological, while non-speech inflicts physical harm that is immediate. See, e.g., Delgado, *supra* note 200, at 137 (noting arguments based on notion that harms from speech are different in kind and seriousness); Frederick Schauer, *The Sociology of the Hate Speech Debate*, 37 VILL. L. REV. 805, 813-14 (1992) (noting tendency to conclude hate speech does not inflict harm). Others note that speech is distinct from non-speech because its harm depends on the perception of the victim. See C. Edwin Baker, *The Process of Change and the Liberty Theory of the First Amendment*, 55 S. CAL. L. REV. 293, 332 (1981). Professor Kennedy also notes that the impact of the word "nigger" may change depending on "the context in which the word is spoken — the speaker's aims, effects, and alternatives. See Kennedy, *supra* note 14, at 51-52. But others have questioned this distinction between speech and non-speech harms, arguing that speech harms can produce both physical and psychological harm. See Delgado, *supra* note 200, at 143-47 (noting physical, psychological, and pecuniary harms caused by racial insults); Matsuda, *supra* note 128, at 2336-38; John A. Powell, *Worlds Apart: Reconciling Freedom of Speech and Equality*, 85 KY. L.J. 9, 59-62 (1997) (questioning distinctions between harms associated with speech and those associated with conduct).

victim's interpretation and reaction to the speaker.²⁵⁷ Hence, non-whites may not perceive racist speech uttered by members of their own group as hateful, and thus such speech may not produce any harm.²⁵⁸ However, to the extent Professor Matsuda suggests that communicative acts may not be harmful in and of themselves, her analysis does not apply to affinity fraud. Indeed, unlike speech, as evidenced by the large sums of money victims lose, investment crimes do inflict economic harm on their victims even when those victims belong to the same identity group as the victim.²⁵⁹ Moreover, Professor Matsuda explains that she would be willing to prohibit intra-group hate speech if individuals used such speech to attack group members, thereby causing them harm.²⁶⁰ As the next sections discuss, affinity fraud generates harms to members of the targeted community as well as to the broader society, thus distinguishing it from parallel investment crimes. These harms suggest the damage affinity fraud perpetrators inflict despite their shared characteristics with the victim. Hence, such conduct may deserve enhancements even under Professor Matsuda's analysis.

Investment crimes that are perpetrated by members of the same group as the victim may also create greater individual harms than such crimes perpetrated by relative strangers. Indeed, individual victims of affinity fraud may experience vulnerability not just because they are targeted based on an immutable characteristic, but also because they are targeted by people that they trusted. Professor Wang notes that traumatic events cause vulnerability because they shatter the victim's basic assumptions regarding the nature of the world.²⁶¹ Affinity fraud victims may experience greater vulnerability because the crime damages their assumptions regarding the relative trustworthiness of their group members.²⁶² The law recognizes that crimes violating trust or trust relationships generate greater harm than crimes that do not involve

²⁵⁷ While Professor Matsuda recognizes the harmful physical and psychological harms associated with hate speech, she does appear to concede that harms may be different depending on the identity of the speaker. See Matsuda *supra* note 128, at 2364.

²⁵⁸ See *id.*

²⁵⁹ See *supra* notes 6 and 7 (demonstrating economic impact of affinity fraud).

²⁶⁰ See Matsuda, *supra* note 128, at 2363-64.

²⁶¹ See Wang, *The Transforming Power of Hate*, *supra* note 20, at 85-86. Professor Wang notes that although the assumptions are part illusory and part reflective of reality, shattering them inflicts psychological and emotional trauma. *Id.*

²⁶² See Fairfax, *supra* note 1, at 98-113 (noting harms generated by crimes that exploit relationships of trust and explaining that perpetrators of affinity fraud exploit such relationships); see also *id.* at 113 (noting that affinity fraud also undermines social trust important to economic stability of many groups targeted by affinity fraud).

trust.²⁶³ As one federal circuit judge noted, “people who violate a trust placed in them often do more damage to the social fabric and are more culpable than those who steal outright.”²⁶⁴ While relationships within affinity fraud do not reflect traditional fiduciary ones, the difference between affinity fraud and its parallel fraud is that perpetrators of affinity fraud prey on the trust group members have for one another.²⁶⁵ Securities regulators point out that the heightened level of trust among group members explains why they are more likely to invest in opportunities presented to them by members of their group.²⁶⁶ Other experts agree that certain groups, particularly racial and ethnic minorities, tend to trust one another more than they trust people outside of their group.²⁶⁷ Because affinity fraud violates the trust among group members, it generates increased vulnerability and therefore inflicts greater harms than its parallel crime.

Thus, like hate crimes, affinity fraud crimes inflict greater harms on their immediate victims than parallel crimes. Victims of such fraud feel increased vulnerability because they are singled out for crime based on a trait they cannot change. Also, investment crimes within groups may be especially troublesome to individual victims because they damage relationships of trust. These enhanced harms distinguish affinity fraud from their parallel offenses and make them worthy of additional sanctions.

B. Harms Inflicted on the Target Community

Hate crimes strike at the very heart of the American identity. When a swastika is smeared on a synagogue wall, or a cross is burned on the lawn of a black family, that act is not only aimed at a single person or edifice, but also at the hearts of millions of others.²⁶⁸

²⁶³ See Alexander, *supra* note 79, at 778 (noting harms associated with violations of trust relationships); DeMott, *supra* note 79, at 901-02 (same); Scallen, *supra* note 79, at 913 (noting party’s vulnerability within trust relationships).

²⁶⁴ United States v. Isaacson, 155 F.3d 1083, 1089-90 (Fernandez, J., dissenting). The judge further observed: “A person who violates a trust may well do serious damage to the ties that bind us together in this complex society and may, therefore, be more reprehensible than, say a pickpocket or a sneak thief.” *Id.* at 1087.

²⁶⁵ See Fairfax, *supra* note 1, at 79.

²⁶⁶ See *id.*

²⁶⁷ See, e.g., FUKUYAMA, *supra* note 84, at 296 (noting that shared history and ethnicity of racial groups in America translate into closeness not enjoyed by surrounding community); Cao, *supra* note 84, at 882 (noting that common culture establishes trust among certain group members).

²⁶⁸ See 139 CONG. REC. H6792-01, H6793 (1993) (testimony of Senator Charles Schumer).

The harmful effect of hate crimes extends beyond the immediate victim to impact that victim's group.²⁶⁹ Members of the "target community" share the characteristic motivating the crime.²⁷⁰ These group members associate themselves with the victim and hence have reactions very similar to the targeted victim.²⁷¹ First, not just the individual, but the entire group feels vulnerable as a result of a crime aimed at their group.²⁷² Second, group members engage in avoidance behavior, withdrawing from certain activities they perceive to be more harmful as a result of bias crimes.²⁷³ Finally, hate crime serves to stigmatize group members, marking them as suitable victims of crime while evoking historical incidents of prejudicial conduct aimed at groups.²⁷⁴ In these ways, hate crime sends a message to an entire community.

Like violent hate crimes, affinity fraud victims' group membership makes them targets, and hence the entire community feels a sense of vulnerability that does not occur with a parallel crime. Because bias crimes target people based on their group membership, each individual's identity is less important than their group identity.²⁷⁵ Because the targeted community understands their relative fungibility with the victim, community members feel vulnerability similar to the victim.²⁷⁶ Of course a community's reaction depends upon their knowledge of a given fraud. Some may claim that the reluctance of many affinity fraud victims to report such crime suggests that the community may not learn

²⁶⁹ See *Oregon v. Plowman*, 838 P.2d 558, 564 (Or. 1992) (noting that hate crimes are directed toward entire group and invite insecurity)

²⁷⁰ See Lawrence, *The Case for a Federal Bias Crime Law*, *supra* note 123, at 152.

²⁷¹ See Lawrence, *A Normative Theory of Bias-Motivated Crimes*, *supra* note 13, at 346 (noting that group members experience feelings beyond mere sympathy or even empathy, but instead perceive the crime as if it were direct attack on them); Lawrence, *The Case for a Federal Bias Crime Law*, *supra* note 123, at 152 ("Members of the target community of a bias crime experience that crime in a manner that has no equivalent in the public response to a parallel crime.").

²⁷² See LAWRENCE, *PUNISHING HATE*, *supra* note 13, at 42.

²⁷³ See Wang, *The Transforming Power of Hate*, *supra* note 20, at 123 (noting that bias crimes "chill the exercise of civil rights," affecting personal and professional decisions of members of target community).

²⁷⁴ See Lawrence, *A Normative Theory of Bias-Motivated Crimes*, *supra* note 13, at 344-45.

²⁷⁵ See Wang, *The Transforming Power of Hate*, *supra* note 20, at 121 (explaining that because victim's experience cannot be explained in way that enables members of target community to differentiate themselves from victim, they recognize their own vulnerability to such crimes).

²⁷⁶ See Lawrence, *A Normative Theory of Bias-Motivated Crimes*, *supra* note 13, at 345-46 (noting that members of target community perceive crime as if it were direct attack on them).

of, and thus may not be impacted by, such fraud. However, while victims may be reluctant to report such conduct to authorities, this reluctance does not apply in connection with their fellow group members. Given the insular nature of many groups, it is likely that group members will learn of the crime well before outsiders do. As a consequence, they will be impacted by such crime. In fact, like hate crimes, securities regulators point out that even non-victims within a given community reveal feelings of vulnerability akin to the victims.²⁷⁷ This vulnerability may be heightened in the context of affinity fraud because securities and investment scams rely on a large number of people for its success, and hence the entire group may recognize that they are at a greater risk for fraudulent conduct. Securities regulators' efforts to warn identifiable group members reflect the understanding that affinity fraud makes such members vulnerable in a way that parallel crimes do not.²⁷⁸ This additional harm distinguishes affinity fraud from its parallel crime and extends the impact of the crime beyond the immediate victim to encompass all of those who share that victim's characteristics.

Moreover, hate crimes inflict greater harm on the broader group because they may negatively influence the entire groups' willingness to engage in certain critical activities. Scholars note that bias motivated crimes may cause group members to withdraw from, or avoid participating in, certain activities.²⁷⁹ For example, burning a cross on the lawn of a black family may not only cause the targeted family to move, but may cause some black families to avoid the neighborhood, while preventing others from establishing their homes in the neighborhood.²⁸⁰ Thus, bias-motivated offenses impact an entire group's decision regarding housing and travel, as well as their exercise of related rights.²⁸¹

²⁷⁷ See, e.g., *Beware of Swindlers*, *supra* note 11 (noting particular groups vulnerability to affinity schemes).

²⁷⁸ See *id.*

²⁷⁹ See Matsuda, *supra* note 128, at 2337; Wang, *The Transforming Power of Hate*, *supra* note 20, at 123-24.

²⁸⁰ See *supra* note 279 and accompanying text.

²⁸¹ Professor Wang relates a story of a black person's avoidance of particular neighborhoods because of his concern related to bias-motivated violence. See Wang, *The Transforming Power of Hate*, *supra* note 20, at 120-21. The notion that discriminatory conduct may impact a particular group's mobility is not new. Indeed, in the 1960s, the Supreme Court upheld the Civil Rights Acts of 1964 §§ 201-07, 42 U.S.C.A. §§ 2000a-2000a-6, on the basis that discrimination in hotels and restaurants impacted interstate commerce because such discrimination discouraged travel by blacks while deterring their movement into areas where discriminatory practices occurred. See *Katzenback v. McClung*, 379 U.S. 294, 299-300 (1964) (concluding that racial discrimination in restaurants had direct and adverse

In the context of affinity fraud, a similar influence may occur. Indeed, such fraud may not only deter the immediate victims from participating in investment-related activities, but also may reduce the likelihood that members of the entire community will participate in such activities because they experience the same vulnerability and withdrawal as the victim. Thus, some members of the target community have expressed a reluctance to engage in investment activities because of affinity fraud schemes.²⁸² This additional harm distinguishes affinity fraud from its parallel investment crimes. While it does not relate to a fundamental right, an individual's ability to participate in investment activities is certainly important in a capitalist society such as ours. Thus, affinity fraud is harmful because it negatively impacts an entire community's ability to participate in a vital activity.

This harm may prove even more devastating for groups who rely on affinity relationships for their economic well being. Indeed, legal, economic, and social barriers to traditional sources of capital have caused many members of racial and ethnic groups to rely more heavily on family, community, and affinity groups for economic resources.²⁸³

effect on interstate commerce); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 252-53 (1964) (holding that racial discrimination in public accommodations impedes interstate travel). Professor Matsuda explains that hate speech also restricts the personal freedom of victims and their targeted community, causing them to avoid places and modify their behavior in order to avoid receiving hate messages. See Matsuda, *supra* note 128, at 2337. Bias-motivated conduct also can have a less dramatic impact on the targeted group such as causing them to decrease their interaction with other groups so that they may be less visible targets. See Wang, *The Transforming Power of Hate*, *supra* note 20, at 119.

²⁸² See *Beware of Swindlers*, *supra* note 11 (describing accounts by one community where people claimed that they would not invest in stock market or other investment products because of their fear of being scammed by affinity fraud perpetrators).

²⁸³ See MELVIN L. OLIVER & THOMAS M. SHAPIRO, *BLACK WEALTH/ WHITE WEALTH: A NEW PERSPECTIVE ON RACIAL INEQUALITY* 47-48 (1995) (noting that as early as 1800s blacks created special societies of other blacks to aid them in business development because segregation and discrimination left them unable to participate in open market). Oliver and Shapiro also note that self-organization and activity within the black community plays and will play a crucial role in the development of black wealth. See *id.* at 190-93; see also FUKUYAMA, *supra* note 84, at 297-304 (noting importance of economic associations to minority groups in America who have faced barriers to traditional sources of credit). This reliance is particularly important among some immigrant communities. See Cao, *supra* note 84, at 879 (noting that "[h]istorically, rotating credit associations have been crucial for the economic development of immigrant communities in the United States, especially because mainstream, majority-owned banks are reluctant to lend to low-income communities."); Joel Garreau, *For Koreans, "Keh" is Key to Success*, WASH. POST, Nov. 3, 1991 at B1 (noting that with estimated 80% of Korean households in United States belonging to at least one revolving credit association, Koreans have most systematic credit association, but other groups such as Chinese, Vietnamese, Ethiopians, West Africans, Central Americans, and Caribbean blacks have participated in credit associations within their communities); David

Such informal groups provide economic resources that enable group members to support themselves, their businesses, and their community as a whole.²⁸⁴ From this perspective, affinity fraud's harm extends beyond the immediate victim by damaging the relationships necessary to sustain and propel the economic growth of certain groups. Also, for some racial and ethnic groups, participation in the securities market is a relatively recent phenomenon, and in most cases, their participation lags behind that of other groups.²⁸⁵ Indeed, surveys have found that blacks are more reluctant than their white counterparts to invest their money in the capital markets, choosing instead to retain their funds in banks or real estate.²⁸⁶ This reluctance has unfortunate consequences. Some studies suggest that to decrease the economic gap between whites and other racial and ethnic communities, these communities must engage in wealth-producing activities such as investment in the securities market.²⁸⁷ When these groups fail to engage in such activities, they

J. Jefferson, *Neighborhood Financing: Lending Clubs Offer Social Support and Quick Capital to Asian Immigrants*, WALL ST. J., Feb. 24, 1989, at R13 (explaining role of revolving credit associations to revitalization efforts in Korean and Vietnamese neighborhoods); Sandra Sugawara & Elizabeth Tucker, *New Firms Backed by Family, Friends*, WASH. POST, Dec. 16, 1987, at A1 (noting that Ethiopian immigrants who lack access to formal credit resort to revolving credit associations).

²⁸⁴ See *supra* note 283; Fairfax, *supra* note 1, at 115-16.

²⁸⁵ See, e.g., Gregory S. Bell, *IN THE BLACK: A HISTORY OF AFRICAN AMERICANS ON WALL STREET 5* (2002) (noting "African Americans began their journey on Wall Street centuries behind other groups").

²⁸⁶ See *African American Investors Reluctant Investors*, 12 J. OF FIN. PLANNING 21 (1999) (citing survey on African American investors by Ariel Mutual Funds and Charles Swab & Co.); Glenn C. Loury, *Opting Out of the Boom*, N.Y. TIMES, June 7, 1998, at 6-7 (same); see also Isaac C. Hunt, *A Message on Investing*, 42 HOW. L.J. 387, 388 (1999). The former SEC Commissioner notes that African Americans are apprehensive about investing in securities, preferring more conservative and lower yielding investment vehicles. Similarly, Oliver and Shapiro note that the assets owned by blacks differ significantly from those owned by whites, with blacks investing a much higher proportion of their money in functional assets such as homes or cars, while whites invest in income-producing assets such as stocks or certificates of deposit. See OLIVER & SHAPIRO, *supra* note 283, at 105.

²⁸⁷ For example, one study found that many African Americans who have managed to accumulate significant financial fortunes, such as Robert Johnson (the first African American billionaire), have done so by relying on the stock market. See Tony Chapelle, *Wealthiest African Americans Growing Via Stock Market*, NETWORK J., March 31, 2001, at 14; see also Hunt, *supra* note 286, at 390 (explaining that responsible investing can be effective means towards closing financial gap between blacks and whites). Then too, a study on minority businesses found that such businesses failure to access capital stagnated their growth. See Elizabeth Aguilera, *Successful Loans are in the Minority Business: Many Minority-owned Companies Face Problems in Getting Loans and Government Contracts*, ORANGE COUNTY REG., Sept. 25, 200, at A6 (citing 10-year report ranging from 1987 to 1997 commissioned by U.S. Minority Business Development Agency). Supporting this notion, Oliver and Shapiro proclaim, "the buried fault line of the American social system is who owns financial wealth

impede their ability to close the economic gap. Consequently, affinity fraud is particularly worrisome because it may undermine certain groups' ability or desire to enter into, and take advantage of, the securities markets. While this harm is different in kind from violent hate crimes, it can have an appreciable impact on a group's economic well being. In this way, affinity fraud produces more harm than other investment crimes.

Scholars also maintain that crimes aimed at groups are more harmful than parallel crimes because they stigmatize the group and mark group members as suitable targets for victimization.²⁸⁸ Professor Frederick Lawrence points out that bias crimes generate greater harms because they implicate a social history of group-based prejudice and oppression.²⁸⁹ In addition to their immediate harms, present day crimes that target groups evoke this history along with the notion of such groups' suitability for crime.²⁹⁰ Thus, victims experience these crimes as a form of stigmatization.²⁹¹

This stigmatization occurs regardless of the nature of the crime. Indeed, many instances of past discrimination involved economic-related conduct such as housing discrimination.²⁹² These non-violent discriminatory patterns marked particular groups as members of the underclass and contributed to the social understanding that certain

— and who does not." See OLIVER & SHAPIRO, *supra* note 283, at 67. According to the authors, blacks do not own financial wealth and this fact generates a host of inequities between the races. *Id.* at 175-77.

²⁸⁸ See Dan M. Kahan & Martha C. Nussbaum, *Two Conceptions of Emotions in Criminal Law*, 96 COLUM. L. REV. 269, 350-53 (1996) (noting that crimes motivated by hate have distinct social meanings and send message that their victims are not full members of society); Wang, *Opportunistic Bias Crimes*, *supra* note 123, at 1413 (noting that selecting victims with reference to group membership perpetuates the view that such group is suitable target); Wang, *Complexities of Hate*, *supra* note 25 at 898-99 (noting that bias-motivated conduct creates a climate for prejudice and discrimination by defining expected targets of crime).

²⁸⁹ See Lawrence, *A Normative Theory of Bias-Motivated Crime*, *supra* note 13, at 347-48.

²⁹⁰ See Lawrence, *The Case for a Federal Bias Crime Law*, *supra* note 123, at 155.

²⁹¹ See *id.* at 152.

²⁹² See KENNETH T. JACKSON, *CRABGRASS FRONTIER: THE SUBURBANIZATION OF THE UNITED STATES 199-200* (1985) (explaining process of redlining by Home Owners' Loan Corporation); DOUGLAS A. MASSEY & NANCY A. DENTON, *AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS 54* (1993) (explaining impact of discriminatory housing policies in creating black underclass); Charles L. Nier, III., *Perpetuation of Segregation: Toward a New Historical and Legal Interpretation of Redlining Under the Fair Housing Act*, 32 J. MARSHALL L. REV. 617 (1999) (noting historical discrimination in housing); see also *Shelley v. Kramer*, 334 U.S. 1 (1948) (overturning restrictive covenants against black residents).

groups can appropriately be subjected to criminal behavior.²⁹³ Current non-violent bias crimes should have the same impact. In this way, affinity fraud generates stigmatic harm on groups in a way that a parallel investment fraud does not.

This group-based conduct also may evoke fear of more violent criminal conduct aimed at such groups. Indeed, bias-motivated economic crime may represent an extension of bias-motivated violent crime, with the former serving as a precursor for the latter. More importantly, any bias-motivated offense creates and reinforces a general social understanding regarding a group's suitability for criminal conduct. Professor Lawrence notes that even non-violent prejudice carries a "clear message that the target and his group are of marginal value and could be subject to even greater indignities, such as violence motivated by the prejudice."²⁹⁴ Thus, all group-motivated crime may suggest that certain groups are suitable for *all* injustices violent and non-violent. In this respect, affinity fraud may inflict a stigmatic harm distinct from parallel investment crimes as well as a fear of more violent criminal behavior.

Unfortunately, justifying penalty enhancements for affinity fraud crimes based on the stigmatic harm associated with such crimes may prove to be a double-edged sword. On the one hand, it seems appropriate to recognize that the harmful nature of bias crimes may stem from the fact that the historical and social environment has identified some groups as suitable victims for crime. On the other hand, justifying penalty enhancements based on notions of a group's vulnerability to bias crimes may itself inflict stigma. Some scholars complain that even when a law intends to be protective, if it singles out particular groups for different treatment, it can serve to stigmatize those groups by suggesting that they need special assistance while other groups do not.²⁹⁵ This

²⁹³ See OLIVER & SHAPIRO, *supra* note 283, at 18 (noting, for example, that discriminatory housing practices contributed to "ghettoization of the black population," and have "lasting impact on the wealth portfolios of black Americans.").

²⁹⁴ Lawrence, *A Normative Theory of Bias-Motivated Crime*, *supra* note 13, at 345; Lawrence, *The Case for a Federal Bias Crime Law*, *supra* note 123, at 152. Professor Matsuda notes that less egregious forms of racism easily degenerate into more serious forms and that victims recognize that violence is the endpoint of bias-inspired conduct such as racial taunts. See Matsuda, *supra* note 128, at 2335.

²⁹⁵ Some justices of the Supreme Court and other scholars have advanced this argument in the context of affirmative action. See, e.g., *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 637 (1990) (Kennedy, J., dissenting) (noting that affirmative action policies impose stigma on its beneficiaries and foster view that they are less able to compete); *City of Richmond v. J.A. Croson Co.*, 476 U.S. 267, 516 (1986) (Stevens, J., concurring) (noting that affirmative action legislation stigmatizes beneficiaries). For a review of this issue, see, e.g., Andrew F.

argument may be particularly compelling in the context of securities and investment fraud. Indeed, singling these groups out for different treatment based on their enhanced vulnerability may suggest that such groups are inherently less intelligent or that group members do not have the capability to investigate and educate themselves about economic matters. At least one federal circuit court suggested that classifying an entire racial or ethnic group as vulnerable for purposes of an economic crime would require proving that the group lacked education or did not have the ability to comprehend business and securities laws.²⁹⁶ Thus, while the crime itself may be seen as a form of stigmatization, our response to the crime may also serve to inflict stigmatic harms on members of targeted groups.

Given the other harms associated with bias crimes, this concern, while undeniably valid, should not prevent treating affinity fraud as a hate crime. The other individual and group harms favor including affinity fraud within hate crime provisions. Moreover, if the manner in which the inclusion is presented is tactful, the potential to stigmatize group members may be minimal. For example, it may be important to educate communities about affinity fraud and to explain the reasons why legislators believe such fraud is worthy of their increased attention. This may help reassure targeted group members that our heightened response to affinity fraud does not reflect a negative evaluation of their intelligence, but rather an understanding that such fraud involves heightened harms that deserve more intense remedies.

C. Societal Harms Associated with Bias Conduct

Legislators and researchers alike further justify hate crime penalty enhancements on the notion that hate crimes impact the larger society.²⁹⁷ This impact comes in various forms.²⁹⁸ One impact relates to hate crime's tendency to polarize our diverse society by prompting retaliatory

Halaby & Stephen R. McAllister, *An Analysis of the Supreme Court's Reliance on Racial "Stigma" as a Constitutional Conception in Affirmative Action Cases*, 2 MICH. J. RACE & L. 235 (1997); John E. Morrison, *Colorblindness, Individuality and Merit: An Analysis of the Rhetoric Against Affirmative Action*, 79 IOWA L. REV. 313, 340-344 (1994).

²⁹⁶ See *United States v. Castellanos*, 81 F.3d 108, 112 (9th Cir. 1996) (noting that members of social group could be considered unusually vulnerable due to "lack of education, extreme insularity, superstition, or lack of familiarity with United States business practices or law enforcement").

²⁹⁷ See Lawrence, *A Normative Theory of Bias-Motivated Crimes*, *supra* note 13, at 347.

²⁹⁸ See *id.*

violence.²⁹⁹ The notion that hate crimes will increase racial or religious hostility by leading to retaliatory violence stems from the prototypical view of a hate crime as involving members of two different races or religious groups.³⁰⁰ This impact does not appear applicable to affinity fraud.³⁰¹ The other societal impact of hate crimes emphasizes such crimes' tendency to violate shared values of equality.³⁰² This harm may be generated by affinity fraud.

As Professor Lawrence remarks, "bias crimes violate the national social contract."³⁰³ Allowing particular groups to be subject to victimization damages our shared ideals regarding the equal treatment of all groups within our society.³⁰⁴ This damage occurs regardless of the identity of those who target such groups. The crux of the damage is that affinity fraud subjects particular groups to crime, while others are not impacted. As Professor Lawrence notes, any criminal behavior that singles out certain people for victimization undermines the principles of

²⁹⁹ See *id.* at 346 ("a single bias crime may ignite intercommunity tensions that may be of high intensity and of long-standing duration").

³⁰⁰ Scholars maintain that bias crimes may polarize society by prompting retaliatory violence. Indeed, a witness at one of the congressional hearings on hate crimes pointed to the riots after the Rodney King verdict as illustrative of the "incendiary or nitroglycerine quality that is generated by crimes that are motivated by bigotry." 139 CONG. REC. H6792-01, H6793 (1993). This statement reflects the belief that hate crimes generate tension among various groups within society. If members of the victimized group take out their anger and frustration on members of the offender's group, then hate crimes serve to increase racial or religious hostility within the nation as well as the potential for retaliatory violence. See Lawrence, *The Case for a Federal Bias Crime Law*, *supra* note 123, at 153 (explaining potential of bias crimes to ignite inter-community tensions of "high intensity and long-standing duration"). The *Mitchell* case may illustrate precisely this point. According to the facts of that case, the black defendants targeted a white victim because of the anger they felt upon seeing a movie depicting white men violently beating other blacks. See *Wisconsin v. Mitchell*, 508 U.S. 476, 480 (1993). According to the Supreme Court, after discussing scenes from the movie "Mississippi Burning," the defendant asked "Do you all feel hyped up to move on some white people?" In a similar vein, black youths stabbing of a Jewish student was in apparent retaliation for an accident in which an Orthodox Jew killed a young black child. See *United States v. Nelson*, 68 F.3d 583 (2d Cir. 1995); see also Lynne Duke, *Racial Violence Flares for Third Day in Brooklyn*, WASH. POST, Aug. 22, 1994, at A04 (describing racial tensions that led to riots between blacks and Jews in New York). In this way, one bias-motivated crime led to another. This makes hate crime more harmful, while pinpointing the need for hate crime laws that can halt this kind of cycle.

³⁰¹ Because affinity fraud occurs within a particular community, arguably only those within the community feel its impact. Thus, affinity fraud cannot polarize groups against one another and incite tension or unrest. This makes affinity fraud similar to its parallel crime and distinct from other forms of bias-motivated offense.

³⁰² See Lawrence, *A Normative Theory of Bias-Motivated Crimes*, *supra* note 13, at 347.

³⁰³ Lawrence, *The Case for a Federal Bias Crime Law*, *supra* note 123, at 145.

³⁰⁴ See Kahan, *supra* note 18, at 465-66 (noting that hate crime laws affirm our commitment to value of equality and reject inequality endorsed by such crimes).

equality important to our society.³⁰⁵ For this reason, bias crimes such as affinity fraud impact society as a whole.

D. *Are Affinity Fraud Perpetrators More Culpable?*

A more difficult question arises when one considers whether affinity fraud perpetrators exhibit more blameworthy conduct than those who commit parallel offenses. Some scholars maintain that enhanced penalties for criminals can be justified only if people who commit a targeted crime are more blameworthy than those who engage in parallel crimes.³⁰⁶ These scholars note that criminal law judges the seriousness of a crime by the harm generated by such actions, as well as the relative culpability of the accused.³⁰⁷ For example, the law views negligent homicide as less serious than intentional murder because a perpetrator who intended to kill his victim is more blameworthy than someone who accidentally caused another's death. For this reason, while it is important to assess whether crimes inflict greater harms, that assessment cannot represent the sole factor justifying penalty enhancements. Accordingly, hate crime statutes must focus on the relative culpability of a defendant's actions.

Based on this view, affinity fraud perpetrators arguably do not exhibit greater culpability. Indeed, many scholars claim that perpetrators of economic crimes are no more blameworthy than those of parallel crimes because all such perpetrators engage in rational, opportunistic behavior when they seek victims who they perceive to be easier targets.³⁰⁸ Thus, when an affinity fraud criminal targets his victim to obtain material wealth, he is no more culpable than other perpetrators of investment crimes who target victims they perceive as more gullible or wealthy. Viewed in this light, perpetrators of affinity fraud bear no additional blame.

This is true even if their conduct generates harms similar to crimes motivated by prejudice towards a victim. Scholars who prefer the discriminatory selection model argue that all bias crimes, regardless of their motives, inflict greater injuries on the immediate victim and have a

³⁰⁵ See Lawrence, *The Case for a Federal Bias Crime Law*, *supra* note 123, at 145.

³⁰⁶ See Crocker, *supra* note 176, at 489; Kent Greenawalt, *Reflections on Justifications for Defining Crimes by the Category of Victim*, 1992/1993 ANN. SURV. AM. L. 617, 619-20; Lawrence, *A Normative Theory of Bias-Motivated Crimes*, *supra* note 13, at 368-69.

³⁰⁷ See *id.*

³⁰⁸ See Lawrence, *A Normative Theory of Bias-Motivated Crimes*, *supra* note 13, at 377 (noting that perpetrators with economic motivation are not on same moral plane as those who commit true bias crimes).

significant impact on the group and the larger society.³⁰⁹ This fact validates that model and justifies imposing enhanced sanctions on all criminals who target people based on an immutable characteristic. Supporters of the racial animus model, such as Professor Lawrence, distinguish between opportunistic crimes and animus-driven offenses. These supporters claim that while both crimes may have the same impact,³¹⁰ the animus-driven criminal demonstrates greater culpability.³¹¹ Like people who intentionally kill, animus-driven criminals' enhanced culpability stems from the fact that they intend to cause the greater harm associated with bias crimes.³¹² By contrast, opportunistic criminals only intend to cause the harm associated with the parallel crime, and hence their sentence should be the same as those who commit parallel crimes. Then too, the harms inflicted by opportunistic criminals may result solely from the victim's perception of a crime.³¹³ If we do not distinguish between opportunistic and animus-driven criminals, then perpetrators could be found liable for hate crime any time a victim perceived that he had been singled out because of his group status.³¹⁴ In this respect, opportunistic criminals like affinity fraud perpetrators should not fall within the purview of hate crime statutes.

However, other scholars insist that opportunistic criminals are more culpable because they take advantage of the social vulnerability of particular groups. In their view, the societal norms that designate certain groups as suitable victims contribute to the perpetrator's inclination to target such victims because those norms make it more likely that perpetrators will consider the victims to be easier targets.³¹⁵ For example,

³⁰⁹ See Wang, *Opportunistic Bias Crimes*, *supra* note 123, at 1429-35.

³¹⁰ Professor Lawrence questions Professor Wang's conclusion that all bias crimes have the same impact, noting that a person's motive must have some affect on a crime's ultimate impact. However, for the sake of argument he concedes that the harms may be the same, yet disagrees with the conclusion that the punishment should be the same. See Frederick M. Lawrence, *Federal Bias Crime Law*, 80 B.U. L. REV. 1437, 1439 (2000) [hereinafter Lawrence, *Bias Crime Law*].

³¹¹ See *id.* at 1439.

³¹² See Lawrence, *A Normative Theory of Bias-Motivated Crimes*, *supra* note 13, at 377-78 (noting that animus-driven criminal appears to be aware that his conduct would cause focused harm on particular group).

³¹³ See *id.* at 369 (noting that this result-oriented focus is inappropriate because in most cases perpetrators have little control over perceptions of others and that victims may mistakenly perceive bias motivation even when none is present).

³¹⁴ See Lawrence, *Bias Crime Law*, *supra* note 310, at 1440 (suggesting that this interpretation could potentially sweep in all inter-racial crimes).

³¹⁵ See Wang, *Complexities of Hate*, *supra* note 25, at 895 (noting the "importance of social context in constructing and reinforcing the motivations for committing bias crimes"); *Opportunistic Bias Crimes*, *supra* note 123, at 1428-29 (stating that "some groups are more

a black person may rob another black person based on his belief that black people do not receive protection from the police and that prosecutors will not investigate or prosecute crimes committed within the black community.³¹⁶ In this way, perpetrators of opportunistic crimes minimize the cost of crime by taking advantage of the social environment in which some groups are more vulnerable than others.³¹⁷ Thus, in the context of our social culture, prejudice and stereotypes about a given group motivate opportunistic decisions to target a given group and hence makes such conduct more blameworthy.

Affinity fraud may reflect an ideal example of this phenomenon. As explained previously, securities regulators note that perpetrators target group members because of their belief that crimes committed against them will be easier to commit and that the perpetrators will be more likely to avoid detection.³¹⁸ While this belief stems in part from perpetrators' understanding that group members tend to trust one another, it also stems from socially constructed assumptions about the group. Thus, securities regulators point out that perpetrators of affinity fraud exploit the victim's assumptions regarding prejudice and discrimination aimed at their group. First, in claiming that they have the ability to understand economic interests, perpetrators prey on the notion that other groups are hostile to their interests. Second, affinity fraud takes advantage of law enforcement's presumed hostility towards certain groups. Thus, the fraud relies on the assumption that law enforcement will not aid particular groups within society. This reliance, in turn, influences the perpetrator's belief that he will be able to avoid detection. The fraud also relies on group members' reluctance to interact with law enforcement. Indeed, securities regulators note that perpetrators explicitly rely on group members' relative suspicions of law enforcement and this reliance enables them to avoid detection and effective prosecution. These assumptions stem from social biases, and reliance on these social biases makes the defendant's actions more culpable.

More importantly, perpetrators of affinity fraud may differ from other opportunistic perpetrators because they know the impact of their actions. Professor Lawrence concedes that a person who acts with reckless

vulnerable because the social context has marked them as suitable targets").

³¹⁶ In much the same vein, Wang notes that often people rob or blackmail gay men based on the presumption that they are socially vulnerable, believing that such people will be reluctant to take protective action such as calling the police or that they will not receive the full protection of the law. See Wang, *Complexities of Hate*, *supra* note 25, at 885.

³¹⁷ See Wang, *The Transforming Power of Hate*, *supra* note 20, at 132.

³¹⁸ See *supra* notes 173-75 and accompanying text.

disregard has greater culpability.³¹⁹ In Professor Lawrence's view, this explains why a Violent Show Off who is aware of the consequences of his conduct (because he is spurred by the animosity of others), and acts in spite of those consequences, may have greater culpability.³²⁰ Indeed, some may assert that mere reliance on social biases should not be sufficient to prove an actor's greater culpability. Unlike animus-driven criminals who intend the additional harm associated with hate crimes, opportunistic criminals may fail to appreciate the significance of their actions. Nevertheless, while it is plausible to assume that other perpetrators fail to appreciate the significance of the harms associated with their conduct, such an assumption applies with less force to affinity fraud perpetrators. Indeed, as a member of the targeted class, these perpetrators understand the manner in which the entire group and society perceives targeted crimes. Hence, they not only rely on such prejudicial biases when committing the crime, but they appreciate these biases and commit the crime nonetheless. This may reveal their greater culpability.

The court in *In re Vladimir* alludes to this enhanced awareness and culpability.³²¹ The court points out that because the defendant was Jewish, he knew the significance of the victim's head covering and prayer tassels.³²² Also, the court noted that the defendant and his family had left their home country because they did not feel safe as Jewish people.³²³ As someone victimized by bias persecution, it is reasonable to presume that the defendant understood and appreciated the impact of his attack on the victim and his group.³²⁴ The court's focus on these facts suggests its belief that the defendant's affiliation with the victim revealed the defendant's greater culpability. At the very least, the defendant's status — and, therefore, his awareness of the impact of his actions — reflects the defendant's recklessness with respect to the harms he will

³¹⁹ See Lawrence, PUNISHING HATE, *supra* note 13, at 72 (stating that negligent racial conduct "does not reach the level of recklessness with respect to the elements of a bias crime").

³²⁰ See Lawrence, *A Normative Theory of Bias-Motivated Crimes*, *supra* note 13, at 378 (explaining possible distinction between Violent Show Off and other perpetrators, and why the Violent Show Off at least appears to have some greater culpability).

³²¹ See *In re Vladimir P.*, 670 N.E.2d 839, 841 (Ill. App. 1996). (noting that defendant was Jewish and suggesting that his shared background may have made him aware of harm inflicted by his bias-inspired conduct).

³²² See *id.* (noting that defendant and his family had moved from Russia to the United States two years prior to the incident).

³²³ See *id.*

³²⁴ See *id.*

inflict. Thus, like the defendant in *In re Vladimir*, affinity fraud perpetrators may not intentionally desire to inflict greater harms, but they are certainly reckless and deserving of enhanced penalties on that basis.

As this discussion reveals, affinity fraud perpetrators exhibit greater culpability because they rely on socially damaging constructs and because they are aware of the harms associated with their behavior, yet commit crimes in spite of this awareness. While their reliance may be unconscious, their awareness is not. Hence, because affinity fraud perpetrators exhibit a reckless disregard with respect to the harms their behavior inflicts, they are more culpable and thus more deserving of increased penalties.

CONCLUSION

Affinity fraud represents an important problem that needs more systematic attention. Studies indicate that such fraud is growing rapidly and has a significant impact on its immediate victims and society in general.³²⁵ Indeed, those who commit affinity fraud swindle investors out of millions of dollars. They also destroy the fabric of many targeted communities, undermining the trust important for both social and economic reasons. Such fraud further abuses charitable impulses of community members, undermining a value important both to the targeted community and the nation as a whole. The increase in affinity fraud therefore represents a significant source of concern for securities regulators and society as a whole. One important method of curtailing affinity fraud may be applying enhanced sanctions to those who commit such fraud. Indeed, legislators responded to hate crimes with just such measures, believing that they were an important response to bias-motivated conduct.

But is affinity fraud a hate crime?

This Article reveals that to the extent we define a hate crime as one in which the perpetrator targets his victim based upon some particular characteristic, the answer is yes. Affinity fraud perpetrators deliberately seek out group members based on race, ethnicity, or religion. Thus, while these securities scams differ from the conventional understanding of a hate crime, they certainly fit within the literal definition of a hate crime. Also, there is legislative and judicial support for including investment fraud within the confines of hate crime legislation.

³²⁵ See *supra* notes 4-12 and accompanying text.

Moreover, the discriminatory selection model supports extension of hate crime legislation to crimes such as affinity fraud. While including affinity fraud within the definition of a hate crime may prove more difficult under the racial animus model, even that model might accommodate defendants who commit affinity fraud. Hence, both the plain text of much hate crime legislation and the current statutory construction suggests affinity fraud can constitute a hate crime.

Affinity fraud also can be defined as a hate crime if we define such crime as one that inflicts greater harm than a similar crime not involving biased targeting. First, victims of affinity fraud crimes can be expected to experience greater vulnerability because they are targeted based on an immutable characteristic. As compared to parallel crimes, affinity fraud victims also experience greater vulnerability because such fraud shatters the victim's notions regarding the relative trustworthiness of their group members. Second, unlike parallel crimes whose impact may be limited to individual victims, the impact of affinity fraud extends to the targeted community. Thus, members of the community experience feelings of vulnerability akin to the victim because they recognize that their shared characteristics with the victim put them at risk for identity-based crimes. Affinity fraud also may cause such members to avoid participating in investment opportunities. This avoidance is problematic in our capitalist society, which relies on society's participation in the financial markets for its growth and development. Such avoidance may have particularly dramatic consequences for oppressed groups whose economic advancement may depend on greater involvement in the securities and investment markets. Third, affinity fraud affects society in general by undermining notions of equality and fairness important to our diverse community. To the extent additional harms justify hate crime legislation, they also should justify classifying affinity fraud as a hate crime.

If hate crime perpetrators are viewed as acting with greater culpability, then affinity fraud should qualify as a hate crime on that basis as well. Perpetrators of such fraud exhibit more blameworthy conduct because, as members of the targeted group, they understand the harmful impact of bias-inspired crimes and commit their acts in the face of that understanding. This kind of reckless disregard for the consequences of their actions provides additional support for including affinity fraud perpetrators within the definition of a hate crime.

To the extent that enhancing the sentences of perpetrators plays an important role in curtailing criminal conduct, hate crime legislation provides a fortuitous fit for affinity fraud. Given the many ways in

which people can express their hate, including ways that some may construe as rational, it may be important that we abandon our common perceptions of such crimes to embrace one that more realistically captures the harms associated with bias-motivated conduct. In this regard, affinity fraud can and should be viewed as a hate crime.
