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Cover Page Footnote

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The author would like to extend his appreciation to John C. Canoni, Daniel S. McLane and Jonathan Rogin for their assistance with this Article.

BIAS CRIME: A CALL FOR ALTERNATIVE RESPONSES

Abraham Abramovsky*

I. Introduction

"I was attacked because I had a beard and wore a hat — just that. I'll never be over it. I feel very sad. I feel bad that people don't know God. They don't know his unity. They don't know his love. They choose to live in a shanty rather than a mansion."

Immediately afterward, he gathered up a cache of stones and stashed them beneath his car seat. "If somebody threw rocks at me again," he said, "they would get a surprise."¹

The speaker of these sad and bitter words was but one of many New Yorkers who have suffered the consequences of their neighbors' bigotry. The intensity of his attackers' anti-semitism was matched only by their willingness to commit violence. In 1991, this lethal combination erupted into a community-wide crisis in the mixed neighborhood of Crown Heights, New York, when a car in a rabbi's procession accidentally jumped a curb and struck two African-American children. One of the children died. Members of the African-American community in Crown Heights responded by rioting for several days, injuring many residents and police officers. A 29-year-old rabbinical student, Mr. Yankel Rosenbaum, was stabbed by an African-American male in the community soon after the accident, in what police termed a "revenge slaying."²

The above examples of the growing crisis of bias crime are particularly unambiguous ones, in which the cause and context of the crime is plainly the racial or religious difference between attacker and victim. The argument for enacting laws to punish and deter bias crime does not always benefit from such clear and unambiguous examples as the brutal murder of Yankel Rosenbaum. A frustrating factor in some of the widely publicized reports of bias-related assault is the element of ambiguity: where a member of one race or religion injures a

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1. N. R. Kleinfeld, *Bias Crimes Hold Steady, But Leave Many Scars*, N.Y. TIMES, Jan. 27, 1992, at A1.

2. David Treadwell and John J. Goldman, *61 Hurt In Anti-Jewish Violence Linked To Traffic Death of Black Brooklyn Child*, L.A. TIMES, Aug. 22, 1991, at A4.

member of another race or religion, even perhaps articulating the difference between attacker and victim by means of an expletive or other statement, the question inevitably arises whether the attack was the product of bias alone, or did other factors, such as an intent to rob or rape, predominate? Does it matter which factor was the primary cause? What is the significance of a spoken slur in the commission of a crime against the person or against property?

The decision whether or not a crime qualifies as a "bias" crime is not easily reached. New Yorkers were stunned in January of 1992³ by news of an incident in which two African-American males abducted and then raped a 15-year-old white girl.⁴ The girl's father related that the attacker forcibly removed her clothing, taped her eyes shut, and then explained that she was being raped because she was "white and perfect."⁵ While this act of rape was indisputably horrendous, the words spoken raise immediate issues of classification and of policy: were the words merely a symptom of the depravity attending the decision to commit rape, or was the rape triggered by racial hatred? How does government go about addressing this and how should it?

Notwithstanding the problems attending classification, this Article advocates a renewed legislative effort in the fight against bias crime. The difficulty that attaches to defining a crime of bias, and to identifying the categories to be included in the statute, is far outweighed by the urgency of the escalating problem. The categories of bias crime are rapidly growing along with the reported number of instances. Some of the more brutal attacks were predicated on the perceived sexual orientation of the victim. On July 2, 1990, three men lured Julio Rivera, a 29-year-old homosexual, into a schoolyard in Queens, New York. After one of the men repeatedly struck Rivera in the head with a hammer, a second delivered a fatal wound, knifing Rivera in the back.⁶ At trial, the man who stabbed Rivera testified, "I killed him because he was gay."⁷ The killers were sentenced in the same month that witnessed the rape of the teenage girl and a dramatic prolifera-

3. The well of racial tension and hate ran particularly deep in the month of January, 1992. On the holiday observing the birthday of Martin Luther King, Jr., crowds attacked a bus in Denver that was carrying members of the Ku Klux Klan. The Klan had rallied at the Colorado State Capitol. See *Klan Supporters Attacked*, N.Y. TIMES, Jan. 21, 1992, at A14.

4. Dennis Hevesi, *Girl is Raped in Bias Case, Police Report*, N.Y. TIMES, Jan. 15, 1992, at B1.

5. *Id.*

6. Joseph P. Fried, *A Murder Verdict Becomes a Rallying Cry*, N.Y. TIMES, Nov. 24, 1991, § 4, at 6.

7. *Id.*

tion of other crimes that had been committed in the name of hatred.⁸

Perhaps the most eloquent expression of the case for more effective anti-bias measures was made by Charles Hynes, Brooklyn District Attorney and formerly the special prosecutor in the Yusef Hawkins⁹ case:

Like the incident at Howard Beach, what occurred in Central Park in April 1989 and what happened in Bensonhurst in August 1989 reflect a reality of urban life that will threaten the existence of every American unless we make greater efforts to understand why these incidents happen. In neither Central Park nor Bensonhurst were drugs or poverty the obvious cause. Instead, it was violence for the sake of violence, fueled by racial dynamics.¹⁰

Bias crime is not a phenomenon peculiar to New York City. Hate-based violence occurs nationwide.¹¹ The prevalence of bias crime, among other things, spurred the bipartisan passage of a federal law¹² requiring the Justice Department to gather data on crimes motivated by prejudice. This Article uses New York City as a microcosm of the larger problem, due to the special character of the City as a "melting pot."

No magic formulas will cure the bias problem overnight. While

8. In a three week period during January 1992, 61 cases of bias-related crimes were reported to police officials. Many of the reports involved months-old incidents. The victims were prompted to come forward after an especially heinous incident in which two black youths were smeared with white paint by four white teenagers. Lynda Richardson, *61 Acts of Bias: One Fuse Lights Many Different Explosions*, N.Y. TIMES, Jan. 28, 1992, at B1.

9. The slaying of Yusef Hawkins in Bensonhurst, a predominately Italian-American section of Brooklyn, is another example of a racially-charged incident which inflamed city residents much the way the riots in Los Angeles following the Rodney King trial verdict did. On August 23, 1989, a gang of approximately 30 to 40 white youths confronted four black males. Several white assailants wielding baseball bats surrounded the victim. Hawkins was shot twice in the heart and died. The event ignited a latent powder keg of racial tensions. This increased tension included additional protest marches led by the Reverend Al Sharpton and Sonny Carson (a self-proclaimed "anti-white" community activist) and counter-demonstrations by Bensonhurst residents supporting the accused. See, e.g., Josh Getlin, *Al Sharpton, Media Star: Is New York's Racial Rabble Rouser a Loose Cannon, or a Lightning Rod?*, L.A. TIMES, Sept. 27, 1989, at 1. See also Celestine Bohlen, *Sharpton Will March, Despite Claims it Might Hurt Dinkins*, N.Y. TIMES, Sept. 7, 1989, at B8; Robert D. McFadden, *'Day of Outrage' March Ends in Violence*, N.Y. TIMES, Sept. 1, 1989, at B1; James N. Baker et al., *A Racist Ambush in New York*, NEWSWEEK, Sept. 4, 1989, at 25.

10. CHARLES HYNES AND BOB DRURY, INCIDENT AT HOWARD BEACH: THE CASE FOR MURDER 304-05 (1990).

11. Peter Finn, *Bias Crime: A Special Target for Prosecutors*, 21 THE PROSECUTOR 9, Spring 1988. One need only look to Los Angeles and the Rodney King incident, which provoked race riots around the country.

12. Hate Crime Statistics Act, Pub. L. No. 101-275, 104 Stat. 140 (1990).

society properly has criminalized certain acts of bias, penal sanctions have failed to address the causes of bias crime. Long range solutions such as community awareness and educational programs are essential if the problem is to be abated. Part II of this Article discusses the statistics warranting concern over bias crime and the approach of law enforcement at the local level. Part III examines the insufficiency of current legislation in New York State. Part IV looks at legislative proposals designed to further combat the problems of bias crime. Part V looks at proposed remedies for bias crime other than penal sanctions and the Article concludes that alternative and creative solutions are necessary to more appropriately address bias crime.

II. The Magnitude and Severity of Bias-Related Violence in New York State

A. Scope and Nature of Bias-Related Crimes

Bias crimes consist of words or actions intended to intimidate or injure a person because of his or her race, religion, ethnicity or sexual orientation.¹³ The crimes range in severity from verbal harassment to murder.¹⁴ Bias crimes pose enormous consequences both for the individual and society as a whole. A bias attack is an assault upon the victim's identity, and has a more devastating effect upon the victim than a comparable crime which lacks prejudicial motivation.¹⁵ Bias crimes are also microcosmic expressions of deeply rooted schisms and social intolerance. Our country is founded on principles of equality, freedom of association and individual liberty; as such, bias crime tears at the very fabric of our society.¹⁶

The New York State law enforcement community has, in recent years, focused a good deal of attention on this problem.¹⁷ In 1988, the New York State Division of Criminal Justice Services, in conjunction with local law enforcement agencies, developed a uniform system for reporting incidents of bias crime.¹⁸ The objective of this ongoing project is to collect information that will assist law enforcement agencies and policy makers in understanding the scope and nature of bias-related crime.¹⁹

13. *Id.* Under the Hate Crime Statistics Act, incidents involving crimes motivated by the victims' race, religion, sexual orientation and ethnicity are recorded. *Id.*

14. *See* Finn, *supra* note 11, at 9.

15. *Id.* at 10.

16. *Id.*

17. *Id.*

18. James C. McKinley, Jr., *Tracking Crimes of Prejudice: A Hunt for the Elusive Truth*, N.Y. TIMES, June 29, 1990, at A1.

19. *Id.*

As of June 1992, approximately sixty-eight percent of all law enforcement agencies in New York State were actively participating in the bias crime reporting system.²⁰ Statistic gathering on bias crimes is currently initiated by the executive branch and the police departments. Although there is no statutory mechanism yet for reporting bias crime in New York State,²¹ some of New York's largest police departments participate in the reporting system.²²

According to the statistics compiled by the New York State Division of Criminal Services for 1989, Jews and African-Americans are the most frequent victims of bias violence.²³ These two groups combined for 60.9% of all such victims.²⁴ The complete statistical breakdown for all classified groups is as follows:²⁵

Anti-semitic	31.9%	Anti-hispanic	4.6%
Anti-black	29.0%	Anti-non-Jewish religion	3.5%
Anti-white	15.8%	Anti-other race (including Asian)	2.9%
Anti-homosexual	7.9%		

New York City, known by some as the "gorgeous mosaic,"²⁶ is a microcosm of the world's various ethnicities, races, religions, and lifestyle preferences. Due to the friction caused by such diversity, New York City is the perfect laboratory for the study of bias-related violence. In 1989, 57.7% of all bias crimes recorded in New York State were committed in New York City.²⁷ In absolute numbers, this represented 541 bias crime incidents.²⁸ These crimes were subdivided as follows:²⁹

20. NEW YORK STATE DIVISION OF CRIMINAL JUSTICE SERVICES, BIAS CRIME INCIDENTS REPORT - JANUARY THROUGH DECEMBER 1989, [hereinafter BIAS CRIME REPORT]. These statistics may be obtained by contacting Ms. Jacqueline A. Lake-Sample, New York State Division of Criminal Justice Services, Executive Park Tower, Stuyvesant Plaza, Albany, New York, 12203. The 68% figure from June 1992 represents 396 of 580 agencies. Interview with Jacqueline A. Lake-Sample (Aug. 10, 1992).

21. See *infra* notes 182-86 and accompanying text.

22. Among those departments participating in the reporting system: Albany, Buffalo, Chataqua, Chemung, Colonie, Erie, Monroe, Nassau, Niskayuna, New York City Police, New York State Police, Onodaga, Oswego, Port Authority, Rochester, Saratoga, State University of New York Police, Suffolk, Syracuse, Westchester and White Plains. BIAS CRIME REPORT, *supra* note 20.

23. *Id.*

24. *Id.*

25. *Id.*

26. The "gorgeous mosaic" is a phrase coined by New York City Mayor David Dinkins to describe the city's multi-cultural diversity. See, e.g., Treadwell and Goldman, *supra* note 2; Anemona Hartocollis, *Poll: Racial Tensions, Drugs Bother New Yorkers the Most*, NEWSDAY, June 18, 1990, at 5.

27. See BIAS CRIME REPORT, *supra* note 20.

28. *Id.*

29. *Id.*

Anti-semitic	156	Anti-Asian	22
Anti-black	143	Anti-non-Jewish-religion	9
Anti-white	118	Ethnic/national origin	6
Anti-homosexual	47	Other	5
Anti-hispanic	31	Unknown	4

The most accurate and complete figures available about specific victimized groups come from the only two national organizations with formal reporting systems, the Anti-Defamation League of B'nai B'rith ("ADL") and the National Gay and Lesbian Task Force ("NGLTF").³⁰ However, these two private foundations focus only on bias crimes motivated by anti-semitism and homophobia. Ideally, the new Hate Crime Statistics Act³¹ would offer comprehensive national coverage of all groups victimized by bias crime. The information available from the ADL and the NGLTF does, however, serve as a barometer for the broader problem.

The number of anti-semitic incidents in 1989 was greater than the 1988 totals both in New York State and throughout the country and was indicative of an incremental rise in such incidents over recent years.³² On the national level, the rise in the frequency of anti-semitic incidents included increases in the most serious forms of anti-semitic vandalism: bombings, arson and cemetery desecrations.³³ Moreover, there were increases for the third straight year in the number of anti-Jewish incidents reported on college campuses.³⁴

In 1989, the NGLTF reported 268 incidents against gays in New York State, including 103 physical assaults.³⁵ Especially troubling is the recent finding by those attempting to combat anti-gay bias that

30. See 1988 Anti-Defamation League Of B'nai B'rith Audit of Anti-Semitic Incidents (includes figures for 1987) [hereinafter 1988 ADL Audit]; 1989 Anti-Defamation League of B'nai B'rith Audit of Anti-Semitic Incidents [hereinafter 1989 ADL Audit]; National Gay and Lesbian Task Force: Anti-Gay Violence, Victimization and Defamation in 1988, at 5 [hereinafter NGLTF Report].

31. See *supra* notes 12-13.

32. 1989 ADL Audit, 1988 ADL Audit, *supra* note 30.

33. 1989 ADL Audit, *supra* note 30, at 17. Anti-semitic incidents substantially exceed those of 1988 even though several elements noted in the 1988 ADL Audit as being related to a large number of incidents were absent from the 1989 ADL Audit picture, for example, the Palestinian intifada and the 50th anniversary of Kristallnacht. *Id.* at 1.

34. *Id.* The ADL's audit of anti-semitic vandalism and other incidents in New York State for 1987, 1988 and 1989 reported the following:

	VANDALISM	HARASSMENT, THREATS & ASSAULTS
1987	207 incidents	105 incidents
1988	208 incidents	115 incidents
1989	213 incidents	115 incidents

1989 ADL Audit, *supra* note 30, at 17; 1988 ADL Audit, *supra* note 30, at 8.

35. NGLTF Report, *supra* note 30, at 11.

this hostility is condoned by large numbers of Americans to a greater degree than bias against other groups.³⁶ A 1988 study by the State of New York for the Governor's Task Force on Bias Related Violence concluded that of all groups, the most severe hostilities by youths are directed at lesbians and gays.³⁷

Over the past several years, anti-gay violence has increased dramatically.³⁸ A number of hypotheses have been given by experts to explain this frightful trend. Some attribute the rise in anti-gay violence to the more accurate recording of such violence.³⁹ Others, while acknowledging that more accurate reporting accounts for a portion of the rise in reported incidents, also argue that anxiety over AIDS has also contributed to greater hostility against homosexuals.⁴⁰

Additional considerations manifest themselves in anti-gay forms of expression. These include the affirmation of the attacker's own values and heterosexual identification through the medium of anti-gay violence.⁴¹ Combatting anti-gay bias crime is particularly difficult because unlike violence directed toward ethnicity, race or religion, anti-gay violence does not evoke as much public sympathy.⁴² In our culture, homosexuals have traditionally been treated as social pariahs and objects of fear and ridicule. The silence of many politicians toward homosexual-related violence reflects this antipathy toward gays, as does a criminal justice system that fails to properly penalize gay bias assaults.⁴³

B. The Law Enforcement Approach

As outlined above, municipal governments and police departments have already taken steps to catalog and report incidents of bias crime. In addition, through community relations efforts, police departments

36. Daniel Goleman, *Homophobia: Scientists Find Clues to its Roots*, N.Y. TIMES, July 10, 1990, at C1.

37. GOVERNOR'S TASK FORCE ON BIAS RELATED VIOLENCE, FINAL REPORT, at 97 (1988).

38. See, e.g., NGLTF Report, *supra* note 30, at 10.

39. Paula Span, *Patrol of the Pink Panthers*, WASHINGTON POST, Sept. 19, 1990, at C1. Although victims are increasingly reporting anti-gay assaults, many still do not report these incidents. A substantial number of victims do not trust the police, may not be aware of anti-gay violence groups, or may wish to keep their homosexuality a secret. *Id.* See also NGLTF Report, *supra* note 30, at 8.

40. The NGLTF Report found that in 1989, 17% of all reported anti-gay attacks were AIDS-related. NGLTF Report, *supra* note 30, at 5.

41. Goleman, *supra* note 36.

42. See Thomas J. Maier, *Because He was Gay? James Zappalorti Wasn't Murdered at Random, Police Say: There was a More Sinister Reason*, NEWSDAY, Nov. 4, 1990, (Magazine), at 8.

43. *Id.*

have encouraged victims to come forward to report incidents, and have examined ways to combat such crime. In New York, for example, some positive law enforcement efforts have been made that address anti-gay violence. In December 1990, Mayor David Dinkins announced that a twenty-member police council would examine ways to combat anti-gay violence.⁴⁴ In Nassau and Suffolk Counties, local and county police receive extensive training in subjects including gay, racial, and ethnic bias.⁴⁵ These good faith police efforts represent a sharp contrast to prior practices involving the gay community.⁴⁶

More broadly, the New York City Police Department's ("NYPD") Bias Unit investigates and categorizes all incidents of bias crime.⁴⁷ This task force was formed in 1980, after a study indicated an increase in racial attacks.⁴⁸ The unit has grown from one captain and seven investigators in 1980 to its present size of twenty-one bias investigators.⁴⁹ Only five other cities have bias units: Baltimore, Boston, Chicago, Miami and San Francisco.⁵⁰

The NYPD Bias Unit investigated and catalogued 1,300 crimes before December 1986.⁵¹ After the Howard Beach incident, there was a dramatic increase in the reporting of bias attacks.⁵² Since 1987, the unit has investigated 1,554 cases and made arrests or found suspects in a third of the cases.⁵³

In the first four months of 1990 there was a twelve percent increase in the number of bias-related crimes over the same period in 1989 —

44. Rose Marie Arce and Kevin Flynn, *Cop Panel to Battle Gay-Bias*, NEWSDAY, Dec. 5, 1990, at 3.

45. Barbara Delatiner, *From Dune Patrols to Gay Rights Class*, N.Y. TIMES, Oct. 7, 1990, § 12LI, at 12.

46. *Id.*

47. McKinley, *supra* note 18.

48. *Id.*

49. This unit is headed by Inspector Paul Sanderson, a 28-year veteran of the New York City Police Department. *Id.*

50. Lucia Mouat, *Mending New York's "Mosaic"*, CHRISTIAN SCI. MONITOR, Dec. 19, 1990, at 8. See also McKinley, *supra* note 18.

51. McKinley, *supra* note 18.

52. *Id.*

53. These cases are subdivided as follows:

Assaults	33%
Aggravated Harassment	28%
Criminal Mischief	21%
Milder Harassment	7%
Robberies	4%
Burglaries	2%
Miscellaneous cases	5%

Id.

from 158 in 1989 to 177 in 1990.⁵⁴ The NYPD's 1990 four-month figures revealed that bias crimes slightly decreased against African-Americans and Jews, while crimes against Whites and Hispanics remained relatively the same.⁵⁵ The most alarming statistic is that in 1990 the number of bias-related attacks on Asians and homosexuals almost doubled from the number reported in 1989.⁵⁶

The most dramatic increase in bias crimes has been those against homosexuals. In contrast to a total of forty-seven reported bias-related crimes in all of 1989, in the first six months of 1990, fifty-five bias-related crimes against homosexuals were recorded.⁵⁷ Included in that statistic is the fatal stabbing of a Staten Island resident in January by attackers who believed him to be gay.⁵⁸ This was the first anti-homosexual homicide to be recorded as such in New York State.⁵⁹

Two of the most noteworthy bias crime units are located on Long Island. Formed in 1979, the Nassau County bias unit was the first established in the United States.⁶⁰ In Nassau County, the investigation of bias-related incidents is handled by a Deputy Police Chief⁶¹ who files a monthly report on bias offenses with the District Attorney's Office, the Federal Bureau of Investigation, and selected community organizations.⁶² The report submitted to the Nassau County District Attorney's Office is then referred to the Bureau of Special Investigations.⁶³ Plea bargaining is not allowed in the prosecution of bias crime in Nassau County.⁶⁴

Nassau County's bias unit does not limit itself to reporting.⁶⁵ Par-

54. Mitch Gelman, *Bias Crimes Up Slightly this Year*, NEWSDAY, May 15, 1990, at 27.

55. *Id.*

56. There were 11 bias crimes reported against Asians during the first four months of 1990, compared with 22 total reports in all of 1989. *Id.*

57. Constance L. Hays, *Gang Attacks 3 and Yells Slurs on West Street*, N.Y. TIMES, July 27, 1990, at B3.

58. Maier, *supra* note 42.

59. *Id.*

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

61. Officer Ken Carey. *Id.*

62. *Id.*

63. *Id.*

64. "There is no plea bargaining in a bias-related crime, unless it comes to the special investigations bureau. If the individual does not take a plea to the particular count, the case will go to trial." Interview with Colin O'Donnell, Assistant District Attorney, Nassau County (1990).

65. According to statistics compiled by the New York State Division of Criminal Justice from January through December 1989, the overwhelming majority of bias crimes reported in Nassau County were directed against Jews and African-Americans. Nassau County reported 106 incidents of bias crime in 1989, which represented 13.3% of all bias

ticularly noteworthy is the County's practice of providing extra patrols for Jewish houses of worship and institutions during the Jewish high holidays.⁶⁶ The Suffolk County Police Department created its Racial and Religious Incidents section in 1984.⁶⁷ The unit is staffed by five detectives under the direction of a detective sergeant.⁶⁸ In 1989, the unit's responsibilities were expanded to include incidents motivated by the victim's perceived sexual orientation.⁶⁹ Suffolk County's reporting statistics also demonstrate widespread incidents of bias attacks.⁷⁰

Critical to the Suffolk County anti-bias unit's mission is its twelve-member community relations unit.⁷¹ The community relations unit is involved with educating the local population by speaking in schools and meeting with various ethnic and religious organizations when requested.⁷² Public education is crucial in the struggle against bias-induced violence. Unfortunately, this component is often neglected.⁷³

Although the statistical increases in bias crimes may reflect more efficient reporting rather than an actual increase in crime, the National Institute Against Prejudice and Violence ("NIAPV") reported a steady increase in hate crimes in the last two years from the majority of agencies who collect such data.⁷⁴ The NIAPV is a Baltimore-based center dedicated exclusively to the study of and response to eth-

crimes in New York State. But while the NYPD reported 148 anti-black incidents and 156 anti-semitic incidents, in Nassau County, anti-semitic incidents outnumbered anti-black incidents by a 3 to 1 ratio. The number of incidents for 1989, by group, recorded in Nassau County is as follows:

Anti-semitic	52	Anti-homosexual	3
Anti-black	17	Anti-other race	2
Anti-other religion	11	Anti-ethnic origin	2
Anti-white	5	Multiple bases	1
Anti-hispanic	5	Unknown	8

BIAS CRIME REPORT, *supra* note 20.

66. Abramovsky, *supra* note 60.

67. *Id.*

68. Detective Sergeant Joseph Zito. *Id.*

69. *Id.*

70. In 1989, 139 bias incidents were reported in Suffolk County, accounting for 14.8% of all incidents reported in New York State. BIAS CRIME REPORT, *supra* note 20. Remarkably, this figure is dramatically less than the usual number of incidents recorded in Suffolk County. Since the unit's inception in 1984 until 1988, most yearly totals have remained between 183 and 189 incidents, with the exception of 1987, when 240 incidents were recorded. Abramovsky, *supra* note 60.

71. *Id.*

72. *Id.*

73. *Id.*

74. See Joan Weiss, *Prejudice, Conflict, and Ethnoviolence: A National Dilemma*, USA TODAY, May 1989, (Magazine), at 28. Joan Weiss is the Executive Director of the Institute. *Id.* at 27.

nic violence.⁷⁵

Crime statistics, however, do not represent an accurate portrayal of the extent of the bias crime problem. According to a recent study conducted by the NIAPV, a majority of bias crime victims do *not* report incidents.⁷⁶ A substantial number of victims distrust the police or believe that the incident is too minor to report.⁷⁷ Therefore, even the most accurate police records would grossly underestimate the number of bias-related incidents.

Empirical data, though indicative of disturbing societal trends, inadequately portrays the severity of the problem. Bias crime has a devastating impact upon the victim. In a typical urban bias attack, the victim is outnumbered four to one.⁷⁸ Bias-related assaults result in the hospitalization of victims four times more often than other assaults.⁷⁹ Victims of bias crimes perpetrated by multiple attackers display greater trauma than other victims.⁸⁰

Even incidents that do not result in physical harm to the victim have emotional impact.⁸¹ Bias crimes, because they are acts of hatred directed to the "different" nature of the victim, have serious emotional and psychological ramifications. According to the NIAPV, almost forty percent of those victimized did not discuss the incident

75. *Id.*

76. See *Group Violence in the U.S.A.: The Institute's National Victimization Survey*, 5 NAT'L INSTITUTE AGAINST PREJUDICE AND VIOLENCE FORUM, Jan.- Feb. 1990, 1, 5-6 [hereinafter *Group Victimization Survey*].

In this study, the institute selected a nationwide sample of listed and unlisted telephone numbers. Two-thirds of the numbers were drawn from directories and the remaining third from randomly generated numbers. The study particularly sampled more heavily from African-American communities. From April through June 1989, 929 self-identified white adults and 1,013 self-identified black adults were interviewed. One hundred and sixty-seven respondents identified themselves with other racial or ethnic groups. The interviews were conducted from the institute by a "multicultural" team at Applied Management Sciences of Silver Springs, Maryland. *Id.* at 1.

Of those responding, 63% were female and 37% were male; the median household size was two people; the median age was 41-42 years; the median education level was 12 years; the median family income was approximately \$15,000. Protestants comprised 66% of the sample; Catholics, 18%; Jews, 2%; all other religious preferences, 6%, and no preference, 8%. Almost 70% were city dwellers. Approximately 20% lived in the suburbs. *Id.* at 1, 5.

The study acknowledged that the majority of those who suffered bias incidents did not report them. The Institute acknowledged that further study was needed into the background characteristics of respondents and that the specific incidents which they did not report must be investigated. *Id.* at 5.

77. See Finn, *supra* note 11, at 9; *Group Victimization Survey*, *supra* note 76, at 5.

78. Daniel Goleman, *As Bias Crime Seems to Rise, Scientists Study Roots of Racism*, N.Y. TIMES, May 29, 1990, at C1.

79. *Id.*

80. *Group Victimization Survey*, *supra* note 76, at 1, 6.

81. *Id.* at 6.

with friends, neighbors or relatives, or received no support when they did discuss their attacks.⁸² Of those victimized, sixty-three percent suffered some degree of trauma as a result of the incident.⁸³ Additionally, although a majority of the victims surveyed indicated some form of depression because of the attack, only five percent sought professional help.⁸⁴

It is important to identify the motivations of the perpetrators. Notwithstanding legislation designed to punish the perpetrator of a bias crime, the proper focus of anti-bias measures should be the individual's reasons for engaging in such behavior. The discernment of an archetypical bias criminal may therefore be helpful in combatting this onerous form of hatred.

C. The Bias Criminal

The vast majority of bias criminals are not members of organized hate groups.⁸⁵ Hate groups are distinguishable from typical bias criminals because hate groups are often highly sophisticated terrorist units.⁸⁶ This is not to say that hate groups rarely engage in acts of bias crime. White supremacists have perpetrated extremely violent crimes including the robberies of armored cars in California and Seattle in 1983, the assassination of radio personality Alan Berg, and assassination attempts against law enforcement officials, federal judges, and civil rights leaders.⁸⁷ In 1989 racist groups were linked to the murders of The Honorable Robert S. Vance of the Eleventh Circuit and civil rights activist and attorney Robert Robinson.⁸⁸

By contrast, the average bias criminal is far less sophisticated than organized terrorist groups. Most of those who perpetrate bias crimes are in their late teens or early twenties.⁸⁹ Since 1981, approximately seventy percent of those arrested in New York City for bias-related incidents have been under the age of nineteen, with forty percent younger than sixteen.⁹⁰ Since 1981, only ten percent of the perpetra-

82. *Id.*

83. *Id.*

84. *Id.*

85. Finn, *supra* note 11, at 9.

86. Bruce Hoffman, *White Supremacists Are Our Terrorists*, NEWSDAY, Dec. 27, 1989, at 53. Mr. Hoffman is a researcher at the Rand Foundation, a prominent think tank.

87. *Id.*

88. *Id.* See also Peter Applebome, *New Evidence on Bombings in South*, N.Y. TIMES, Dec. 29, 1989, at 11. Combatting organized hatred, a struggle involving complex legal and law enforcement issues, is well beyond the scope of this Article.

89. See, e.g., Goleman, *supra* note 78.

90. McKinley, *supra* note 18.

tors arrested were over twenty-seven years of age.⁹¹ The archetypical bias criminal does not have funding, an organization, or a recruitment campaign. This distinction does not serve as an *apologia* for bias criminals. Bias crimes are not mere expressions of youthful rebellion. Those who commit these acts are often acting out, through vandalism and violent assault, bigotry shared by their family, friends and community.⁹²

A recent nation-wide survey, reported in the *Boston Globe*, revealed that prejudice among high school age youths has risen to significant levels.⁹³ This survey found that fifty-seven percent of the teenagers surveyed stated that they had witnessed a bias-motivated attack.⁹⁴ Of those surveyed, forty-seven percent said that if they saw a racial attack in progress, they would either join in or feel that the group being attacked deserved the infliction of pain they were getting.⁹⁵

The overwhelming majority of bias crimes are committed in groups of four or more.⁹⁶ As a result, as is well documented, group violence is often most heinous.⁹⁷ The collective ignorance of the group generates the passion to engage in violent behavior, while the anonymity of the crowd diffuses moral responsibility.⁹⁸ Anonymity also promotes "bravery" and serves to augment the severity of the attack.⁹⁹

Closely related to the group phenomenon is the idea of "protecting one's turf."¹⁰⁰ The most frequent bias attacks are upon someone in a neighborhood where he is seen as out of place. A clear example of this situation is the Bensonhurst incident, where a group of white individuals attacked Yusef Hawkins, who was black, ostensibly because he was in a predominantly white neighborhood.¹⁰¹ Similarly, acts of vandalism aimed primarily at black families moving into "white" neighborhoods is another common form of bias crime.¹⁰² The Klanwatch Project, a unit of the Southern Poverty Law Center which

91. *Id.* at B4.

92. *Id.*

93. Diego Ribadeneira, *Study Says Teen-agers' Racism Rampant*, BOSTON GLOBE, Oct. 18, 1990, at 35. The survey was based on interviews with 1,865 high school age students, and had a margin of error of plus or minus three percentage points. *Id.*

94. *Id.*

95. *Id.*

96. Goleman, *supra* note 78.

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*

101. See, e.g., Howard W. French, *Hatred and Social Isolation May Spur Acts of Racial Violence*, *Experts Say*, N.Y. TIMES, Sept. 4, 1989, at 31. See also Goleman, *supra* note 78; *Group Victimization Survey*, *supra* note 76.

102. French, *supra* note 101.

monitors activity by the Ku Klux Klan and similar groups, stated that violence generated by the arrival of minorities into white neighborhoods is probably the most common and devastating form of bias crime.¹⁰³ This scenario alone accounted for about half of the nation's racial hate crimes last year.¹⁰⁴ A variation on the "turf" phenomenon occurs in anti-homosexual bias. Those who attack homosexuals often travel to a "gay" neighborhood to commit the assault.¹⁰⁵ The most frequent attack is against a lone male or two men walking together.¹⁰⁶

Above all, bias crime reflects deeply-ingrained hatred. These emotions represent not only hatred for the different individual but also the affirmation of the inherent superiority of one's own group. Such responses have both psychological and sociological dimensions. Indeed, to most effectively combat the problem of bias crime, it is apparent that mere punishment after an offense has been committed is insufficient. Policies designed to strike at the roots of the problem, the instilled notions of hatred and misconceptions of "difference," are by far the preferred course of action. New York has statutes designed to punish bias crime perpetrators. In the next section, these provisions will be examined to determine the effectiveness of existing measures in combatting bias crime.

III. Present New York Anti-Bias Legislation

A number of New York statutes, penal and non-penal, address bias crime.¹⁰⁷ New York presently handles bias crime by enhancing common law offenses and increasing the penalty when the incident is determined to be bias-related. In New York, aggravated harassment in the first¹⁰⁸ and second degrees¹⁰⁹ and disruption of a religious ser-

103. Ronald Smothers, *Hate Crimes Found Aimed at Blacks in White Areas*, N.Y. TIMES, Apr. 28, 1990, at 26.

104. *Id.*

105. See Goleman, *supra* note 78.

106. *Id.*

107. See *infra* notes 108-12 and accompanying text.

108. Aggravated harassment in the first degree reads as follows:

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

1. Damages premises primarily used for religious purposes, or acquired pursuant to section six of the religious corporation law and maintained for purposes of religious instruction, and the damage to the premises exceeds fifty dollars; or

2. Commits the crime of aggravated harassment in the second degree in the manner proscribed by the provisions of subdivision three of section 240.30 of this article and has been previously convicted of the crime of aggravated harassment in the second degree for the commission of conduct pro-

vice¹¹⁰ are the penal statutes currently utilized to combat bias crimes. Statutory provisions outside of the Penal Code dealing with bias crime include sections of the Civil Rights Law¹¹¹ and Religious Corporations Law.¹¹²

The most commonly applied penal code sanction against bias crime is second degree aggravated harassment,¹¹³ applicable where a person "strikes, shoves, kicks or otherwise subjects another person to physical contact . . . because of the race, color, religion or national origin of such person."¹¹⁴ This statute enhances the penal code's harassment offense in cases wherein the attacker's intent is based upon prejudice.¹¹⁵ The provision, therefore, does not criminalize acts which were previously legal.¹¹⁶ While harassment is only a violation, aggra-

scribed by the provisions of subdivision three of section 240.30 or he has been previously convicted of the crime of aggravated harassment in the first degree within the preceding ten years.

N.Y. PENAL LAW § 240.31 (McKinney 1989).

109. Aggravated harassment in the second degree provides:

A person is guilty of aggravated harassment in the second degree when, with intent to harass, annoy, threaten or alarm another person, he . . . [s]trikes, shoves, kicks or otherwise subjects another person to physical contact, or attempts or threatens to do the same because of the race, color, religion or national origin of such person.

N.Y. PENAL LAW § 240.30(3) (McKinney 1989).

110. Disruption, or disturbance, of a religious service reads as follows: "A person is guilty of aggravated disorderly conduct, who makes unreasonable noise or disturbance while at a lawfully assembled religious service or within one hundred feet thereof, with intent to cause annoyance or alarm or recklessly creating a risk thereof." N.Y. PENAL LAW § 240.21 (McKinney 1989).

111. N.Y. CIV. RIGHTS LAW §§ 40-c, 40-d (McKinney 1992). Section 40-c is a general protection against discriminatory practices by private or public actors. This section is enforced by the provisions of § 40-d. Section 40-d states that any person who violates § 40-c will be deemed guilty of a class A misdemeanor and will face \$100-\$500 in fines. This penalty may be recovered by the victim in any court of competent jurisdiction in the county in which the defendant resides. *Id.*

112. N.Y. RELIG. CORP. LAW § 28 (McKinney 1990) provides for the liability of parents or guardians of children between 10 and 18 for the child's damage to houses of religious worship. This liability is capped at \$5,000 and is flexibly imposed according to the parent's financial condition. Further, the court has discretion to order the child to perform community service in lieu of or in combination with the parent's liability. *Id.*

113. See Abraham Abramovsky, *Aggravated Harassment in Bias-Related Incidents*, N.Y. L.J., Aug. 10, 1988, at 3.

114. N.Y. PENAL LAW § 240.30, *supra* note 109.

115. The ordinary harassment offense occurs when an attacker, "with intent to harass, annoy or alarm another person . . . strikes shoves, kicks or otherwise subjects him to physical contact, or attempts or threatens to do the same . . ." N.Y. PENAL LAW § 240.25(1) (McKinney 1989). However, under the aggravated harassment statute, a prosecutor must prove 1) that a harassment occurred and 2) that it was motivated by prejudice. This is known as the double intent problem. Abramovsky, *supra* note 113.

116. See *infra* notes 137 and 156 for a discussion of the First Amendment implications of the statute.

vated harassment is a class A misdemeanor.¹¹⁷

First degree aggravated harassment contains two subsections. Under the second, if an individual is found guilty of second degree aggravated harassment and has a prior conviction under the same statute, the penalty is increased to a class E felony.¹¹⁸ The first subsection deals exclusively with damage to property used for religious purposes.¹¹⁹ First degree aggravated harassment involves the destruction of religious property where the damage exceeds fifty dollars.¹²⁰

The current aggravated harassment statutes became law in 1982. According to the memorandum in support of the bill, the aggravated harassment statutes were a response to "an increase in the number of incidents where people [were] being exposed to racial or religious prejudice."¹²¹ The memorandum particularly noted that the law should more directly combat incidents motivated by prejudice that occur at places of religious worship, educational establishments, and residential buildings.¹²²

Although the aggravated harassment statutes received overwhelming legislative approval, passing by a 58-0 vote in the State Senate and 106-3 in the Assembly,¹²³ the bill did not escape scrutiny. A number of objections to the proposed legislation were contained in a June 14, 1982 memorandum from the New York State Division of Criminal Justice Services.¹²⁴ Although the Division expressed some "misgivings," the anti-bias bill was approved despite its "obvious substantive and technical deficiencies."¹²⁵

The memorandum stated that the heightened penalties for vandalism of religious properties should not be a part of the offenses of public order, but rather should be considered part of Article 145,¹²⁶

117. The maximum sentence for a violation is 15 days while the maximum sentence for a class A misdemeanor is one year. N.Y. PENAL LAW § 70.15 (McKinney 1987 & Supp. 1992).

118. N.Y. PENAL LAW § 240.31(2) (McKinney 1989). The maximum sentence for a class E felony is four years. N.Y. PENAL LAW § 70.00(2) (McKinney 1987 & Supp. 1992).

119. N.Y. PENAL LAW § 240.31(1) (McKinney 1989).

120. *Id.*

121. Bill Jacket, L. 1982, ch. 191, eff. Sept. 1, 1982, memorandum in support.

122. *Id.*

123. *Id.*

124. Memorandum from Arnold Hectman to John McGoldrick, June 14, 1982 (contained in Bill Jacket, *supra* note 121) [hereinafter Hectman Memorandum].

125. *Id.* at 2.

126. Article 145 of the Penal Law is entitled Criminal Mischief and Related Offenses. Aggravated harassment in the first degree is an enhancement of criminal mischief in the fourth degree. N.Y. PENAL LAW § 145.00 (McKinney 1988). Fourth degree criminal

which dealt with vandalism.¹²⁷ Subsection one of first degree aggravated harassment is an enhancement of the criminal mischief statutes, not the harassment statutes.¹²⁸ The Division feared that the distortion would cause confusion,¹²⁹ but there is no evidence that this provision has caused substantial confusion.

The Division's second observation was that damage to religious property under first degree aggravated harassment was punished more severely than similar damage to a person under the second degree provision.¹³⁰ Under the Penal Law's penalty scheme, if one acts against a person in a manner consistent with aggravated harassment in the second degree, the penalty is a misdemeanor.¹³¹ If one, however, damages religious property, the penalty is a felony.¹³² The division criticized this penalty scheme as contrary to "the long established principle that values the protection of people more highly than property."¹³³ Such an allocation of punishment calls for substantive reform of the anti-bias statutes to reflect the need to punish those who injure persons more severely than those who only damage houses of worship.¹³⁴

Although the Division's memorandum is silent on this issue, it is significant that the current aggravated harassment provisions do not carry felony charges for those acts of vandalism perpetrated against the *dwellings* of victims. Bias-motivated vandalism against an individual's home is a frequently encountered form of hate-oriented activity. The only statutory provisions punishing this form of bias violence are the traditional criminal mischief statutes¹³⁵ and the misdemeanor civil rights anti-discrimination provisions.¹³⁶ Thus, if a vandal were to spraypaint the initials "K.K.K." on the door of a home of a black family that recently moved into an otherwise all-white neighborhood, the vandal would face only misdemeanor charges. However, if the

mischief is a class A misdemeanor carrying a penalty of up to one year of imprisonment. See *supra* note 117.

127. Hectman Memorandum, *supra* note 124, at 2.

128. Previous drafts of this bill recognized this. *Id.*

129. *Id.*

130. *Id.*

131. *Id.*

132. Hectman Memorandum, *supra* note 124, at 2.

133. *Id.*

134. Indeed, the legislature's proposed measures increase the penalties for bias assaults in an attempt to correct this inconsistency. See *infra* notes 168-70 and accompanying text.

135. See *supra* note 126.

136. See *supra* note 111.

vandal did the same thing to the facade of the local Abyssinian Baptist Church, he would be subject to a felony charge.

The Division's biggest fear was that a First Amendment or an Equal Protection Clause problem would be created by increasing punishment of a crime because the victim was a member of a protected class and the perpetrator's intent was discriminatory.¹³⁷ The Division conceded that the alleged "constitutional infirmity, if it exists, is not

137. *Id.* The Supreme Court recently handed down its decision in *R.A.V. v. City of St. Paul*, 112 S. Ct. 2538 (1992). In *R.A.V.*, the Court declared a city "bias-motivated crime" ordinance unconstitutional under the First Amendment. *Id.* at 2547. The St. Paul ordinance at issue provided:

Whoever places on public or private property a symbol, object, appellation, characterization or graffiti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender commits disorderly conduct and shall be guilty of a misdemeanor.

Id. at 2541 (quoting St. Paul, Minn. Legis. Code § 292.02 (1990)).

The next day, the Wisconsin Supreme Court held a statute unconstitutional that was similar to New York's aggravated harassment statute, citing *R.A.V. State v. Mitchell*, 485 N.W.2d 807 (Wis. 1992). The Wisconsin statute provided:

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

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

(b) Intentionally selects the person against whom the crime under par. (a) is committed or selects the property which is damaged or otherwise affected by the crime under par. (a) because of the race, religion, color, disability, sexual orientation, national origin or ancestry of that person or the owner or occupant of that property.

(2)(a) If the crime is committed under sub. (1) is ordinarily a misdemeanor other than a Class A misdemeanor, the revised maximum fine is \$ 10,000 and the revised maximum period of imprisonment is one year in the county jail.

(b) If the crime committed under sub. (1) is ordinarily a Class A misdemeanor, the penalty increase under this section changes the status of the crime to a felony and the revised maximum fine is \$10,000 and the revised maximum period of imprisonment is 2 years.

(c) If the crime committed under sub. (1) is a felony, the maximum fine prescribed by law for the crime may be increased by not more than \$5,000 and the maximum period of imprisonment prescribed by law for the crime may not be more than 5 years.

(3) This section provides for the enhancement of the penalties applicable for the underlying crime. The court shall direct that the trier of fact find a special verdict as to all of the issues specified in sub. (1).

(4) This section does not apply to any crime if proof of race, religion, color, disability, sexual orientation, national origin or ancestry is required for a conviction for that crime.

Id. at 809 n.1 (quoting Wis. Stat. § 939.645 (1989-90)).

The First Amendment issue is beyond the scope of this Article and will not be addressed in detail. It should be noted that New York's statute does not infringe on First Amendment rights in the same degree as the St. Paul ordinance. The statute does not seek to regulate expressions of speech but, rather, violent conduct accompanied by discriminatory intent.

an obvious one."¹³⁸ The Division felt that the possible unconstitutionality of the bill should not affect its passage.¹³⁹

The constitutional issues alluded to by the Division were addressed in two New York cases. In *People v. Dinan*,¹⁴⁰ the defendant unsuccessfully challenged the constitutionality of the second degree aggravated harassment provision. Dinan was charged with attempting to break into the complainant's home, while threatening that he was "going to get you . . . Jews."¹⁴¹ The defendant maintained that the statute violated both the free speech and due process clauses of the federal and state constitutions.¹⁴² He argued that expressions of religious intolerance were constitutionally protected as long as they did not disrupt public order.¹⁴³

The court held that the totality of the defendant's behavior failed to rise to the level of protected speech under the First Amendment.¹⁴⁴ The court also reasoned that even if Dinan's behavior was expressive, it was unprotected, since any restriction on speech was a collateral ramification and not the primary purpose of the law.¹⁴⁵ The court also noted that absolute freedom of speech must, under reasonable circumstances, bend to satisfy the common good.¹⁴⁶

*People v. Grupe*¹⁴⁷ also upheld the constitutionality of the aggravated harassment statutes. In *Grupe*, the defendant allegedly assaulted a Jewish man. In the course of the attack the defendant shouted ethnic slurs at the complainant including "I'll show you, [you] Jew bastard."¹⁴⁸ Grupe argued that the aggravated harassment statute violated his right to freedom of speech.¹⁴⁹

Grupe also argued that the aggravated harassment statute was violative of equal protection because behavior identical to that in which he engaged, without bigoted motivation, would have constituted the lesser charge of harassment.¹⁵⁰ In short, Grupe's position was that the Legislature impermissibly classified a group (violent bigots) and without a rational basis imposed stricter penalties upon them than on

138. Hectman Memorandum, *supra* note 124, at 2.

139. *Id.*

140. *People v. Dinan*, 461 N.Y.S.2d 724 (N.Y. City Ct. 1983).

141. *Id.* at 725.

142. *Id.*

143. *Id.*

144. *See id.* at 726.

145. *Dinan*, 461 N.Y.S.2d at 726.

146. *Id.*

147. *People v. Grupe*, 532 N.Y.S.2d 815 (N.Y. Crim. Ct. 1988).

148. *Id.* at 817.

149. *Id.*

150. *Id.*

individuals outside the classified group convicted of the identical crime.¹⁵¹

The court rejected the First Amendment argument, reasoning that “[t]he clear intent of the measure . . . is to prohibit violence and physical intimidation based upon bigotry. One could violate this statute while remaining entirely mute.”¹⁵² The court also found that the defendant was not being prosecuted for the content of his speech, but rather that the speech was relevant only as circumstantial evidence that the defendant’s conduct was motivated by his perception of the victim’s religion.¹⁵³ Since the statute sought to regulate only violent conduct and not speech or thought, the court found that the First Amendment was not offended.¹⁵⁴

The equal protection argument was also rejected. Using the rational basis test, the court held that the Legislature’s determination to classify bias-motivated harassment as a different grade of offense carrying a different grade of punishment was a rational exercise of that body’s functions.¹⁵⁵ In sum, the most crucial anti-bias crime components of the aggravated harassment statutes have successfully staved off constitutional challenge in New York.¹⁵⁶

The remaining statute dealing with bias crime — disruption of a religious service¹⁵⁷ — is not a crucial component of the anti-bias law. This provision upgrades the offense of disorderly conduct to a class A misdemeanor.¹⁵⁸ The constitutionality of this statute was challenged but affirmed in *People v. Ianelli*.¹⁵⁹

151. Abramovsky, *supra* note 113.

152. *Grube*, 532 N.Y.S.2d at 818.

153. *Id.*

154. *See id.*

155. *Id.*

156. Although New York courts have upheld the constitutionality of the aggravated harassment statutes, there is still some controversy. A Michigan county judge declared that state’s “ethnic intimidation law” unconstitutional. *See Law Banning Racial Threats is Disallowed*, CHICAGO TRIBUNE, Nov. 30, 1990, at 11; Dawn Weyrich Ceol, *Hate-Crime Laws Raise Issue of Free Speech vs. Motivation*, WASH. TIMES, Nov. 30, 1990, at A5. *See also supra* note 137 for a discussion of the *R.A.V.* case and First Amendment implications.

157. N.Y. PENAL LAW § 240.21, *supra* note 110.

158. *Id.*

159. *People v. Ianelli*, 504 N.E.2d 383 (1986), *cert. denied*, 482 U.S. 914 (1987). Ianelli shouted anti-semitic slurs outside her neighbor’s home, a residential building used as a synagogue, disturbing Rosh Hoshanah services. In her appeal, Ianelli claimed that the statute violated the Due Process and Establishment Clause of the United States Constitution. However, the defendant did not move properly pursuant to Criminal Procedure Law §§ 170.30(1)(a), 170.30(2), 170.35(1)(c) and 255.20(1) for dismissal of the indictment. *Ianelli*, 504 N.E.2d at 384. Ianelli’s argument, therefore, was rejected because of procedural errors rather than on the basis of substantive law. The statute’s constitution-

The New York anti-bias crime statutes outside the penal code¹⁶⁰ impose both criminal and civil liabilities. Civil Rights Law section 40-d is a particularly useful statute for prosecution because it penalizes those who violate section 40-c, the aggravated harassment statutes, or those "who shall aid or incite the violation of" these statutes.¹⁶¹ Section 40-d can also be used to provide monetary relief for victims of bias crimes.¹⁶² Religious Corporations Law section 28¹⁶³ imposes liability on parents for physical damage to houses of worship done by their children. Holding parents liable for church vandalism caused by their minor children is significant because the overwhelming majority of church vandalism, like all bias crime, is perpetrated by youths.¹⁶⁴

The current New York State anti-bias laws do not sufficiently address the problem of hate crimes. The current statutory provisions are geared towards punishing those who deface buildings, particularly houses of worship. These provisions do not target conduct involving the physical assault of individuals and are only adequate within the context of combatting misdemeanor crimes. The more explosive problems of bias-motivated assaults and homicides, such as the Bensonhurst and Howard Beach situations, are not dealt with properly by current anti-bias legislation. The next section will discuss legislative proposals being considered in New York to better address the bias crime problem.

IV. Legislative Proposals Against Bias Crime

Two main proposals concerning bias crime are presently pending in the New York State Legislature: the Comprehensive Bias and Gang Assault Act¹⁶⁵ and the Bias Related Violence or Intimidation Act.¹⁶⁶ These proposals represent an ongoing concern, reflected in the memoranda accompanying the bills, of the Legislature to more effectively address the bias crime issue. Both Governor Mario Cuomo and At-

ality is technically still open to challenge in New York, notwithstanding the *R.A.V.* and *Mitchell* cases. See *supra* note 137.

160. See *supra* notes 111-12.

161. N.Y. CIV. RIGHTS LAW § 40-d, *supra* note 111.

162. *Id.*

163. N.Y. RELIG. CORP. LAW § 28, *supra* note 112.

164. See *supra* notes 18, 78 and accompanying text.

165. 1992 N.Y.S.B. 6950A (Feb. 5, 1992); 1992 N.Y.A.B. 10626 (Mar. 31, 1992) [collectively hereinafter Comprehensive Act](only citations to Senate Bill 6950A will be given). This bill originated in the Senate.

166. 1992 N.Y.S.B. 7861 (Apr. 28, 1992); 1991 N.Y.A.B. 6786B (Mar. 25, 1991) [collectively hereinafter Bias Related Act](only citations to Senate Bill 7861 will be given). This bill originated in the Assembly.

torney General Robert Abrams support these efforts as well.¹⁶⁷ Both Acts have passed preliminary hurdles and are ripe for passage this year.

The Comprehensive Bias and Gang Assault Act seeks to increase the punishment for both bias-related and gang attacks that occur because the victim is a member of a protected class.¹⁶⁸ All assaults that involve bias receive a one grade punishment increase¹⁶⁹ and assaults committed by three or more persons are punishable under the new gang assault crimes.¹⁷⁰ Further, the Act would require all law enforcement agencies to collect data on hate crimes and submit the figures in their annual report to the Legislature and the Governor;¹⁷¹ district attorneys would be required to report the disposition of all cases involving bias or gang assault.¹⁷² The Act also amends sentencing and plea-bargaining procedures with respect to bias crimes,¹⁷³ increases penalties for vandalism to school or church property,¹⁷⁴ and enlarges the number of crimes for which youths can be tried under juvenile offender status.¹⁷⁵

The Bias Related Violence or Intimidation Act¹⁷⁶ creates the crimes of bias-related violence or intimidation in the first and second degrees and mandates that the sentence for those crimes run consecutively with any other sentence imposed.¹⁷⁷ Sex, disability, age and

167. See 1991 Governor's Program Bill 49 and 1991 Attorney General's Legislative Program 89-91 (supporting the Bias Related Act). In 1982, Abrams stated that anti-bias legislation did not involve his department, but recently Abrams has become a vocal supporter of stiffer penalties for bias crime. See Robert Abrams, *Not All Bias Crimes Bills Are Equally Effective*, N.Y. TIMES, June 1, 1990, at A24 (editorial in support of bias crime bill); see also Gary Rosenberger, *Dinkins Blasts Bias Crimes at Scene of Gay Shootings*, U.P.I., July 26, 1991, available in LEXIS, Nexis Library, UPI File; Rick Brand, *Catterson Plans to Hire O'Brien*, NEWSDAY, Apr. 13, 1991, at 11.

168. Comprehensive Act, *supra* note 165, at 1. This position mirrors the philosophy of conservative critics of bias crime legislation. An editorial opinion published in the *National Review*, a prominent conservative magazine, stated that the solution to the bias problem is "the restoration of public safety by more energetic policing and by more certain and severe punishment of crime. Not only would such measures protect potential victims, black and white, but they would also soothe the fears and racial tensions which unrestrained crime has fostered." John O'Sullivan, *Do The Right Thing - Suppress Crime*, NAT'L REV., Oct. 13, 1989, at 13.

169. Comprehensive Act, *supra* note 165, at 2-4.

170. *Id.* at 2.

171. *Id.* at 10.

172. *Id.*

173. See generally Comprehensive Act, *supra* note 165.

174. *Id.* at 2.

175. *Id.* at 3.

176. Bias Related Act, *supra* note 166.

177. *Id.* at 2, 4.

sexual orientation would be added to the protected classes¹⁷⁸ under the aggravated harassment crimes.¹⁷⁹ The Act also provides for an increased penalty under Civil Rights Law section 40-d, removes the defense of mistake of fact as to the victim's protected status, and establishes a statewide reporting system of bias-related incidents and the disposition of such cases.¹⁸⁰

A. The Comprehensive Bias and Gang Assault Act

On February 5, 1992, the New York State Senate proposed the Comprehensive Bias and Gang Assault Act.¹⁸¹ The most significant reform from a bias crime standpoint is the statutory requirement of a system to record bias-related incidents.¹⁸² Subsection 4-c would be added to section 837 of the Executive Law to require the collection and analysis of statistical and other information on bias-related crimes.¹⁸³ The information would include the number of crimes reported to police, the number of persons arrested for such crimes, the offenses with which arrested persons were charged, the county in which the crime occurred, and the disposition of all cases in which bias crime was a charged offense.¹⁸⁴ All law enforcement agencies would be required to make an annual report to the Commissioner of Criminal Justice Services of all investigations related to bias crimes, while the district attorney from each county would have to report the disposition of all hate crime cases to the Commissioner as well.¹⁸⁵ Finally, the Commissioner would have to include these figures in the quarterly report to the Legislature and the Governor.¹⁸⁶

The Act expands criminal mischief in the second degree¹⁸⁷ to encompass damage to school or church property, a cemetery, a commu-

178. *Id.* at 2-3. The State Senate had been unwilling to include sexual orientation in previous versions of bias crime bills, so this inclusion represents a significant step toward protection for gays, lesbians, and bisexuals.

179. N.Y. PENAL LAW §§ 240.30, 240.31; *see supra* notes 108-09 and accompanying text.

180. Bias Related Act, *supra* note 166, at 4-5. The reporting system provision of the Act mirrors the one proposed under the Comprehensive Act.

181. Comprehensive Act, *supra* note 165. The Senate had introduced a similar bill in previous legislative sessions. *See* M.P. McQueen, *Tempered Praise for GOP Bias-Crime Bill*, NEWSDAY, May 16, 1990, at 17.

182. Comprehensive Act, *supra* note 165, at 10.

183. *Id.* A bias related crime is defined as an actual, threatened, or attempted action directed at an individual because the intended victim is or was believed by the perpetrator to be a member of an identifiable class or group of individuals. *Id.*

184. *Id.*

185. Comprehensive Act, *supra* note 165, at 10.

186. *Id.*

187. N.Y. PENAL LAW § 145.10 (McKinney 1988). This crime is a class D felony. *Id.*

nity center, or personal property related to any of the foregoing.¹⁸⁸ Any damage to the structures themselves and damage to personal property up to \$ 1,500 is covered.¹⁸⁹ Many anti-semitic crimes involve the destruction of synagogues or the articles inside synagogues, such as the Torah scrolls.¹⁹⁰ The Act also provides stiffer penalties for assaults, whether bias-motivated or not.¹⁹¹

Penal Law sections 10.00(18) and 30.00(2) would be reformed to hold fourteen or fifteen-year-olds criminally responsible for assault in the second degree.¹⁹² This change reflects an awareness of the reality and severity of the crime of assault. Unfortunately, the overwhelming majority of bias crimes and gang assaults are committed by youths.¹⁹³ Therefore, this reform would provide law enforcement officials with an important weapon in the fight against bias crime. Other reforms involving procedural aspects under the Comprehensive Act include a limitation on the court's ability to reduce charges from felony to non-felony offenses and restrictions on plea bargains.¹⁹⁴

188. Comprehensive Act, *supra* note 165, at 2.

189. *Id.*

190. See *supra* note 33 and accompanying text.

191. Under the Act, first degree assault would be increased from a class C to a class B felony, second degree assault would be increased from a class D to a class C felony, and third degree assault would be increased from a class A misdemeanor to a class D felony. Comprehensive Act, *supra* note 165, at 2. According to the statement in support of the bill, all assaults are elevated by one penalty grade to properly reflect the severity of the consequences of such violent crimes. The maximum sentences for a first offender would be 25 years for a class B felony, 15 years for a class C felony, and 7 years for a class D felony. See Statement in Support of Senate Bill S6950A (1992). To ensure that these penalty increases are not diminished by concurrent sentencing, the Act amends section 70.25 of the Penal Law to mandate that any sentences imposed run consecutively with other sentences. If mitigating circumstances can be shown by the defendant, the court can order the sentences to run concurrently, but the court must make a statement on the record of the facts and circumstances on which the determination was based. Comprehensive Act, *supra* note 165, at 4-5.

The Act also provides for the addition of the new crime of gang assault to the penal code. *Id.* This crime was originally proposed by New York City Mayor David Dinkins as a response to the rape of the "Central Park jogger." Dinkins' proposal supports both the creation of a new gang assault crime and the creation of new penal code provisions to deal with bias crime as a separate offense. M.P. McQueen, *Cuomo Urges Bias Law*, NEWSDAY, May 15, 1990, at 2. Gang assault occurs when the defendant, aided by two or more individuals, attempts to injure the victim and such injury is inflicted upon the victim. First degree gang assault involves intent to cause serious physical injury and such injury is actually inflicted, while second degree gang assault involves intent to commit only physical injury and serious physical injury results. Comprehensive Act, *supra* note 165, at 2.

192. *Id.*

193. See *supra* notes 89-90 and accompanying text.

194. The maximum sentence for those convicted of class B felonies has been enhanced, from 30 to 40 years. Comprehensive Act, *supra* note 165, at 5.

Under additional reforms, if a person is convicted of two violent felonies, of which one

The Comprehensive Act represents the first time sexual preference has been included in the classifications protected by bias crime statutes. The legislative findings specifically state that the Legislature was cognizant of the recent increase in attacks motivated by bias towards homosexuals.¹⁹⁵ The proposed legislation would extend the full panoply of enhanced penalties and reformed procedures to cover such attacks.¹⁹⁶

A crucial anti-bias provision of the Act involves the judge's discretionary authority in sentencing those convicted under the statute.¹⁹⁷ The proposed reform of sections 390.30(1) and 390.30(3) of the Criminal Procedure Law requires that the pre-sentencing investigation gather information to determine whether "the crime resulted because the victim is or was believed by the defendant to be a member of an identifiable class or group of individuals."¹⁹⁸ The subsequent report and victim impact statement must comment on whether the defendant was motivated by bias.¹⁹⁹ The victim or the victim's family (if the victim was murdered or is a minor child) is permitted to comment on the proposed sentence.²⁰⁰ These factors are then considered by the judge in sentencing.²⁰¹

The Comprehensive Act has been criticized because it represents merely an enhancement of the assault statutes and is not perceived to be a genuine attempt to penalize bias crime more severely.²⁰² Bias crimes are not specifically penalized and judges need only "consider" bias motivation. The proposal was strongly criticized by the gay community because of the lack of direct reference to bias crimes toward gays and the discretionary element in sentencing.²⁰³

is a class B felony, the maximum aggregate sentence is increased from 40 years to 50 years. If a person commits three or more violent felonies and one is a class B felony, the aggregate maximum sentence is increased from 50 to 60 years. *Id.*

Also significant is that judges no longer would be permitted to reduce charges of first and second degree assault to non-felony offenses. *Id.* Plea negotiations would also be affected by the enhancement of assault in the first degree to a class B felony. An individual charged with first degree assault who wants to plead guilty to a lesser offense would be found guilty of a class C felony. *Id.* at 7.

195. Comprehensive Act, *supra* note 165, at 1.

196. *Id.*

197. *Id.* at 9.

198. *Id.*

199. *Id.*

200. Comprehensive Act, *supra* note 165, at 8.

201. *Id.* at 8-9.

202. See Abrams, *supra* note 167.

203. McQueen, *supra* note 181; Reggie Rivers, *Bias Protest at Marino's Office*, NEWS-DAY, July 23, 1990, at 21 (demonstrators protesting State Senate Majority leader Ralph Marino's blockage of anti-bias bill staged a "die in" in front of Marino's Muttontown, Long Island home).

However, the bill represents one approach to the rise in assaults and gang violence, without making stiffer penalties or sentences dependent upon a finding of bias motivation. Under the Comprehensive Act, penalties for all violent assaults, including bias-related attacks, would be increased. This would remove the First Amendment and Equal Protection Clause obstacles, because the statute would no longer mandate increased punishment on the basis of words or thoughts.²⁰⁴

Further, the Act needs to be examined in conjunction with the Bias Related Act. The bills complement each other and the two proposals together provide a significant step toward deterring bias crime while punishing perpetrators who commit such attacks.

B. The Bias Related Violence or Intimidation Act

This proposal represents the latest effort of the Assembly to enhance penalties against hate crimes. Since 1987, the New York State Assembly has unsuccessfully attempted to enhance the anti-bias provisions of the penal code.²⁰⁵ The Bias Related Act adds several new anti-bias classifications: sex,²⁰⁶ disability,²⁰⁷ age,²⁰⁸ and sexual orientation.²⁰⁹ A mistaken identification as to the victim's sexual preference would not be a defense against the anti-bias statute.²¹⁰ The new protected categories are included in first and second degree aggravated harassment²¹¹ as well as in the new crimes created under Article 490.²¹²

The Act adds two new felonies: first and second degree bias related violence or intimidation.²¹³ Bias related violence or intimidation in

204. Indeed, this bill does not suffer from the same potential defects as other bills which predicate enhancement only upon a finding of bias motivation. Such a predication necessarily runs into a First Amendment or equal protection problem. See *supra* notes 137, 156. The Comprehensive Act is more likely to survive constitutional attack because it punishes all assault perpetrators equally, regardless of their motives or thoughts that may be otherwise protected.

205. See Abraham Abramovsky, *Bias Motivated Crime - Part III*, N.Y. L.J., Nov. 9, 1989, at 3.

206. Sex is not defined under the Act. Bias Related Act, *supra* note 166.

207. Disability is defined as a physical, mental, or medical impairment resulting from anatomical, physiological, or neurological conditions that prevents the exercise of a normal bodily function. Bias Related Act, *supra* note 166, at 4.

208. Age refers to persons sixty years of age or older. *Id.*

209. Sexual orientation is defined as a person's actual or perceived homosexuality, heterosexuality, or bisexuality. *Id.*

210. *Id.* at 4-5.

211. N.Y. PENAL LAW §§ 240.30, 240.31, *supra* notes 108-09.

212. Bias Related Act, *supra* note 166, at 3-5.

213. *Id.* at 4.

the second degree occurs when the perpetrator intends to harm an individual who is a member of a protected class and the perpetrator intentionally, knowingly, or recklessly causes physical injury to the individual or damage to the individual's property.²¹⁴ First degree bias related intimidation or violence involves the same intent as its second degree counterpart, but the perpetrator intentionally, knowingly, or recklessly causes the death of the individual toward whom the bias is directed.²¹⁵ The penalties for these crimes are a class C felony for the first degree version and a class D felony for the second degree variety.²¹⁶

These new felonies are patterned after federal laws²¹⁷ which impose criminal sanctions for civil rights violations.²¹⁸ The requirement that the defendant must commit the crime "with the intent to deprive an individual or group of individuals of the exercise of their civil right" is a codification of the "specific intent" *mens rea* required for prosecutions under the analogous federal statutes.²¹⁹ The specific intent requirement was established in *Screws v. United States*.²²⁰ *Screws* held that the defendant must commit the act complained of with the "particular purpose" of depriving the victim of a protected right.²²¹

The specific intent requisite in the federal statutes is a double criminal intent requirement.²²² First, the prosecutor must establish that the defendant intended to commit the action for which he is accused (*i.e.* assaulting someone). Second, the prosecutor must establish that the defendant was motivated by prejudice towards the victim's group affiliation. Establishing prejudicial motivation involves proving, beyond a reasonable doubt, that the defendant engaged in a particular thought process that was a primary factor in the commission of the offense for which the defendant is charged. In evaluating and proving that a particular occurrence was motivated by prejudice, prosecutors generally use the following guidelines: 1) common sense; 2) language used by the perpetrator; 3) severity of the attack; 4) lack of provocation; and 5) absence of any other apparent motive.²²³

214. *Id.*

215. *Id.*

216. *Id.*

217. These statutes include 18 U.S.C. § 241 (conspiracy against civil rights of citizens), § 242 (deprivation of civil rights under color of law) and § 245 (federally protected activities) (1992).

218. See Memorandum in Support of the Bias Related Act, at 2 (1992).

219. See Governor's Program Bill, *supra* note 167.

220. 325 U.S. 91 (1945).

221. *Id.* at 103-04.

222. See *supra* note 113.

223. See Finn, *supra* note 11, at 13-14.

Other provisions of the Bias Related Act include an increase in the fine under Civil Rights Law section 40-d from \$500 to \$1,000,²²⁴ applicability of the bias related violence or intimidation offenses to enterprise corruption charges,²²⁵ and sentencing and reporting provisions that mirror the Comprehensive Act.²²⁶ The Bias Related Act, like the Comprehensive Act, calls for bias-related sentences to run consecutively with other sentences imposed.²²⁷ The Bias Related Act also contains a reporting system similar to the one proposed under the Comprehensive Act.²²⁸

The Bias Related Act is not without its defects. The bill includes a comprehensive list of suspect and semi-suspect classifications more commonly associated with the anti-discrimination laws.²²⁹ The inclusion of such a laundry list of classifications dilutes the overall purpose of bias crime legislation. Crimes motivated by prejudice place heavier pressure for retribution upon the criminal justice system because these offenses have torn our communities asunder and have called into question our society's commitment to its professed ethos of tolerance and pluralism. The categories of sex, age, and disability, while applicable to employment and other forms of discrimination, are out of place in a bias crime statute.²³⁰ While individuals in these categories

224. Bias Related Act, *supra* note 166, at 5.

225. *Id.* at 1-2. See *infra* note 257 and accompanying text for a discussion of how applying the New York State counterpart to RICO to bias crime incidents can increase the effectiveness of bias crime deterrence.

226. Bias Related Act, *supra* note 166, at 2, 5.

227. *Id.* at 2. See *supra* note 191.

228. The Bias Related Act only requires the reporting of investigations, actual charges brought, and the disposition thereof in addition to requiring the Commissioner of Criminal Justice Services to make a quarterly report of these figures and information to the Legislature and the Governor. *Id.* at 5. By comparison, the Comprehensive Act includes everything the Bias Related Act requires, but it goes further to require the composition and analysis of statistics on bias-related attacks, arrests made and other information. See *supra* notes 182-86 and accompanying text.

229. See, e.g., *Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985) (discussion of suspect and semi-suspect classifications under the Fourteenth Amendment). Interestingly, the Act does not include height as a suspect classification, although height has been protected by other New York statutes aimed at preventing discriminatory treatment. In 1990, Governor Cuomo signed into law a bill prohibiting bars from allowing contests or promotions, referred to as 'dwarf tossing' or 'dwarf bowling.' Dwarf tossing is a contest of strength whereby bar patrons compete for prize money by hurling a dwarf. The winner is the individual who has thrown the dwarf the furthest. Similarly, in dwarf bowling, contestants try to knock down the most bowling pins using a dwarf strapped to a skateboard. Governor Cuomo recognized that New York "does not lightly impose limits on the activities of consenting participants. But balancing all the interests affected, I am persuaded that approval of this bill respects basic human dignity and protects the safety and self respect of the special people who are the subject of this strange diversion." *Bars-Dwarf Tossing and Dwarf Bowling-Prohibition*, 1990 N.Y. LAWS 2744 (McKinney 1990).

230. While the increased penalties for bias crime followed statistical evidence that

are victims of attacks, it is unclear that such crimes are motivated by prejudice.²³¹

C. Other Legislative Efforts

Another bill pending before the State Assembly would create new crimes for bias assaults.²³² The Bias Assault Proposal creates the crime of murder in the third degree to cover gang and bias assaults that result in the victim's death.²³³ The proposal also creates the category of serious physical injury²³⁴ and provides for new crimes that result in such injury.²³⁵ The penalty for reckless endangerment is increased when committed by four or more individuals.²³⁶ Finally, consecutive sentencing would be required for assaults and other serious offenses.²³⁷

The only bias-related provisions are the creation of murder in the third degree and aggravated riot.²³⁸ Under the new section 125.24(2) of the Penal Law, a person would be guilty of third degree murder if "[w]ith intent to cause serious physical injury to a person because of the race, color, creed, national origin, sex, sexual orientation or disability of such person, he or she causes the death of such person or of a

blacks, gays and Jewish people were being beaten for belonging to that protected group, no such evidence precedes the inclusion of gender, age, and disability into the scheme of bias crimes. See *supra* notes 23-29 and accompanying text. In fact, expanding the protected categories imposes a heavy burden on law enforcement officials and district attorneys, who have to investigate and prosecute the new bias crimes without the help of tested and traditional methods to determine whether or not the crime was actually motivated by prejudice toward the victim's protected status. Although the Legislature is to be applauded for recognizing the extent of the bias crime problem, it may have done more procedural harm than societal good in this regard. See *supra* note 223 and accompanying text.

231. Statistics have not yet been compiled showing that bias crime is a problem with respect to the otherwise-protected categories (under civil discrimination laws) of gender, age, or disability.

232. 1991 N.Y.A.B. 3293A (Feb. 7, 1991) [hereinafter Bias Assault Proposal].

233. *Id.* at 8.

234. Permanent serious physical injury is defined as "physical injury which causes death, substantial and permanent disfigurement of the face of a person, permanent loss or disablement of any bodily organ or member of a person, or permanent damage to the brain of a person which substantially impairs the function of such person's brain or any bodily member or organ." Bias Assault Proposal, *supra* note 232, at 5-6. The proposal does not separately define "serious physical injury," but it is assumed that if the injury meets the definition of permanent serious physical injury, or otherwise meets the definition except for permanence of the injury, then the injury can be characterized as serious physical injury.

235. *Id.* at 5, 7-9.

236. *Id.* at 8.

237. *Id.* at 7. The consecutive sentencing provision applies to crimes whether or not bias or hate is involved. *Id.*

238. Bias Assault Proposal, *supra* note 232, at 8-9.

third person.”²³⁹ As for aggravated riot, a new section 240.07 of the Penal Law would provide for guilt where a person:

- (a) simultaneously with ten or more other persons . . . engages in tumultuous and violent conduct and thereby intentionally causes or creates a grave risk of causing alarm to a person or group of persons because of the race, creed, color, national origin, sex, sexual orientation or disability of such person or group of persons, and (b) in the course of and as a result of such conduct, a person other than one of the participants suffers serious physical injury.²⁴⁰

This proposal is somewhat different than the two Acts described above.²⁴¹ First, the proposal contains a consecutive sentencing provision,²⁴² but the list of crimes that would carry such consecutive sentences does not include the bias-related crimes of third degree murder or aggravated riot. Second, without reason, it neglects to include age in the protected categories although it does include sex and disability. Finally, it cannot be characterized as a comprehensive response to the bias crime problem because, in addition to the aforementioned defects, it does not contain a reporting system requirement. The Acts described above²⁴³ reflect the idea that a reporting system is an essential element of a proper statute addressing bias crime. However, this proposal can certainly exist as a separate amendment to certain portions of the Penal Law in conjunction with one or both of the two Acts. While alone it is certainly not an acceptable answer to the alarming rise of bias crimes, it is a suitable addition to a legislative program that already contains effective measures to combat bias crime.

Whether or not any or all of the foregoing legislative proposals are actually enacted, the issue of bias crime must still be addressed at other levels. While penal sanctions are one method of dealing with bias crime, non-penal remedies serve the same ends sought by criminal statutes. The next section discusses some of the programs that work outside the criminal justice system to strike at the roots of the bias crime problem.

239. *Id.* at 8. The new crime would be a class A-II felony.

240. *Id.* at 8-9. This provision is clearly a response to the Central Park jogger incident and the “wilding” incident engaged in by the gang on that same night. The Memorandum in Support of the legislation makes reference to the fact that “wilding” currently carries only a class A misdemeanor charge and should be increased to a class C felony. See Memorandum in Support of 1991 Assembly Bill 3293A, at 2 (1991).

241. See *supra* notes 181-231 and accompanying text.

242. Bias Related Proposal, *supra* note 232, at 7.

243. See *supra* notes 181-231 and accompanying text.

V. Proposed Remedies for Bias Crime Other Than Penal Sanctions

Stricter penal sanctions, although recommended, should not be considered the sole solution to the bias crime problem. No legislative program can ever fully address bias violence. Enhanced penal sanctions should be considered one part of a broader scheme of combatting these crimes. To augment the current and proposed statutes, alternative methods should be employed in the overall remedial scheme, including increased civil recoveries, additional sources of recovery (such as vicarious parental liability), and educational and community-sponsored workshops and awareness groups. These methods are not mutually exclusive and ideally would be used as part of a comprehensive plan.

A. Civil Recoveries Enhanced

Throughout the 1980s, civil penalties have been an effective means of dealing with bias violence, particularly by organized hate groups.²⁴⁴ Successful tort claims against the Ku Klux Klan have cost them millions of dollars.²⁴⁵ Recently, one victim's family benefitted from tort-related penalties against the Metzger family, leaders of the White Aryan Resistance.²⁴⁶

The application of civil penalties to the vast majority of bias offenders, namely unemancipated minors, yields certain problems. Minors often have limited financial resources and for the most part are immune from jail sentences. Punishment of the perpetrator and compensation for the victim would therefore be minimal.

Several New York statutes provide that a perpetrator's parent(s) be held vicariously liable for the torts of their children. These statutes, enacted in piecemeal fashion to address specific situations, vary in maximum possible liability. Section 3-122 of the General Obligations Law (the "Parental Responsibilities Act") provides that a parent or legal guardian having custody of an infant ten to eighteen years of age "shall, if such infant willfully, maliciously or unlawfully damages or destroys real or personal property or . . . knowingly enters or remains unlawfully in a building and wrongly takes . . . personal property

244. See generally Elinor Langer, *The American Neo-Nazi Movement Today*, THE NATION, July 16, 1990, at 82, 98.

245. A successful tort suit recently resulted in a \$7 million dollar settlement against United Klans of America. The resulting financial loss shut this group down. *Id.* at 98.

246. See Robb London, *Sending a \$12.5 Million Message to a Hate Group*, N.Y. TIMES, Oct. 26, 1990, at 20 (jury awards \$ 12.5 million to the family of an Ethiopian man murdered by three skinhead followers of the White Aryan Resistance (WAR)).

from such building . . . be held liable" in a civil action up to a stated maximum of \$2,500. Curiously, another provision of the statute provides for *unlimited* parental liability in cases involving the destruction of cemetery property.²⁴⁷ Other New York statutes cover damage to municipal,²⁴⁸ state,²⁴⁹ and school property.²⁵⁰ These statutes vary in maximum allowable damages. As an example of the seemingly arbitrary damage cap figures, none of the vicarious parental liability statutes provide the \$5,000 damages ceiling of section 28 of the Religious Corporation Law.²⁵¹

Although these statutes impose civil liability only in the form of monetary restitution, one New York court found the Parental Liability Act to be a bill of attainder in violation of the United States Constitution.²⁵² The court predicated its holding of unconstitutionality on its perception that the statute attempted to impose vicarious civil liability on a parent for the acts of his or her child solely because of the parent-child relationship.²⁵³ The court, however, noted that if the Legislature had indicated any other rational basis for the classification, such as lack of supervision, the constitutional problem would evaporate.²⁵⁴

If the bill of attainder problem can be avoided,²⁵⁵ parental vicarious civil liability should be extended to cover bias-related incidents. The Religious Corporation Law already allows such vicarious liability for one species of bias crime.²⁵⁶ The Parental Liability Act's enhanced

247. N.Y. GEN. OBLIG. LAW § 3-113 (McKinney 1988).

248. N.Y. GEN. MUN. LAW § 78-a (McKinney 1986) (\$2,500 maximum penalty for the destruction of municipal property).

249. N.Y. EXEC. LAW § 171 (McKinney 1982) (\$2,500 maximum penalty for damage to state property caused by minor child).

250. N.Y. EDUC. LAW §§ 1604(35-a), 1709(36-a), 2503(18), 2554(16-b) and 2590-g(15) (McKinney 1988) (various maximum vicarious liability ceilings).

251. See *supra* note 112 and accompanying text.

252. *Owens v. Ivey*, 525 N.Y.S.2d 508 (N.Y. City Ct. 1988).

253. A bill of attainder imposes liability on a particular person without a trial. BLACK'S LAW DICTIONARY 165 (6th ed. 1990). Predicating the parent's liability on the mere existence of a parent-child relationship left the parent without a defense, and since liability was automatic under the statute, the parent was effectively deprived of a trial. Therefore, the statute violated the Constitution's prohibition against bills of attainder. *Id.* at 516.

254. If the legislature had predicated the parent's liability on lack of supervision, negligence or willful behavior of any sort, the bill of attainder problem would have been avoided. These bases for liability involve the affirmative fault of the parent beyond the unescapable fact of the parent-child relationship. Therefore, any of these predicates would provide an independent basis upon which to impose vicarious civil liability on the parent for the act of his or her child. *Id.*

255. See *infra* notes 258-59 and accompanying text.

256. See N.Y. RELIG. CORP. LAW § 28, *supra* note 112.

protection against graveyard vandalism, allowing limitless vicarious liability, protects similar religious values. Accordingly, the Legislature should enact statutes which provide greater civil liabilities for those who choose to harm people rather than churches or tombstones.

The Legislature could accomplish this end by increasing the maximum penalty under Civil Rights Law section 40-d from \$500 to the \$5,000 limit of Religious Corporation Law section 28. Also a new subsection of section 40-d should be drafted, imposing vicarious civil liability on the parents whose children commit bias-related acts.

A new monetary penalty scheme of section 40-d should be drafted which mirrors the civil provisions contained in the Racketeer Influenced Corrupt Organization Act ["RICO"].²⁵⁷ A treble damage award should be drafted for violators of the Civil Rights Law with the option to elect a stated fine if the treble damage recovery is lower than that amount. Attorney's fees also should be awarded to successful plaintiffs under section 40-d.

Such a penalty scheme likely would not be considered a bill of attainder under *Owens*.²⁵⁸ This classification of vicarious civil liability is rationally based upon the legitimate state interest of combatting bias crime and compensating the victims of such crime. This also recognizes that parents should have a supervisory and educational role in the lives of their children. Overt acts of anti-social, prejudicial violence are indicative of a failure by the offender's parents in properly instructing the child how to behave in a pluralistic society.²⁵⁹

The difficulties associated with holding parents *criminally* liable for their failure to supervise children would, however, pose far greater problems at law than any putative benefit. California recently enacted such legislation.²⁶⁰ This statute poses a number of serious problems. Legislation that holds parents criminally liable for the crimes of their

257. RICO is codified at 18 U.S.C. § 1951 *et seq.* (1984). The civil remedies provision is contained in 18 U.S.C. § 1964 (1984).

258. Under *Owens*' bill of attainder rationale, a statute would not be unconstitutional, provided the imposition of liability on the parent was based on something other than the parent-child relationship. The *Owens* court stated that lack of supervision, negligence or willful behavior of any sort would be appropriate, constitutional bases for parental liability. See *supra* notes 253-54 and accompanying text. The proposed statutes predicate a parent's vicarious civil liability for the act of his or her child on an affirmative act or omission by the parent beyond the simple fact of being the child's parent.

259. Such an affirmative act or omission by the parent provides an appropriate basis upon which to hold the parent liable for the act of his or her child. New York already has other provisions that impose vicarious civil liability in the form of a monetary penalty. See *supra* notes 112, 247-50. To the extent that these existing statutes do not violate *Owens*, they should be imitated or improved upon in the legislative findings and actual text of the proposed statutes.

260. CAL. PENAL CODE § 272 (West 1988).

children would constitute a radical departure from traditional principles of criminal law that one cannot be held responsible for failing to prevent another person from committing a crime.²⁶¹ Additionally, such legislation represents an unfair infringement upon the rights of parents, who traditionally have been given wide latitude in the exercise of their parental duty.²⁶²

This type of legislation would also disproportionately impact single-parent households or households which rely heavily upon a single wage earner. It would be unwise to incarcerate a single, working parent for the wrongdoing of one of his or her children.²⁶³ This action would not only fail to address the current family disorder, such as the encouragement of bigoted behavior, but would also deprive other family members of their sole means of support. Unlike the tort system, which punishes by requiring the tortfeasor (or his or her parent) to pay a money judgment to the aggrieved, incarcerating the offender's parent offers the victim no compensation and only results in the imprisonment of one more individual.

B. Non-Legislative Remedies

Although penal sanctions and monetary tort law recoveries serve valuable retributive and compensatory functions, their value in deterring bias crime is at best minimal. The problem of hate crimes cannot be solved entirely through stricter penalties and more accurate statistical data, although these elements are a part of the overall solution. While such efforts are important tools in the drive to reduce bias crimes, society must not rely on them to eradicate the problem. These remedies are only effective after the commission of an offense. Disciplines outside of the legal system must be involved in the effort to eradicate bias crime completely. Such efforts must involve the entire society. These societal efforts should focus on the education of youth. Instead of punishing after the fact, more emphasis needs to be placed on the perpetrator's thought processes that form before the act is committed.

Racial prejudice is not confined to the parameters of the Howard Beach or Bensonhurst incidents. More and more young people today openly express prejudiced attitudes and beliefs, and some of them engage in vandalism and violence in acting out their bigotry. Such crimes are not limited to white youngsters. Black and Hispanic stu-

261. See generally *Warshauer v. Lloyd Sadaudo S.A.*, 71 F.2d 146 (2d Cir. 1934).

262. Abraham Abramovsky, *Parent's Liability for Child's Crime*, N.Y. L.J., Aug. 10, 1989, at 3.

263. *Id.*

dents are no less reticent than their white counterparts about subjecting others to acts of discrimination and scapegoating.²⁶⁴

Children do not learn to hate in a vacuum. Prejudice is learned by individuals through interactions with parents, peers, the media, and various other forms of life experience. A landmark research study conducted by the ADL and the University of California at Berkeley from 1963 to 1975 on the subject of 'Prejudice in America' reached the conclusion that, by the age of twelve, children have already developed a complete set of stereotypes about every ethnic, racial, and religious group in society.²⁶⁵ These prejudicial notions, however, can be counteracted during the next few years of adolescence.²⁶⁶ If no counteraction occurs during this time, however, children will continue to build on their stereotypes and become narrow, bigoted adults.²⁶⁷

In order to effectively combat bias, vigorous efforts must be made by communities to promote harmony and positive interaction between members of different ethnic, racial, and religious backgrounds. Bias crime represents a systemic failure of American society to teach youths the values of tolerance and decency which are necessary for the survival of a pluralistic democracy.

The most important vehicle for instruction on these issues are the schools. Educators, on all levels of instruction, should emphasize that ethnic, racial, and similar slurs are not considered acceptable behavior.²⁶⁸ Conscious efforts also must be made to include lessons that increase children's awareness of the evils of prejudice. This is particularly crucial at the elementary²⁶⁹ and junior high school levels.²⁷⁰

On the high school level, social studies and civics teachers can integrate discussions about prejudice into the academic curricula. Such instruction need not devote extensive time to these topics.²⁷¹ Often, one reading integrated into the unit is sufficient to deepen students' understanding of the evils of prejudice.²⁷² Foreign language instruction can be made more interesting and relevant to the real world by emphasizing the culture and traditions of the speakers of the particu-

264. Frances M. Sonnenschein, *Countering Prejudice Beliefs and Behavior: The Role of the Social Studies Professional*, SOCIAL EDUCATION, April-May 1988, at 264.

265. *Id.* at 265.

266. *Id.*

267. *Id.*

268. *Id.*

269. Deborah A. Byrnes, *Children and Prejudice*, SOCIAL EDUCATION, April-May 1988, at 267.

270. Mara Sapon-Shevin, *A Minicourse for Junior High Students*, SOCIAL EDUCATION, April-May 1988, at 272.

271. See Sonnenschein, *supra* note 264, at 266.

272. *Id.*

lar language studied. A better understanding of the needs and problems faced by individuals from other cultures can engender greater admiration for the values of tolerance and respect. One particularly praiseworthy program is the establishment of the Genocide Study Center at Plainview-Old Bethpage High School.²⁷³ The Center contains information about the slaughter of Jews and Eastern Europeans under the Nazis, the killing of Armenian Christians by the Turks in the 1910s, the activities of the Khmer Rouge in Cambodia in the 1970s, and South African Apartheid.²⁷⁴

Outside the educational environment, community groups and leadership are necessary to promote goodwill between people of differing backgrounds. These groups can be a part of the local government, private organizations, church groups, or the actions of individual community leaders. Community groups based in both Bensonhurst and Howard Beach have substantially contributed to the healing process.²⁷⁵ Similarly, on Long Island a number of county-level governmental groups have been created. In Suffolk County, the Community Liaison of the Suffolk County Police Department offers bias seminars to schools and other organizations upon request. The Nassau County Police have engaged in similar efforts.

Continuous good faith efforts should also be made by synagogues, churches, and other religious establishments to foster goodwill. This can be achieved by encouraging ecumenical forms of interactions between both members of the adult community and youths. The leadership of individual members of the clergy is particularly necessary.

An innovative anti-prejudice media program entitled "World of Difference" is currently being initiated by the ADL.²⁷⁶ This project involves a local newspaper, local television station, and the local schools in a prejudice awareness and prevention campaign funded by corporate sponsors.²⁷⁷ In this way, the entire community becomes part of the effort to reduce prejudice and can positively reinforce the work done by the schools.²⁷⁸ "World of Difference" has been initiated in cities across the nation including Albany, Boston, Detroit,

273. Elizabeth Wasserman, *Genocide Study Center Dedicated*, NEWSDAY, May 22, 1989, at 7.

274. *Id.* The center was moved to Plainview Old Bethpage John F. Kennedy High School in 1991. Interview with Mrs. Nancy Cammarano (Nov. 15, 1991).

275. Mouat, *supra* note 50, at 6. Community groups such as the Bensonhurst Redevelopment Corporation and Concerned Citizens of South Queens (Howard Beach) and local clergy people have done a significant amount of work to mend New York City's tumultuous race relations. *Id.*

276. See Sonnenschien, *supra* note 264, at 266.

277. *Id.*

278. *Id.*

Houston, Miami, and Philadelphia.²⁷⁹ Programs like these are necessary in order to create public awareness of bias crime and the evil of prejudice.²⁸⁰

C. The Canadian Model: A National Strategy

A genuine, national good faith effort that advocates difference as a civic and cultural asset rather than a liability is crucial. Canadian efforts to combat racial bias are highly instructive. As is the case in the United States, Canada is experiencing severe ethnic tensions. The most divisive difference between Canadians is linguistic. In nearly all Canadian provinces, most people are native English speakers while in Quebec, French is the predominant language. This tension has led to unrest that threatens to tear the Canadian confederation apart.²⁸¹

Increased immigration from third world countries enhances the possibility of ethnic intolerance in Canada. In 1957, 95 percent of the 282,164 immigrants were Europeans or Americans. But of the 152,098 immigrants to Canada 30 years later, the percentage of Europeans and Americans dropped to 24 percent. The remainder in 1987 came mostly from the third world, a shift that is changing Canadian society and severely testing the country's self-image of racial toleration.²⁸² This tension is particularly acute in the province of Quebec, where the majority of new immigrants resist assimilation into francophone culture at a time when Quebecers are becoming increasingly concerned over the future of the French language in North America.²⁸³

The Canadian Multiculturalism Act, passed in July 1988, is intended to codify Canada's commitment to social, ethnic, and racial equality. This Act, referring to the relatively recently adopted Canadian Constitution, states:

The Constitution of Canada provides that every individual is equal before and under the law and has the right to the equal protection

279. *Id.*

280. *Id.*

281. See, e.g., Storer H. Rowley, *Quebec Arouses Anti-French Backlash*, CHICAGO TRIBUNE, Jan. 1, 1991, at C1 ("[t]he quest to paint Quebec's landscape French-only has touched off an anti-French backlash across Canada."); William Claiborne, *Sault Ste. Marie May Hold English-Only Language Vote*, WASHINGTON POST, Nov. 23, 1990, at A23; Brian Mulroney, *Mulroney Fears Unity at Risk as Cultural Battles Continue*, TORONTO STAR, Nov. 2, 1990, at A23 (Canadian Prime Minister Brian Mulroney urges unity); Barry Came, *Opinions Unlike the Others; Quebecers Disclose Distinctive Attitudes*, MACLEAN'S, Jan. 1, 1990, at 18.

282. Peter Kopvillem, *Faces from Far Shores; Immigrants are Testing Canada's Self Image of Racial Tolerance*, MACLEAN'S, Jan. 1, 1990, at 40.

283. *Id.*

and benefit of the law without discrimination and that everyone has the freedom of conscience, religion, thought, life, opinion, expression, peaceful assembly and association and guarantees those rights equally to male and female persons.²⁸⁴

The Multiculturalism Act embodies values reminiscent of the Bill of Rights and the Fourteenth Amendment of the United States Constitution. In addition, the Multiculturalism Act recognizes a need to promote and encourage cultural diversity:

The Government of Canada recognizes the diversity of Canadians as regards race, national or ethnic origin, colour and religion as a fundamental characteristic of Canadian society and is committed to a policy of multiculturalism designed to preserve and enhance the multicultural heritage of Canadians while working to achieve the equality of all Canadians in the economic, social, cultural and political life of Canada.²⁸⁵

Community-wide developments are instrumental in ensuring the mandate of the Multiculturalism Act is carried forth. The Police Department of Vancouver, British Columbia offers an example of how Canadian law enforcement officials are enforcing the multicultural policy. The Vancouver Police Department currently has no bias unit; however, a community relations unit deals regularly with multicultural problems. This unit is in charge of policy and community education.²⁸⁶ In 1984, Vancouver's Police Commissioner initiated a program of "intercultural training sessions" to educate people about racial harmony. These sessions meet approximately once a month, with the chief constable delivering the opening speeches himself.

In April 1988, members of Vancouver's various ethnic communities became involved with the police in workshop exchanges and reverse role playing activities. In addition, a total of twenty-two hours at the recruit training level for the British Columbia Justice Institute is devoted to intercultural skills, including the teaching of Indo-Canadian, Native American, and Chinese cultural values. Currently, the Vancouver Police Department is faced with an increase in attacks upon ethnic and racial minorities by an increasing population of White Power "skinheads" operating on Canadian soil. Vancouver, like many cities in the United States, also has to deal with street gangs.²⁸⁷

The most striking difference between New York and Vancouver law enforcement procedures, particularly with regard to high profile

284. Canadian Multiculturalism Act, S.C. c.24 (4th Supp.) (1988).

285. *Id.*

286. See Abramovsky, *supra* note 205.

287. *Id.*

criminal events such as gang violence, is the non-publication, via the televised or print media, of the names of gangs. By not publicizing the names of the gangs, the police hope to decrease the incentive for involvement in gang activities as well as recruitment by denying such organizations media attention.²⁸⁸

Some individuals within the Vancouver law enforcement community advocate reform in the area of anti-bias crime enforcement, including suggestions that definitive bias statutes be enacted. This would involve a more aggressive role for the Community Relations Unit. In the past, the unit has affected a reactive posture towards bias crime. Police intervention was often too late to achieve its desired effect.²⁸⁹

The Canadian approach to the bias problem differs from United States policy in that Canada's efforts are rooted more deeply in the national ideology, as is reflected in the Multiculturalism Act. The Act is necessary for the continued survival of Canada. Without such a deeply rooted commitment, Canada faces potential political balkanization along linguistic lines.

Admittedly, Canada has more at stake than the United States in combatting bias crime. It is certainly true that the United States is also a nation with many cultures at odds with each other: English speaking versus Spanish speaking, black versus white, immigrant versus native, inter-religious and inter-ethnic conflicts. Bias problems, however, do not threaten America's territorial integrity yet.

VI. Conclusion

The bias problem in the United States is a substantial and complex problem. Bias crimes polarize and divide our communities. Too often these events are exploited by unscrupulous politicians, media-created demagogues, and inflammatory press. The cost of continued failure to address the causes of such crimes can be measured in the ever-increasing number of youths swinging baseball bats at their helpless victims.

No one seriously questions the severity of the problem. Steps toward a potential solution have been taken. Local police forces have acknowledged their responsibility and made preliminary commitments. Statutes are in place and proposals are being designed to better assist the prosecution and deterrence of bias crimes. It is painfully obvious that despite all this progress, more needs to be done. In addi-

288. *Id.*

289. *Id.*

tion to the present remedial scheme, varied approaches need to be fostered and accentuated. The proposed statutes in New York take a stronger stance on identifying and punishing bias crime incidents.

Even more important than a successful conviction rate is the development of effective educational and community responses to intolerance and prejudice. Without attacking the roots of bias crime, progress will be perpetually stalled. By focusing on correcting the misconceptions fostered by a close-minded society, future generations may value people for their difference rather than punish them for it.