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# Hate Is Enough

## HOW NEW YORK'S BIAS CRIMES STATUTE HAS EXCEEDED ITS INTENDED SCOPE

### INTRODUCTION

On the night of Oct. 8, 2006, twenty-eight-year-old Michael Sandy drove from his home in the Williamsburg section of Brooklyn to a quiet stretch of beach near the Belt Parkway.<sup>1</sup> Sandy, a designer for a Long Island IKEA furniture store, believed he was headed for a late night tryst with a man he had met a short time earlier in an internet chat room.<sup>2</sup> Instead, Sandy was set upon by a four teens who had orchestrated the rendezvous in order to rob him.<sup>3</sup>

But the attackers' scheme unraveled quickly. Instead of handing over his cash, Sandy fled, and the young men pursued him onto the Belt Parkway.<sup>4</sup> Sandy was struck by a car, suffering injuries that put him in a coma and eventually killed him.<sup>5</sup> Three of the teens, John Fox, 19, Ilya Shurov, 20, and Anthony Fortunato, 20, were charged with felony-murder as a hate crime.<sup>6</sup> A fourth, Gary Timmins, 16, would plead guilty to attempted robbery as a hate crime in exchange for his testimony against the others.<sup>7</sup>

The hate crime statute used against the four defendants in *Fox* was not new. With the passage of the Hate Crimes Act of 2000,<sup>8</sup> New York State joined the growing number of states with criminal statutes designed to deter and punish crimes

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<sup>1</sup> Jamie Schram, John Doyle & Dan Mangan, *Gay 'Bias' Victim Clinging to Life—May Have Brain Injuries from Mugging and Hit-Run*, N.Y. POST, Oct. 10, 2006, at 17.

<sup>2</sup> See *People v. Fox*, 844 N.Y.S.2d 627, 631 (Sup. Ct. 2007), *aff'd on other grounds sub nom. People v. Fortunato*, 903 N.Y.S.2d 910 (App. Div. 2010).

<sup>3</sup> *Id.* at 631-32.

<sup>4</sup> *Id.* at 632.

<sup>5</sup> *Id.*

<sup>6</sup> Alex Ginsberg & Larry Celona, *'Hate' Gets Redefined in Gay Slay*, N.Y. POST, Oct. 26, 2006, at 6.

<sup>7</sup> See *Inmate Information*, N.Y. STATE DEPT. OF CORRECTIONAL SERVICES, <http://nysdocslookup.docs.state.ny.us/GCA00P00/WIQ3/WINQ130> (last visited Feb. 21, 2011).

<sup>8</sup> N.Y. PENAL LAW §§ 485.00-485.10 (Consol. 2010).

motivated by bias.<sup>9</sup> The statute increases penalties for certain enumerated crimes in situations where the victim is selected or the crime is committed based upon a belief or perception regarding age, sex, race, national origin, sexual orientation, or a host of other listed characteristics.<sup>10</sup> The effect of a conviction for an enumerated crime, plus the hate-crime element, is to increase the sentencing parameters for the base offense, generally by one sentencing class level.<sup>11</sup> The difference can be significant. An assault resulting in serious physical injury, normally a “D” felony, punishable by no more than 7 years in prison, becomes a “C” felony, punishable by up to 15 years.<sup>12</sup>

As the Sandy case progressed, details emerged that underscored the tension between the statute’s language and its legislative intent. Perhaps most surprising, defendant Fortunato pursued a trial defense that included evidence that he himself was homosexual.<sup>13</sup> Accordingly, the picture of the defendants, as a group, that slowly took shape was not that of a quartet of vitriolic gay-bashers overcome by animus, but rather of four extraordinarily cold and calculating thieves looking for easy money to buy drugs.<sup>14</sup> Because this picture did not fit the stereotypical “hate crime” pattern, the defendants made a pretrial motion for dismissal based on the argument that the hate crime statute could not be applied to a case where no actual “hate” was alleged.<sup>15</sup>

The Sandy defendants were attempting to draw the court’s attention to a subtle distinction in hate crime law—that between “pure hate” crimes and “opportunistic bias” crimes. The first type needs little explanation; these are offenses involving

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<sup>9</sup> See, e.g., Bane Act sec. 7, § 422.75, 1991 Cal. Stat. ch. 607; Act of Apr. 21, 1988, sec. 4, § 939.645, 1987 Wis. Sess. Laws 348.

<sup>10</sup> N.Y. PENAL LAW § 485.05(1).

<sup>11</sup> *Id.* § 485.10(2). Criminal offenses in New York State are categorized by offense levels designated by a letter of the alphabet that corresponds to a particular range of penalties. *Id.* § 70.00(2).

<sup>12</sup> See N.Y. PENAL LAW §§ 120.05, 70.00.

<sup>13</sup> John Marzulli, ‘I Was Leading Double Lives,’ Says Brooklyn Slay Suspect, DAILY NEWS (N.Y.), Oct. 2, 2007, at 14. The evidence was adduced for the purpose of arguing to the jury that Fortunato could not have “hated” Sandy, despite the fact that the statute has no such requirement. *Id.*

<sup>14</sup> John Marzulli, *Gays ‘Easy to Get’—Bias Slay Suspect*, DAILY NEWS (N.Y.), Sept. 26, 2007, at 19 (“And he [Fortunato] was telling us how like it’s easy to get them once you talk to them. . . . They’ll come and meet you, and we were gonna do it for the money.”).

<sup>15</sup> Memorandum of Law in Support of Defendant Fortunato’s Motion to Dismiss the Hate Crime Charges, at 1-2, *People v. Fox*, 844 N.Y.S.2d 627 (Sup. Ct. 2007) (No. 8607/06).

palpable and virulent animus towards a particular group or demographic. Crimes of the second kind, on the other hand, are not motivated by any negative feelings towards the group or demographic, but nonetheless constitute offenses that fit some statutory definitions of hate or bias crimes. Generally, these offenses are motivated by a perception regarding the victim's group that leads the perpetrator to believe that the particular victim is an easy or convenient target for the crime. Examples might include muggers who believe that women are less likely to fight back than men, or burglars who believe that South Asians keep large amounts of cash and jewelry in their homes. In each case, the perpetrator demonstrates no hate towards the group; he might in fact conceivably be a member of the group.<sup>16</sup>

At first blush, New York State's Hate Crimes Act appears unconcerned with this distinction. It does not require that the defendant be motivated by "hate" or "animus" as those terms are commonly understood. The law asks only that prosecutors prove that the defendant intentionally selected the victim or committed the crime "because of a belief or perception regarding the race, color, national origin, ancestry, gender, religion, religious practice, age, disability or sexual orientation of a person."<sup>17</sup> That language is sufficiently broad to include two interpretations of the events in *Fox*: that the defendants targeted Sandy because they hated gays, or, alternatively, that they singled him out based on the belief that he would not resist or report the crime. Accordingly, the trial court denied the Sandy defendants' motion to dismiss the hate crime charges.<sup>18</sup> The decision was sound, at least insofar as the language of the statute was so clear as to leave no opportunity for an exploration of legislative intent.<sup>19</sup>

This note argues that the legislators who enacted the Hate Crimes Act had no affirmative intent to include crimes of opportunistic bias within its scope. The primary evil against which its drafters hoped to strike a blow was traditional, "pure hate" bias crimes. Nevertheless, it has been applied to fact patterns well outside the traditional "pure hate" scenario; the *Fox* case is both the most newsworthy and most dramatic example. As

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<sup>16</sup> For an in-depth discussion of the distinction, and why opportunistic bias crimes should be punished as forcefully as traditional hate crimes, see Lu-in Wang, *Recognizing Opportunistic Bias Crimes*, 80 B.U. L. REV. 1399 (2000).

<sup>17</sup> N.Y. PENAL LAW § 485.05.

<sup>18</sup> *Fox*, 844 N.Y.S.2d at 635.

<sup>19</sup> *Id.* at 634.

a result, the Hate Crimes Act confers on prosecutors strong power to punish a wider array of offenses than intended, grants unnecessary license to law enforcement, threatens the legislature's primacy as the state's law-creating body and leads to unequal application of those laws across jurisdictions.

Part I begins with a brief history of bias crimes statutes in general and a review of the unsuccessful challenges to them. Part II examines the New York statute in detail, including the legislative intent as evidenced through legislative materials, public statements, and news reports. Part III provides an expansive review of New York cases in which the law appears to have been applied to fact patterns outside the scope of this discerned intent. Finally, Part IV concludes with a discussion of the problems created by the Hate Crimes Act, and argues that the best solution to these problems is for the legislature to change the language of the statute.

There is certainly room for reasonable people to disagree about the proper scope of a hate crime statute and whether it should embrace crimes of opportunity in addition to crimes of pure hate. Nevertheless, this note is not concerned with such normative questions. This note seeks only to determine whether the scope of the law, as it is currently understood, is consistent with the understanding of the drafters in 2000.

## I. HATE CRIME LAWS

This section will provide a brief overview of hate crime and bias crime laws in the United States, beginning with the first statutes in the late 1970s and early 1980s. It will outline the most common challenges—legal and nonlegal—such laws have faced and will conclude with an analysis of the most common forms drafters employ in making these statutes part of their jurisdiction's code.

### A. *History of Hate Crime Statutes*

The hate crime statutes now on the books in nearly every U.S. jurisdiction are largely creations of the last twenty-five years.<sup>20</sup> The first city to have devoted a specific unit in its police department to investigating bias-related crimes was Boston, which in 1978 was struggling with unrest resulting from court-

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<sup>20</sup> JAMES B. JACOBS & KIMBERLY POTTER, HATE CRIMES: CRIMINAL LAW AND IDENTITY POLITICS 3 (1998).

ordered desegregation of its public schools.<sup>21</sup> The following year, Massachusetts enacted a statewide civil rights law establishing penalties for interfering with others' civil rights, though the statute did not specifically enumerate status characteristics—such as race, gender or religion—of potential victims.<sup>22</sup>

In 1981, the Anti-Defamation League of B'nai B'rith (ADL)<sup>23</sup> promulgated a model hate crime statute made up of two components: first, an institutional vandalism component, specifically criminalizing intentional damage to houses of worship, and second, an intimidation component, enhancing penalties for base offenses like harassment.<sup>24</sup> By 1985, seven states had hate crime statutes of one kind or another, and by 1991, that number had reached 22.<sup>25</sup> James B. Jacobs and Kimberly Potter trace the actual birth of the term “hate crime” to the introduction of the Hate Crimes Statistics Act in the House of Representatives in 1985.<sup>26</sup> The bill, which eventually became law in 1990, required the federal government to keep track of hate crimes.<sup>27</sup>

As of this writing, Wyoming is the only state without a hate crime provision of any sort.<sup>28</sup> Four other states—Arkansas, Georgia, Indiana, and South Carolina—lack a hate crime statute that enhances penalties for criminal offenses committed as a result of hate or bias.<sup>29</sup> At the federal level, Congress passed the Hate Crimes Sentencing Enhancement Act in 1994, which

<sup>21</sup> Brian Levin, *From Slavery to Hate Crime Laws: The Emergence of Race- and Status-Based Protection in American Criminal Law*, 58 J. SOC. ISSUES 227, 237 (2002).

<sup>22</sup> *Id.* (citing MASS. ANN. LAWS chap. 265, § 37 (LexisNexis 2010)).

<sup>23</sup> The ADL is an anti-bigotry and civil rights advocacy organization formed in 1913. Its original mission statement specifically mentioned fighting “the defamation of the Jewish people,” but also proclaimed the need “to secure justice and fair treatment to all citizens alike and to put an end forever to unjust and unfair discrimination against and ridicule of any sect or body of citizens.” Anti-Defamation League, *About the Anti-Defamation League*, ADL CHARTER OCTOBER 1913, <http://www.adl.org/about.asp?s=topmenuhtml> (last visited Feb. 20, 2011).

<sup>24</sup> Susan Gellman, *Sticks and Stones Can Put You in Jail, but Can Words Increase Your Sentence? Constitutional and Policy Dilemmas of Ethnic Intimidation Laws*, 39 UCLA L. REV. 333, 339 (1991).

<sup>25</sup> *Id.*

<sup>26</sup> JACOBS & POTTER, *supra* note 20, at 4.

<sup>27</sup> Hate Crimes Statistics Act of 1990, Pub. L. No. 101-275, 104 Stat. 140 (codified at 28 USC § 534 (2006)).

<sup>28</sup> Anti-Defamation League, *State Hate Crime Statutory Provisions*, LEADERSHIP CONF. ON CIV. & HUM. RTS. (2008), <http://www.civilrights.org/publications/hatecrimes/appendix-a.html> (last visited Feb. 11, 2011).

<sup>29</sup> *Id.* Arkansas and Georgia provide civil remedies and criminalize institutional vandalism; Indiana and South Carolina criminalize institutional vandalism. *Id.*

mandated an increase of at least three offense levels for federal offenses committed out of hate or bias.<sup>30</sup> The various statutes differ in the array of characteristics which may form the basis for a hate crime. All include race, religion, and ethnicity, but characteristics such as gender and sexual orientation have yet to be included in many of the statutes.<sup>31</sup>

### B. *Challenges to Hate Crime Laws*

Although this note focuses on objections to New York's criminalization of opportunistic bias crimes, New York's law—and those of other states that preceded it—have already been subject to numerous criticisms and challenges. This section briefly details those prior arguments against hate crime legislation and how resolution of those arguments has, for the most part, foreclosed their application in New York.

#### 1. Overbreadth

When the first hate crime laws were enacted, the debate surrounding them focused on whether they were overbroad because they criminalized conduct protected by the First Amendment—namely thought and speech. In *Wisconsin v. Mitchell*,<sup>32</sup> the United States Supreme Court confronted and disposed of this issue, essentially preventing its exploration by a New York court. Mitchell, a black youth, was convicted of leading a bias-motivated gang assault and robbery of a white man after having watched the film “Mississippi Burning,” which depicts acts of hatred and discrimination by whites against blacks in the 1960s.<sup>33</sup> The jury heard evidence that Mitchell yelled, “Do you all feel hyped up to move on some white people?” and “You all want to fuck somebody up? There

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<sup>30</sup> Violent Crime Control and Law Enforcement Act of 1994 § 280003, Pub. L. No. 103-322, 108 Stat. 1796. The federal statute requires discriminatory selection. *Id.* § 280003(b). Federal sentences are determined by reference to a chart, promulgated by the United States Sentencing Commission, on which the “base offense level” of the crime is matched with the criminal history of the defendant to arrive at a recommended range of time of incarceration. Federal Sentencing Guidelines Manual Ch. 5 Pt. A (2010). The “base offense level” for every form of criminal conduct is laid out in great detail elsewhere in the manual. *Id.* Ch. 2. Accordingly, any increase to the base offense level will necessarily result in a higher recommended range.

<sup>31</sup> Anti-Defamation League, *supra* note 28. Compare, for example, Illinois, which includes sexual orientation, and Michigan, which does not. *See* § 720 ILL. COMP. STAT. 5112-7.1 (West 2011); MICH. COMP. LAWS ANN. § 750.147b (West 2011).

<sup>32</sup> *Wisconsin v. Mitchell*, 508 U.S. 476 (1993).

<sup>33</sup> *Id.* at 479-80.

goes a white boy; go get him.”<sup>34</sup> The Wisconsin Supreme Court overturned the conviction, holding that the hate-crime statute, which enhanced existing sentences in cases where a victim was chosen for discriminatory reasons, impermissibly criminalized racial views and preferences.<sup>35</sup> That court further held that the statute chilled free speech because it made citizens less likely to express prejudicial thoughts, lest they be used as evidence against them to prove discriminatory victim selection.<sup>36</sup> But on appeal, the United States Supreme Court reversed, holding that enhancing penalties based upon the defendant’s motivation was not tantamount to the punishment of thought or speech.<sup>37</sup> The Court’s reasoning stemmed primarily from the proposition that enhanced sentencing based on motive has traditionally been within the authority of sentencing judges and noncriminal anti-discrimination legislation.<sup>38</sup>

The decision does not necessarily rule out a different result in New York. In theory, New York’s Court of Appeals could interpret the nearly identical free speech provision of the state constitution more liberally than the U.S. Supreme Court did its federal counterpart.<sup>39</sup> However, given the high court’s ruling on the matter and the high level of acceptance hate crime laws have attained across the country, such a possibility would have to be considered remote. Some trial courts in New York have addressed the issue, each time ruling against the defendant.<sup>40</sup> Furthermore, New York’s Office of the Attorney General, which has a statutory right to intervene in criminal proceedings in which the defendant contests the

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<sup>34</sup> *Id.* at 480.

<sup>35</sup> *State v. Mitchell*, 485 N.W.2d 807, 810-12 (Wis. 1992).

<sup>36</sup> *Id.* at 172-73.

<sup>37</sup> *Mitchell*, 508 U.S. at 484-85.

<sup>38</sup> *Id.*

<sup>39</sup> N.Y. CONST. art. I, § 8 (amended 2001) (“Every citizen may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press.”).

<sup>40</sup> See *People v. Ivanov*, 886 N.Y.S.2d 68 (table), 2008 N.Y. Misc. LEXIS 7477, at \*8 (Sup. Ct. 2008) (holding the statute did not violate the First Amendment; the defendant appears not to have raised a state constitutional claim); *People v. McDowd*, 773 N.Y.S.2d 531, 534 (Sup. Ct. 2005), *aff’d* 801 N.Y.S.2d 906 (App. Div. 2005); *People v. Amadeo*, No. 3523/2000, 2001 N.Y. Misc. LEXIS 406, at \*10-11, \*14 (Sup. Ct. Aug. 1, 2001) (holding that no authority exists explicitly establishing that New Yorkers’ rights under Art. I § 8 of the state constitution are different from their rights under the First Amendment to the Federal Constitution).



constitutionality of a statute,<sup>41</sup> has taken the position that the scope of free speech under the federal and state constitutions is nearly identical, if not actually so.<sup>42</sup>

The likely unavailability of a judicial finding of overbreadth has not entirely silenced critics whose objections stem from concerns about government control of thought. Even if hate crime statutes do no such thing, several scholars have argued that, as a matter of policy, it is better not to even risk discouraging bigoted thought through the criminal law.<sup>43</sup>

## 2. Vagueness

Another constitutional objection—vagueness—has not yet been confronted by the Supreme Court.<sup>44</sup> Nevertheless, Oregon's high court has considered the issue and found a hate crime statute similar to New York's sufficiently specific to survive a vagueness challenge.<sup>45</sup> Furthermore, several New York trial level courts have considered and disposed of the issue.<sup>46</sup>

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<sup>41</sup> See N.Y. EXEC. LAW § 71 (Consol. 2010). The statute is not clear as to whether the Attorney General's right of intervention applies exclusively to state constitutional challenges, or both state and federal constitutional challenges. *Id.*

<sup>42</sup> Memorandum of Law in Opposition to Motion to Dismiss Indictment Counts for the Attorney General at 7, *Amadeo*, 2001 N.Y. Misc. LEXIS 406.

<sup>43</sup> See, e.g., Gellman, *supra* note 24, at 381 ("Beginning with the most basic of values underlying the First Amendment, laws which limit or chill thought and expression detract from the goal of insuring the availability of the broadest possible range of ideas and expression in the marketplace of ideas.")

<sup>44</sup> The Supreme Court, in *Mitchell*, did not reach the defendant's vagueness claim, as it was not pressed in the court below and fell outside the scope of the grant of certiorari. *Wisconsin v. Mitchell*, 508 U.S. 476, 482 n.2 (1993).

<sup>45</sup> See *State v. Plowman*, 838 P.2d 558, 561 (Or. 1992) (en banc) ("The crime is defined in sufficiently clear and explicit terms to apprise defendant and others of what conduct is prohibited."). It should be noted, however, that the Oregon statute's wording is not identical to the New York statute. The Oregon statute refers to belief or perception regarding the *victim*, OR. REV. STAT. § 166.165(1)(a)(A) (2010), while the New York statute requires the same belief or perception regarding "a person," N.Y. PENAL LAW § 485.10 (Consol. 2010).

<sup>46</sup> See, e.g., *People v. Ivanov*, 886 N.Y.S.2d 68, 2008 N.Y. Misc. LEXIS 7477, at \*8 (Sup. Ct. 2008); *People v. Fox*, 844 N.Y.S.2d 627, 637 (Sup. Ct. 2007); *Diaz*, 727 N.Y.S.2d at 300-01. Nevertheless, there is an intriguing argument to be made for vagueness, particularly with regard to statutes, like New York's, that refer to the race, religion, etc., of "a person." As Susan Gellman has pointed out, such language leaves open certain strange but entirely possible situations. For example, such a statute might conceivably punish a white woman who attacks another white woman she overhears using a racial slur on a black child. Gellman, *supra* note 24, at 355-56.

### 3. Policy and Practice

Additionally, detractors have argued that hate crime statutes of this sort do nothing to actually deter hate crimes, but rather amount to an opportunity for legislators to “take a stand” or “go on record” against prejudice.<sup>47</sup> Alternatively, some have predicted that even statutes worded so as to result in equal prosecution of, for example, black-on-white violence as white-on-black violence, would not be equally applied in practice.<sup>48</sup> These policy- and practice-based arguments against hate crime laws are not as easily disposed of, for they rely, at least in part, upon one’s perception of the political process. An in-depth discussion of their validity is beyond the scope of this note, beyond briefly noting that forty-five states have enacted legislation of this variety.<sup>49</sup>

#### C. *Categories of Hate Crimes Statutes*

Enacted hate crime laws take four basic forms: criminal civil rights laws, civil causes of action, penalty enhancers, and substantive crimes.<sup>50</sup> Civil rights laws criminalize the interference with the exercise of certain civil rights, for

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<sup>47</sup> See, e.g., JACOBS & POTTER, *supra* note 20, at 67 (“Politicians specialize in symbolic pronouncements. They enthusiastically support laws that reaffirm widely revered values such as ‘the flag,’ ‘patriotism,’ ‘freedom,’ and ‘tolerance.’ Supporting hate crime legislation provides them an excellent opportunity to put themselves *on record* as opposed to criminals and prejudice and in favor of law and order, decency, and tolerance.”); Editorial, *Triangulating ‘Hate Crimes,’* N.Y. POST, Apr. 8, 1999, at 28 (“For all their seemingly good intentions, hate-crime laws serve no purpose other than to make their sponsors feel good about themselves. As weapons against hatred and prejudice, they are worthless.”). The *Fox* defendants appeared to be sounding this note in their motion to dismiss, arguing that unless the statute were narrowly construed to require animus, “the charges are inapposite to the intent and purpose of the statute and will be arbitrarily enforced not to protect sections of our community, but rather to serve political motives.” Memorandum of Law in Support of Defendant Fortunato’s Motion to Dismiss at 2, *Fox*, 884 N.Y.S.2d 627 (No. 8607/06).

<sup>48</sup> See, e.g., Brian S. MacNamara, *New York’s Hate Crimes Act of 2000: Problematic and Redundant Legislation Aimed at Subjective Motivation*, 66 ALB. L. REV. 519, 537 (2003) (“Both the police and district attorneys are likely to bend in the direction of the prevailing political winds; as one advocacy group gets louder, more bias crimes against that group will be charged and prosecuted, adding further legitimacy to that particular group’s claims of victimization.” (citing JACOBS & POTTER, *supra* note 20, at 20-21)). Interestingly, this concern appears to have taken hold on both the left and the right. See Gellman, *supra* note 24, at 361 (expressing concern that a hate crime statute might be applied disproportionately to black youths hurling anti-white invective at police officers).

<sup>49</sup> See *supra* Part I.A.

<sup>50</sup> JACOBS & POTTER, *supra* note 20, at 29.

example, school attendance or voting.<sup>51</sup> Cause-of-action laws give the victim of an alleged hate crime or a person whose rights have been interfered with an opportunity to sue civilly for damages.<sup>52</sup> Penalty enhancers are criminal codes which increase the punishment for certain enumerated crimes when the finder of fact determines that the motivation was hate- or bias-related.<sup>53</sup> Finally, some jurisdictions define hate crimes separately as independent, substantive crimes, rather than an enhancement to other base crimes.<sup>54</sup>

It is the latter two varieties which are of primary interest here. The distinction between penalty-enhancing statutes and substantive-crime-creating statutes is primarily a procedural one and not related to the focus of this note. However, these types of statutes, taken as a group, divide in another, more substantive fashion. As a rule, they are either “discriminatory selection” statutes or “group animus” statutes.<sup>55</sup> The former define a hate crime as any offense in which the victim is selected for discriminatory reasons.<sup>56</sup> The latter further requires that those discriminatory reasons include specific negative feeling or animus towards the group of which the victim is perceived to have been a member.<sup>57</sup> Thus, group animus statutes criminalize a more specific subset of the offenses targeted by discriminatory selection statutes. Discriminatory selection statutes would proscribe any type of bias crime—whether it be a crime of “pure hate” or an opportunistic bias crime. Group animus statutes, on the other hand, would only criminalize crimes of pure hate.<sup>58</sup>

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<sup>51</sup> See, e.g., 18 U.S.C. § 245 (2006).

<sup>52</sup> See, e.g., CAL. CIV. CODE §§ 51.7, 52, 52.1 (Deering 2010).

<sup>53</sup> See, e.g., N.Y. PENAL LAW § 485.10 (Consol. 2010).

<sup>54</sup> See, e.g., OHIO REV. CODE ANN. § 2927.12 (LexisNexis 2010) (defining the crime of “ethnic intimidation”). In practice, there is little difference between this substantive crime and a penalty-enhancing statute like New York’s, as Ohio defines “ethnic intimidation” in terms of several enumerated, previously existing base offenses.

<sup>55</sup> FREDERICK LAWRENCE, PUNISHING HATE: BIAS CRIMES UNDER AMERICAN LAW 29-30 (1999).

<sup>56</sup> *Id.* As noted, New York’s hate crime statute is based on the discriminatory selection model. Lawrence cites other examples, most notably the Wisconsin statute, which was upheld by the U.S. Supreme Court. *Id.* at 190 (citing WIS. STAT. § 939.645 (1997)).

<sup>57</sup> LAWRENCE, *supra* note 55, at 30. Lawrence cites, among others, New Hampshire’s statute, which uses the operative language, because “of hostility towards the victim’s religion, race, creed[, etc.]” *Id.* at 191 (citing N.H. REV. STAT. ANN. § 651:6 (1997)).

<sup>58</sup> This distinction will be discussed further *infra* Part III.

## II. THE NEW YORK STATE HATE CRIMES ACT OF 2000

At this point, a brief summary of the statute itself is warranted. Part A will guide the reader through the basic provisions written into the law. Part B will undertake a comprehensive review of those provisions, with an eye toward discerning the intent of the drafters with respect to the issue of opportunistic bias crimes. Part B will also examine all relevant external materials, including legislative and executive documents, press reports, and letters from the public.

### A. Overview

With the passage of the Hate Crimes Act of 2000, New York became the 44th state to enact a statute enhancing criminal penalties for crimes committed out of bias or hate.<sup>59</sup> The New York statute was based in large measure upon the Wisconsin statute upheld by the U.S. Supreme Court in *Wisconsin v. Mitchell*.<sup>60</sup> The law includes a wide range of characteristics as listed triggers: “race, color, national origin, ancestry, gender, religion, religious practice, age, disability[,] or sexual orientation.”<sup>61</sup> It is similarly wide ranging in the array of base offenses which can be enhanced if a jury finds that bias or hate was the motivation.<sup>62</sup> The sentencing scheme generally provides that each base offense is enhanced by one offense level.<sup>63</sup>

The main portion of section 485.05 of the penal law contains two provisions outlining the basic contours of hate crimes as defined in the law. The first specifies that a hate crime is committed when the defendant commits an enumerated substantive offense and *selects the victim* based upon a belief or perception regarding any of the above-listed characteristics.<sup>64</sup> The second specifies that a hate crime is committed when the defendant *commits* the enumerated

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<sup>59</sup> MacNamara, *supra* note 48, at 519.

<sup>60</sup> Memorandum, Governor’s Program Bill No. 1RR, at 1 (2000); *see also* William C. Donnino, *Practice Commentary to Penal Law § 485.05* (McKinney Supp. 2002) (“In drafting its statute, New York was apparently guided by both a Wisconsin statute whose constitutionality had been sustained and a model statute published by the Anti-Defamation League (ADL).” (citation omitted)); MacNamara, *supra* note 48, at 523.

<sup>61</sup> N.Y. PENAL LAW § 485.05 (Consol. 2010).

<sup>62</sup> *Id.* § 485.05(3). Scores of statutory offenses are listed, including the major felonies of murder, manslaughter, rape, robbery, arson, assault, and kidnapping.

<sup>63</sup> *Id.* § 485.10. For Class A-1 felonies, a hate crime conviction increases the minimum, but not the maximum.

<sup>64</sup> *Id.* § 485.05(1)(a).

substantive offense because of such a belief.<sup>65</sup> Put more simply, to be a hate crime, discriminatory selection may be behind either the choice of victim or the decision to commit the crime at all.<sup>66</sup> Neither provision requires that the belief or perception must regard the victim in particular; both sections use the language “belief or perception regarding the [listed characteristics] of a person.”<sup>67</sup> This appears to allow application to cases of mistaken identity, in much the same way that many states’ intentional murder statutes require intent to kill a person—but not necessarily the same person who dies.<sup>68</sup>

The statute also includes additional evidentiary and definitional material.<sup>69</sup> It specifically indicates that proof of the characteristics of the defendant, the victim, or both is legally insufficient to prove the hate crime motivation.<sup>70</sup> The statute also defines two terms as used in the list of characteristics: age (“sixty years old or more”)<sup>71</sup> and disability (“a physical or mental impairment that substantially limits a major life activity”).<sup>72</sup>

Finally, one unusual feature of the statute is the inclusion of legislative findings in the actual text of the law. Section 485.00 outlines the legislature’s rationale and goals in passing the law, listing, in particular, a finding that hate crimes have increased substantially in recent years and that, by their nature, they cause harm to entire communities.<sup>73</sup> In large part, it was the inclusion of these legislative findings that prompted the *Fox* defendants to make their argument for a limitation on the scope of the law.<sup>74</sup>

### B. *Legislative Intent*

As noted, the text of section 485.05 makes no distinction between crimes of pure hate and crimes of opportunity. In

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<sup>65</sup> *Id.* § 485.05(1)(b).

<sup>66</sup> Legislative materials explain that the second subsection was included to cover crimes where the perpetrator clearly exhibits group animus, but where no particular victim is intentionally selected—such as firebombing a predominantly black church without knowing who, in particular, is inside. Memorandum, Governor’s Program Bill No. 1RR, at 2 (2000).

<sup>67</sup> N.Y. PENAL LAW § 485.05(1)(a)(b) (emphasis added).

<sup>68</sup> *See, e.g., id.* § 125.25.

<sup>69</sup> *Id.* § 485.05.

<sup>70</sup> *Id.* § 485.05(2).

<sup>71</sup> *Id.* § 485.05(4)(a).

<sup>72</sup> *Id.* § 485.05(4)(b).

<sup>73</sup> *Id.* § 485.00.

<sup>74</sup> *People v. Fox*, 844 N.Y.S.2d 627, 633 (Sup. Ct. 1997); *see also infra* Part II.B.6.

requiring simply that the victim be selected, or the crime be committed, because of a belief or perception regarding a person's race, religion, or other characteristics, it embraces both traditional hate crimes and more nuanced fact patterns, such as the Sandy case, that invite categorization as opportunistic bias crimes. In fact, section 485.05 has been applied across a wide spectrum of crimes, from those as nebulous as the *Fox* case to those as clear cut as "race war" murderer Phillip Grant.<sup>75</sup>

Nevertheless, it does not necessarily follow that the drafters of the Hate Crime Act intended so broad a scope. A review of the legislative history suggests that crimes of pure hate were the primary types of offenses the legislature sought to punish with this statute. At the very least, the legislative history tells us that the crimes-of-hate/crimes-of-opportunity distinction was a nuance that escaped most of the public debate and discussion on the bill.

A few words about legislative intent are in order before we examine the statute and its history. In declining to engage in an exhaustive examination of the Hate Crimes Act's legislative history, the *Fox* court averred, "the hate crimes charges in this case are consistent with the intent of the Legislature as manifested by the plain language of Penal Law § 485.05(1)(a)."<sup>76</sup> In other words, a court need not engage in an examination of legislative history, nor draw on rules of construction, nor delve into the contemporary political or social controversies that surrounded enactment of the statute, if the statute itself is unambiguous.<sup>77</sup> Invocation of this simple, rational, and well-established rule shortened the court's task in *Fox*.

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<sup>75</sup> Philip Grant, an African-American man, was charged with waiting in a Westchester mall stairwell for hours before fatally stabbing Concetta Russo-Carriero, who was white. Grant later told investigators that he wanted to start a "race war" and that "the first person I see in this mall that looks white, I'm killing. . . . As long as she had blond hair and blue eyes, she was going to die." Lisa W. Foderaro, *Murder Suspect Told Police He Hunted a White Woman*, N.Y. TIMES, July 6, 2005, at B3.

<sup>76</sup> *Fox*, 844 N.Y.S.2d at 633.

<sup>77</sup> See N.Y. STAT. § 76 (McKinney 2011) ("Where words of a statute are free from ambiguity and express plainly, clearly and distinctly the legislative intent, resort may not be had to other means of interpretation."); 97 N.Y. JUR. STATUTES § 104 ("As the clearest indicator of legislative intent is the statutory text, the starting point in any case of interpretation must always be the language itself, giving effect to the plain meaning thereof. . . . Where the language of a statute is clear and unambiguous, courts must give effect to its plain meaning. . . . Generally, the unambiguous language of the statute is alone determinative. Where words of a statute are free from ambiguity and clearly express the legislative intent, resort may not be had to other means of interpretation such as the rules of construction, for courts should not interpret what

This note, however, seeks to conduct just such a far-reaching analysis. It is well-established that where the statutory text is *not* clear, where the plain language does *not* spell out the legislative intent, resort may be had to all manner of supporting materials, including legislative memoranda, public statements, and floor debates.<sup>78</sup> Because the task here is to ascertain the legislature's true intent—putting aside presumptions about the unambiguous statutory language—this note will consider all possible sources that shed light on the intended scope of the Hate Crimes Act.

### 1. The Statute

Entitled “legislative findings,” section 485.00 precedes the actual statutory definition of the crime and provides the reader of the Penal Law with an unusual statement of purpose by the legislature.<sup>79</sup> Only two other sections of the Penal Law include the legislative findings in the actual text of the statutes: the enterprise corruption statute, the state's analog to federal RICO provisions, and the state anti-terror law.<sup>80</sup>

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has no need of interpretation.”); *Rochester Cmty. Sav. Bank v. Bd. of Assessors*, 669 N.Y.S.2d 1008, 1009-10 (1998).

<sup>78</sup> See generally, 97 N.Y. Jur. Statutes §§ 105, 114, 146, 148.

<sup>79</sup> N.Y. PENAL LAW § 485.00. The full text of the findings are as follows:

The legislature finds and determines as follows: criminal acts involving violence, intimidation and destruction of property based upon bias and prejudice have become more prevalent in New York state in recent years. The intolerable truth is that in these crimes, commonly and justly referred to as “hate crimes”, victims are intentionally selected, in whole or in part, because of their race, color, national origin, ancestry, gender, religion, religious practice, age, disability or sexual orientation. Hate crimes do more than threaten the safety and welfare of all citizens. They inflict on victims incalculable physical and emotional damage and tear at the very fabric of free society. Crimes motivated by invidious hatred toward particular groups not only harm individual victims but send a powerful message of intolerance and discrimination to all members of the group to which the victim belongs. Hate crimes can and do intimidate and disrupt entire communities and vitiate the civility that is essential to healthy democratic processes. In a democratic society, citizens cannot be required to approve of the beliefs and practices of others, but must never commit criminal acts on account of them. Current law does not adequately recognize the harm to public order and individual safety that hate crimes cause. Therefore, our laws must be strengthened to provide clear recognition of the gravity of hate crimes and the compelling importance of preventing their recurrence.

Accordingly, the legislature finds and declares that hate crimes should be prosecuted and punished with appropriate severity.

*Id.*

<sup>80</sup> See N.Y. PENAL LAW §§ 460.00, 490.00 (2011).

Two passages in the legislative findings are at least arguably inconsistent with the statutory definition that follows. First, the findings refer to victims being selected “because of their race, color, national origin, [etc.]” rather than, as it is phrased in section 485.05, “because of a *belief or perception regarding* the race, color, national origin, [etc.]”<sup>81</sup> The section 485.05 phrasing quite clearly employs language evincing an intent to include situations where perpetrators are motivated by such prejudicial beliefs—situations such as the perception in *Fox* that a gay victim would make an easy mark. The section 485.00 language, however, is more ambiguous; it lends itself to both that expansive interpretation but also the narrower, traditional, “pure hate” construction.<sup>82</sup>

Second, and more significantly, the legislative findings make reference to “[c]rimes motivated by invidious hatred toward particular groups.”<sup>83</sup> There is no ambiguity there. The American Heritage Dictionary defines “invidious” as “tending to rouse ill will, animosity, or resentment,” or “containing or implying a slight.”<sup>84</sup> If the use of the word “hatred” alone was not clear enough, its modification with the term “invidious” provides certainty that the drafters of this law envisioned its application to gay bashing and other pure hate attacks.<sup>85</sup>

There is also a third passage that is instructive with respect to the intended scope of the statute, one that might easily be overlooked because it is not truly a “passage.” It is the act’s title. The title suggests rather strongly that the harm to be remedied here was “hate”—not misperceptions, stereotypes, or even bias. There is a credible argument to be made that the statute’s title is a valid indicator of the law’s legislative intent. It is well established that courts in New York State are instructed to discern legislative intent through a contextual

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<sup>81</sup> *Id.* §§ 485.00, 485.05 (emphasis added).

<sup>82</sup> The language employed in section 485.00, by its omission of the words “belief or perception regarding” found in section 485.05, invites a common-sense reading: a victim who is selected “because of” his race is, in most people’s understanding, the victim of a hate crime.

<sup>83</sup> N.Y. PENAL LAW § 485.05.

<sup>84</sup> THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 949 (3d ed. 1992).

<sup>85</sup> Courts in New York routinely interpret statutes so as to accord significance to every word. *See Toys “R” Us v. Silva*, 89 N.Y.2d 411, 420 (1996) (construing discontinuation of “substantially’ all the nonconforming use[s]” to mean something less than complete cessation of nonconforming uses), *rev’g Toys “R” Us v. Silva*, 229 A.D.2d 308, 310 (N.Y. App. Div., 1st Dep’t. 1996) (“A basic rule of statutory construction requires that meaning and effect be given to every part and word of the statute.”) (Kupferman, J., dissenting).



prism, taking into account all the facts and circumstances surrounding its passage.<sup>86</sup> In its affirmation as intervenor in *People v. Amadeo*,<sup>87</sup> the Attorney General examined the Hate Crimes Act's title in just such a fashion, interpreting "context" to include the title of an act as well.<sup>88</sup>

## 2. Supporting Documents

The legislative materials relevant to the Hate Crimes Act of 2000 are neither voluminous nor conclusively illuminating. However, to the extent they are helpful in the instant inquiry, they offer no indication that the bill's drafters or supporters envisioned the application of the law to extend to opportunistic hate crimes. The Budget Report on the bill does not mention the issue at all under "Arguments in Opposition," though it does summarize several other objections.<sup>89</sup> The Governor's Memorandum in Support, in deconstructing section 485.05(2), states that this section, which establishes the evidentiary burden to be met, "is designed to ensure that only those who are truly motivated by invidious hatred are prosecuted for committing hate crimes."<sup>90</sup>

Letters included in the Governor's bill jacket provide additional insights into the law's purpose. The Roman Catholic Bishops of New York State, which opposed the bill, expressed several reservations, including the loss of discretion by judges, the potential for disparate application and the absence of alternatives to incarceration.<sup>91</sup> Only one issue raised by the group even suggests superficial awareness of the crimes-of-

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<sup>86</sup> N.Y. STAT. LAW § 95 (Consol. 2010).

<sup>87</sup> *People v. Amadeo*, No. 3523/2000, 2001 N.Y. Misc. LEXIS 406, at \*1 (Sup. Ct. Aug. 1, 2001).

<sup>88</sup> Affirmation in Opposition to Motion to Dismiss Indictment Counts at 9 & n.4, *Amadeo*, 2001 N.Y. Misc. LEXIS 406 (No. 3523/2000). To be sure, the term "hate crime" can also be understood more generally as embracing a wide variety of bias offenses, but the Office of the Attorney General, the state's chief law enforcement agency, did not take that position in *Amadeo*. The Attorney General's memorandum of law is discussed more fully *infra* Part II.B.6.

<sup>89</sup> BUDGET REPORT ON BILLS, S. 4691a, 2000 Leg., Reg. Sess. (N.Y. 2000), <http://image.iarchives.nysed.gov/images/images/96904.pdf> (part of legislative packet listing arguments in opposition, including the redundancy of such legislation and the impropriety of punishing motivation or belief).

<sup>90</sup> Memorandum, Governor's Program Bill No. 1RR at 2 (2000).

<sup>91</sup> Letter from the N.Y. State Catholic Conference to Members of the N.Y. Senate (Apr. 3, 2000), *available at* <http://image.iarchives.nysed.gov/images/images/96904.pdf> (part of legislative packet; attaching a 1999 statement of the Roman Catholic Bishops of N.Y. State).

opportunity/crimes-of-hate problem: the bill's "fail[ure] to distinguish between an isolated offense and deep-seated bias."<sup>92</sup>

Two important governmental bodies, in letters to the Governor, expressed a clear view that the new law would embrace only crimes of pure hate. In its letter expressing its support for the measure, the Office of the Attorney General appeared to take as a given that the statute was meant to punish "hate," noting,

[b]y employing this new law to the fullest, our government will send a powerful message to victims and others like them that, regardless of personal characteristics or lifestyle, they are valued members of the community, and will make clear to victimizers that this state does not tolerate *hatred* founded upon bias and prejudice.<sup>93</sup>

The Attorney General's Legislative Bureau Chief could just as easily have chosen the words, "this state does not tolerate bias and prejudice." Additionally, Mayor Rudolph Giuliani's legislative representative, Anthony Piscitelli, sounded a virtually identical note, writing, "[e]nactment of this legislation would also indicate to all New Yorkers that the New York State Legislature is willing to act to provide solutions to help stem the tide of hate motivated violence."<sup>94</sup>

Eight letter writers cited notable hate crimes that occurred elsewhere in the country shortly before the passage of the Hate Crimes Act as examples of the "terrible occurrences" the new law would prevent.<sup>95</sup> The two incidents most commonly cited

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<sup>92</sup> *Id.*

<sup>93</sup> Memorandum from Kathy Bennett, Chief, Legislative Bureau, Office of the Att'y Gen., to James M. McGuire, Counsel to the Governor 2 (July 18, 2000) (emphasis added), available at <http://image.iarchives.nysed.gov/images/images/96904.pdf> (part of legislative packet).

<sup>94</sup> Letter from Anthony Piscitelli, Legislative Rep. to Mayor Giuliani, to George E. Pataki, Gov. of N.Y. 2 (July 7, 2000), available at <http://image.iarchives.nysed.gov/images/images/96904.pdf> (part of legislative packet). Giuliani himself sounded a similar note in the aftermath of a violent anti-Semitic rampage at a Jewish center in Los Angeles in 1999:

I understand, since I spent a lot of my life in law enforcement, that legislation like the hate-crimes legislation doesn't necessarily prevent an act like this. It's an after-the-fact punishment as opposed to something that could be done before . . . But the statement is a very strong societal statement against hatred and maybe over a period of time that could help wipe out this irrational way of behaving.

Brendan Bourne et al., *Racist Faces Death Penalty—Charged in Postal Slay and Kid Shootings*, N.Y. POST, Aug. 13, 1999, at 6.

<sup>95</sup> Letter from Herbert I. Cohen, M.D., to Sen. Joseph Bruno (Mar. 12, 1999); Letter from Doris Corrigan, State Committeewoman, to George E. Pataki, Gov. of N.Y. (Mar. 16, 1999); Letter from Georgia K. Guida to George E. Pataki, Gov. of N.Y. (Mar. 2, 1999); Letter from Amy Klein to George E. Pataki, Gov. of N.Y. (Mar. 5, 1999); Letter

in the letters are probably among the most infamous “pure hate” acts of violence in the public consciousness: the dragging death of James Byrd, Jr., by white supremacists in Jasper, Texas, in 1998, and the beating death of gay University of Wyoming student Matthew Shepard the same year in Laramie, Wyoming.<sup>96</sup>

### 3. The Assembly Bill

A different piece of hate crime legislation that was under consideration contemporaneously offers some clues as to the legislative intent behind the bill that was passed.<sup>97</sup> The bill that became the Hate Crimes Act of 2000 originated in the Senate at the behest of the Governor.<sup>98</sup> By contrast, the Assembly had passed its own bill during each of the previous eleven years, only to see it fail in the Senate each time.<sup>99</sup> The 1999-2000 legislative session was no exception. The Assembly bill had passed the Assembly and was—yet again—being denied a floor vote in the Senate, when that body passed the Governor’s bill.<sup>100</sup>

There were significant differences between the two pieces of legislation. Rather than enhancing sentences for crimes where bias was a motive, Assembly bill A.1573 created a separate crime of bias-motivated violence or intimidation.<sup>101</sup> Like its Senate counterpart, it included legislative findings, but

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from Robin S. Merrill to George E. Pataki, Gov. of N.Y. (Mar. 10, 1999); Letter from Helen Quirini to George E. Pataki, Gov. of N.Y. (undated); Letter from Michael Rubinovitz to George E. Pataki, Gov. of N.Y. (Mar. 11, 1999); Letter from Herbert K. Reis, Esq., to George E. Pataki, Gov. of N.Y. (Mar. 12, 1999). All letters are part of the legislative packet and can be viewed at <http://image.iarchives.nysed.gov/images/images/96904.pdf>.

<sup>96</sup> See sources cited *supra* note 95. Matthew Shepard, a 22-year-old, openly gay University of Wyoming student, was beaten, burned, and tied to a fence in October 1998 after two men, pretending to be gay, approached him at a Laramie bar. James Brooke, *Gay Man Beaten and Left for Dead; 2 Are Charged*, N.Y. TIMES, Oct. 10, 1998, at A9. He succumbed to his injuries a short time later. James Brooke, *Gay Man Dies from Attack, Fanning Outrage and Debate*, N.Y. TIMES, Oct. 13, 1998, at A1. James Byrd, Jr., a black man, was beaten and chained to a car by three white supremacists, then dragged for some two miles to his death in June 1998. Carol Marie Cropper, *Black Man Fatally Dragged in a Possible Racial Killing*, N.Y. TIMES, June 10, 1998, at A16.

<sup>97</sup> Where the final version of a bill passed differs from an earlier version, a court may infer that the drafters of the final version were aware of those differences and consciously intended them. See *Kimmel v. State of New York*, 906 N.Y.S.2d 403, 408 (N.Y. App. Div., 4th Dep’t. 2010) (finding that final 1989 version of the Equal Access to Justice Act was intended to have broader reach than the rejected 1982, 1983, 1984 and 1986 versions).

<sup>98</sup> See Memorandum, Governor’s Program Bill No. 1RR (2000).

<sup>99</sup> Liam Plevin, *Analysis / By Any Means Necessary / Nassau Republicans Support Liberal Bills to Win Votes*, NEWSDAY (N.Y.), June 25, 2000, at A17.

<sup>100</sup> Editorial, *Taking Action on Hate Crimes*, N.Y. TIMES, June 17, 2000, at A14.

<sup>101</sup> A.1573 § 4, 1999 Assem., 222d Sess. (N.Y. 1999).

it differed in that it would have explicitly made the findings a functioning part of the statute, thus eliminating the uncertainty surrounding the purpose of the findings included in the bill that was passed.<sup>102</sup> In sum, the legislative findings were included to guard against prosecutorial overreaching: Section 1 of the bill required prosecutors to submit an attestation to accompany the grand jury indictment averring that he or she had found the grand jury review of the evidence to be consistent with the legislative findings.<sup>103</sup> Section 2 of the bill gave defendants the right to move for dismissal on the grounds that the application of the law in a particular case was not consistent with the legislative findings.<sup>104</sup> If those provisions did not provide a clear enough indication that the Assembly was concerned with over-application, its memo on the bill offers an explicit rationale for the inclusion of the findings.<sup>105</sup>

None of this means that the framers of the Hate Crimes Act of 2000—in the version that passed—intended anything different. However, the existence of A. 1573 at least put the Senate and the Governor’s legislative team on notice that the issue of overreaching should be a concern. The legislature’s decision not to include a similar provision in the enacted legislation can be interpreted as a conscious decision to pass a bill that folded opportunistic bias crimes within its purview.

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<sup>102</sup> See *supra* Part II.B.1.

<sup>103</sup> A.1573 § 1. In other words, the bill would have imposed on prosecutors the quasi-judicial duty to determine legislative intent and to circumscribe their own charging decisions.

<sup>104</sup> *Id.* § 2.

<sup>105</sup> Memorandum on Provisions in the Bias Bill, A.1573, 1999 Assem., 222d Sess. (N.Y. 1999) (“The bill includes a statement of ‘Legislative Findings.’ This statement is intended to make it clear that it is not enough for the accused to merely be of a different ethnic background, gender, physical condition or sexual orientation of the victim for this statute to come into play. There must be a showing that the defendant had the specific intent to deprive an individual or group of an enumerated civil right.”). In explaining the structure and function of the proposed law to its critics on the Assembly floor, its sponsor, Assemblyman Arthur Eve, engaged in the following illuminating colloquy with colleague David Seaman:

Mr. Seaman: It has to be proven that it was done not because it was easier to take the pocketbook away from the senior citizen—

Mr. Eve: That’s right.

Mr. Seaman:—but because there was some disregard for that senior citizen?

Mr. Eve: That’s right. Because of their age.

N.Y. Assembly Debate on Assembly Bill A.1573, at 16 (Jan. 19, 1999).

#### 4. Public Statements

The individual legislators who sponsored and voted for the Hate Crimes Act offered the public various arguments in its favor, though very few have any relevance to discerning their intent as to the inclusion of crimes of opportunity in the statute's scope. To the small extent legislators' public statements were relevant to this issue, most appear to support a pure-hate-only interpretation of the bill.<sup>106</sup> The same perceptions are evident in statements by other politicians weighing in publicly on the bill's merits.<sup>107</sup>

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<sup>106</sup> For example, when the bill was passed, State Senator Roy Goodman, a Manhattan Republican who sponsored the bill in the Senate, told reporters that, "This [bill] recognizes that a bias crime is a crime not committed against an individual but a whole class of people," while specifically mentioning hate-based gay-bashing incidents. Tom Precious, *After 11 Tries, State Senate Is Set to Pass Hate-Crime Law*, BUFFALO NEWS, June 7, 2000, at 8B. Goodman, addressing the Senate, was even less measured, telling his Albany colleagues, "And I say to you that what we are attempting to deal with here is some of the darkest and most tragic impulses which enter warped minds who seek to take out vengeance upon specific groups . . ." N.Y. Senate Debate on Senate Bill S4691A, at 4533-34 (June 7, 2000).

The bill passed in 2000, in large part because Senator Joseph Bruno, the majority leader who blocked the bill the previous eleven years, changed course and agreed to support it—albeit grudgingly. Bruno told Newsday:

I don't believe that a bias or hate bill by itself is going to do anything to reduce crime. But I believe that the message that we're focusing on people who have malice in their hearts or hate or a bias towards an individual or group. . . . [M]aybe the time has come for us to send that message out there.

Jordan Rau & Liam Plevin, *Bias Bill Is Expected to Advance*, NEWSDAY (N.Y.), June 7, 2000, at A07. Bruno's faint praise evidenced a narrower view of the legislation as directed strictly at hate, and he said much the same thing the same day in the Senate chamber during floor debate: "I have a feeling still that this legislation is more perception than it is substance." N.Y. Senate Debate on Senate Bill S4691A, at 4530 (June 7, 2000).

On the other hand, not all legislators and public officials restricted their view of hate crimes to offenses of pure hate. Then-state Senator David Paterson told reporters in June 2000 that the spate of sexual assaults during the Puerto Rican Day Parade that year were proper crimes to be charged under the statute. Thomas J. Lueck, *Manhattan: Hate Crimes*, N.Y. TIMES, June 21, 2000, at B8 ("The appalling assaults that occurred following the Puerto Rican Day Parade in Central Park meet the test."). I presume here that Paterson meant that the hate crime statute could be applied to the selection of the victims as women, not as non-Latinas. Nevertheless, in either eventuality, there was no evidence of group animus in the assaults.

<sup>107</sup> Westchester District Attorney Jeanine Pirro spoke out in favor of the law, calling attention, with examples, to strictly hate-based incidents. Pirro told the *New York Times* in a 2000 interview, "We've seen explosions in Westchester. We've seen stabbings. We've seen people assaulted. We've seen people who just open their own door and have someone say to them, 'I don't like people like you living in my country. Go back to where you came from.'" Kate Stone Lombardi, *County Arms Itself to Battle Internet's Messengers of Hate*, N.Y. TIMES, Dec. 5, 1999, at 14WC. Even critics failed to perceive—or at least were not concerned by—the possibility that crimes of opportunity with little actual "hate" would be swept up by the statute. Conservative Party chair Michael Long objected primarily to the bill's creation—in his view, at least—of

## 5. Public Debate and Media Coverage

Naturally, much of the public debate over the passage of the bill took place on the opinion pages of the state's major newspapers. By and large—regardless of which side the writers or editorial boards took—the understanding appears to have been that the law would cover crimes motivated by hate. The concept of opportunistic bias crimes seems not to have played any role in the position of the print media.

Not surprisingly, those in favor of the bill chose to highlight the most heinous and disturbing crimes of pure hate, since such crimes would likely strike an emotional chord with readers. Writing in the *Daily News*, for example, columnist Albor Ruiz highlighted the killing of a gay, black Long Island teenager by his white father as a horrific example of the type of offenses the Hate Crimes Act would combat.<sup>108</sup> A *New York Times* editorial calling for the passage of a compromise bill that would reconcile different Assembly and Senate versions clearly showed that the *Times*' editorial board believed the bill would punish—or at least was meant to punish—only crimes of pure hate.<sup>109</sup>

One might reasonably expect that the bill's opponents, in particular, would perceive the bill to have criminalized borderline conduct such as opportunistic bias crimes. Instead, the opinion pages of newspapers opposing the legislation were filled with wider objections to hate crimes in general. Regarding efficacy, for example, one writer in the *Daily News* suggested that the hate-crime “problem” was not as pervasive as believed, and that similar legislation across the United States had had little effect in combating it.<sup>110</sup> Seeing the bill as a monument to identity politics, the *New York Post* proclaimed, “We may be a land of equal justice under law, but the

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protected classes, telling the *Buffalo News*, “Isn't the average person's life and safety worth just as much as a homosexual?” Precious, *supra* note 106. Long misapprehends the bill's even-handedness: the statute would punish equally an attack by gays on a heterosexual whose sexual orientation was related to the crime's motive.

<sup>108</sup> Albor Ruiz, *Horrible Slay May Revive Hate-Crime Legislation*, *DAILY NEWS* (N.Y.), March 30, 2000, at Suburban 4.

<sup>109</sup> Editorial, *Attacking Hate Crimes*, *N.Y. TIMES*, June 9, 2000, at A30 (“This week the State Senate finally approved a bill that will increase punishments for those convicted of crimes motivated by hatred.”).

<sup>110</sup> Edward Lewine, *Hate Law: Paper Tiger?*, *DAILY NEWS* (N.Y.), July 16, 2000, at 13.

inescapable conclusion one draws from these laws is: Some groups are more equal than others.”<sup>111</sup>

In fact, it was the rare commentator who perceived the crimes-of-hate/crimes-of-opportunity distinction, and even then, it appears only to have been singled out regarding sex crimes. Only one news editorial came close to isolating the issue, asking if heterosexual rapes would henceforth be prosecuted as hate crimes.<sup>112</sup>

## 6. Court Interpretations

Ordinarily, appellate courts’ interpretations would provide some of the best clues as to the legislative intent of a statute and would, at any rate, constitute binding resolutions of doubts as to a statute’s meaning.<sup>113</sup> Unfortunately, the New York appellate courts have had precious little opportunity to contemplate the Hate Crimes Act. As of June 2011, the Court of Appeals had done so in detail only once.<sup>114</sup> The four Appellate Divisions have decided only eighteen cases involving the statute. None directly address the question of the statute’s intended scope.<sup>115</sup> With respect to the direct appeals of Fox and Fortunato themselves, the former has not yet been decided, and the latter did not raise any Hate Crimes Act-related issues.<sup>116</sup>

Of the trial courts that have discussed this issue, however, as of the time of the writing of this note, only *Fox*

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<sup>111</sup> Rod Dreher, *Is It a Hate Crime to Beat up Sickos in Sheets?*, N.Y. POST, Oct. 19, 1999, at 18. The context of the discussion was enhancement of the federal hate crime statute to include sexual orientation, but the point was directed at hate crime laws in general, and presumably the New York bill then under discussion in Albany.

<sup>112</sup> See Editorial, *Targeting Hate; Details to Come*, BUFFALO NEWS, June 13, 2000, at 2B; The issue was, however, flagged by legal journalists. See Glenn Pincus, *Courts and Prosecutors Face New Hate Crime Act*, N.Y. L.J., Sept. 21, 2000, at 1 (calling the inclusion of sex crimes in the act “probably an unintended result calling for considerable prosecutorial restraint and discretion”).

<sup>113</sup> N.Y. STAT. LAW § 77 (McKinney 2011) (“The construction of a statute is a question of law for the court and should not be submitted to the jury.”).

<sup>114</sup> In *People v. Assi*, 928 N.E.2d 388 (N.Y. 2010), the Court of Appeals addressed two issues not relevant to this note. First, the court held that the statute applied to property crimes, despite the reference to “a person” in section 485.05. *Id.* at 391. Second, the court rejected the defendant’s claim that the statute had not yet taken effect on October 8, 2010, the day of the events at issue, because it was a Sunday. *Id.* at 392. The *Assi* case is discussed further *infra* Part III.

<sup>115</sup> The vast majority consider appeals of hate crime convictions, or their Family Court equivalents, where the appellant argues that the verdict was against the weight of the evidence. See, e.g., *People v. Ortiz*, 851 N.Y.S.2d 784 (App. Div. 2008); *In re Vanna W.*, 846 N.Y.S.2d 354 (App. Div. 2007).

<sup>116</sup> *People v. Fortunato*, 903 N.Y.S.2d 910 (App. Div. 2010), *leave to appeal denied*, 15 N.Y.3d 893 (2010).

subjected this issue to a thorough analysis. As noted above,<sup>117</sup> the defendants in *Fox* claimed that their selection of Sandy as the victim of their criminal scheme was motivated by opportunistic calculation, not hatred of gays, and thus fell outside the statute.<sup>118</sup> They pointed to the cooperating defendant Gary Timmins' grand jury testimony that defendant Fortunato told the group that he had contacted and robbed gay men in the past, and that "this was an easy way to rob someone."<sup>119</sup>

In rejecting the defendants' claim that their alleged conduct fell outside the scope of the statute, the trial judge, Jill Konviser, suggested that the defendants were, in effect, asking the court to redefine the clear meaning of the statute.<sup>120</sup> The judge declined to do so, noting specifically that the inclusion of the legislative findings in the statute—whatever its purpose—did nothing to alter the clear language of section 485.05.<sup>121</sup> Rather, she suggested an interpretation of the legislative findings (and for that matter, the statute's title) that did considerably less violence to the law's practical scope: that the legislature, in including the language it did, made a finding that opportunistic bias crimes were of *equivalent* odiousness to crime of pure hate and thus could be subsumed under a statute that mainly criminalized the latter.<sup>122</sup>

The *Fox* court did not subject the Hate Crime Act to much scrutiny. This need not have been the case, since the trial judge, having served as Governor Pataki's Senior Assistant Counsel from 1997 to 2002, was uniquely positioned to offer an insider's perspective on legislative intent.<sup>123</sup> However, as the judge herself pointed out in the *Fox* opinion, once the court

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<sup>117</sup> For a brief review of the facts of *Fox*, see *supra* Part I.

<sup>118</sup> Memorandum of Law in Support of Defendant Fortunato's Motion to Dismiss at 2, *People v. Fox*, 844 N.Y.S.2d 627 (Sup. Ct. 2007) (No. 8607/06) ("[T]hey did so *not* because of any animus or prejudice against gays which is the heart and soul of this legislation.").

<sup>119</sup> *Fox*, 844 N.Y.S.2d at 631.

<sup>120</sup> *Id.* at 633 ("The defendants implicitly recognize that their conduct falls within the plain language of the hate crimes statute and seek to avoid its implications by asking this court to redefine a hate crime in a manner that would remove them from the scope of the statute.").

<sup>121</sup> *Id.* at 633 & n.4.

<sup>122</sup> *Id.* at 633 ("The Legislature, through its findings, therefore, made an assessment that the intentional selection of a victim based on a protected characteristic is tantamount to a crime motivated by bias, prejudice or hatred, thereby justifying enhanced punishment.").

<sup>123</sup> See *Judicial Directory—Hon. Jill Konviser*, N.Y. UNIFIED COURT SYS., <http://www.nycourtsystem.com/Applications/JudicialDirectory/Bio.php?ID=7030086> (last visited Feb. 11, 2011).



determines that the statute is clearly worded and unambiguous, the court's analysis is at an end.<sup>124</sup> Therefore, any further discussion of the legislative history of the Act would not have been appropriate.<sup>125</sup> In *Fox*, the court did take the extra step of offering an explanation for the inclusion of the legislative findings—namely, to justify enactment, communicate outrage, and advance its goal of deterring bias crimes.<sup>126</sup>

*Fox* is the only reported case to have squarely considered this issue. In fact, no judge has subjected the statute to as searching a level of scrutiny. With respect to the opportunistic bias crime issue, one Family Court assumed—without citing authority—that the legislature could not possibly have intended to include opportunistic bias crimes.<sup>127</sup> In *People v. Diaz*, a Supreme Court<sup>128</sup> remarked that the legislative findings implicitly referenced historical injustices.<sup>129</sup> Another, in *People v. Amadeo*, averred that opportunistic bias crimes were “probably not even covered by the act.”<sup>130</sup>

*Amadeo* is also noteworthy because the court had at its disposal not only the arguments of the parties, but also those of the Attorney General, who retains a statutory right to intervene where the constitutionality of a statute is in question.<sup>131</sup> In its brief, the Attorney General summarily disposed of defendant Amadeo's argument, sounding very much like the *Fox* defendants:

The examples cited by the defendant, i.e. crimes against women and against Asian shopkeepers based on their vulnerability as victims, would arguably not fall within the ambit of the hate crimes statute

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<sup>124</sup> *Fox*, 844 N.Y.S.2d at 633 (“The governing rule of statutory construction is that courts are obliged to interpret a statute to effectuate the intent of the Legislature, and when the statutory language is clear and unambiguous, it should be construed so as to give effect to the plain meaning of [the] words’ used.” (citing *People v. Finnegan*, 647 N.E.2d 758, 760 (N.Y. 1995))).

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> *In re John V.*, 820 N.Y.S.2d 490, 495 n.3 (Fam. Ct. 2006) (“No doubt, the Legislature did not intend the Hate Crimes Act to have such a reach—but it could.”).

<sup>128</sup> In New York State, the trial-level criminal court with jurisdiction over felonies is somewhat confusingly called Supreme Court.

<sup>129</sup> *People v. Diaz*, 727 N.Y.S.2d 298, 300 (Sup. Ct. 2001) (“Implicit in the findings, of course, is the acknowledgment of our shared pain from past crimes committed against masses of peoples, groups, and individuals which unquestionably were meant to target certain classes of people.”).

<sup>130</sup> *People v. Amadeo*, No. 3523/2000, 2001 N.Y. Misc. LEXIS 406, at \*12 & n.7 (Sup. Ct. Aug. 1, 2001).

<sup>131</sup> See N.Y. C.P.L.R. 1012(b) (Consol. 2010).

unless the proof included evidence of some group-based animus motivating the defendants.<sup>132</sup>

Unlike the *Fox* court, the Attorney General treated the legislative findings in the Hate Crimes Act as a substantive provision, and accordingly found that the findings precluded application of the law to opportunistic bias crimes.<sup>133</sup>

## 7. Other Jurisdictions

Because New York enacted its hate crime statute so late in relation to other states, the drafters had the ability to model the statute based on the laws that existed in other jurisdictions. A survey of state hate crime laws that existed at the time New York's Hate Crimes Act was under consideration shows that several states had clearly modeled their statutes to require that a defendant be motivated by hate or animus.<sup>134</sup> Since these models were available to the drafters, the inference can be drawn that they made a deliberate decision to omit particular language limiting the statute to crimes motivated by hate.

Nevertheless, an alternative explanation exists. The drafters of the Hate Crimes Act used as their model the Wisconsin statute upheld in *Mitchell*.<sup>135</sup> Assuming for the moment that the primary concern of the drafters was to produce a statute that would not be struck down by a court, their importation of the Wisconsin statute—even including its ambiguities as to crimes of opportunity and crimes of hate—makes perfect sense. In *Mitchell*, the Wisconsin statute received the U.S. Supreme Court's imprimatur; in the roughly seven years following, no other potentially fatal flaws presented

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<sup>132</sup> Memorandum of Law in Opposition to Motion to Dismiss Indictment Counts at 10, *Amadeo*, 2001 N.Y. Misc. LEXIS 406 (No. 3523/2000). The defendant in *Amadeo* was charged with knifing a man he believed to be Mexican on a subway platform and, afterward, hurling ethnic slurs. *Amadeo*, 2001 N.Y. Misc. LEXIS 406 at \*1-2. This conduct could not reasonably be classified as an opportunistic bias crime, but the defendant nonetheless made the argument—unsuccessfully—that his due process rights were violated by being prosecuted under a statute worded broadly enough to include conduct not intended by the legislature. *Id.* at 11-12.

<sup>133</sup> *Id.* (“Interpreting the statute in light of these findings would require that the ‘belief or perception regarding’ the group to which a victim belongs . . . must include a bias or prejudice against that group.” (internal citations omitted)).

<sup>134</sup> LAWRENCE, *supra* note 55, at 191 (listing FLA. STAT ANN. § 775.085 (West 1995) (“commission of such felony or misdemeanor evidences prejudice based on the race, color, [etc.]”); MASS. GEN. LAWS ch. 22c, § 32 (1997) (“any criminal act coupled with overt actions motivated by bigotry and bias”); N.H. REV. STAT. ANN. § 651:6 (1997) (“because of hostility towards the victim’s religion, race, [etc.]”)).

<sup>135</sup> See *supra* note 60 and accompanying text.

themselves. Viewed this way, the drafters' choice to forego the more specific language embodied in other states' statutes (language that would have clarified the ambiguities discussed in this note), might reflect less a conscious choice as to the statute's scope than the simple possibility that the legislature was constitutionally risk-averse.<sup>136</sup>

### 8. Summary

On balance, it is very difficult to say with certainty that the legislature specifically intended to enact a statute that folded within its scope opportunistic bias crimes. The statements issued by its framers, other public officials, and the public at large overwhelmingly suggest that pure hate was the intended target of the statute. Although the one case on point, *Fox*, unambiguously takes the opposite position, it does so more as a matter of judicial restraint in statutory interpretation. Other courts, as well as the Office of the Attorney General, appear to disagree with *Fox*. Finally, the fact that the Assembly bill was clearly written to exclude opportunistic bias crimes does not mean that the Senate must have intended the opposite, by its decision to pass a differently worded bill. Even if the framers of the Senate bill intended to include opportunistic bias crimes, there is strong evidence that most of the legislators who voted for it and most members of the public who supported it were unaware of that particular detail.

### III. APPLICATION OF THE NEW YORK STATUTE OUTSIDE THE BOUNDS OF PURE HATE CRIMES

Use of the Hate Crimes Act in New York State got off to what appeared to be a problem-free start. On Sunday, October 8, 2000, the very day the law took effect and the day before Yom Kippur, three Yonkers men fire-bombed a synagogue in

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<sup>136</sup> The Wisconsin statute, as amended in 1992, read in pertinent part:

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

Act of Apr. 30, 1992, 1991 Wis. Sess. Laws 291.

the Riverdale section of the Bronx.<sup>137</sup> The men, all Arab-American, told police they wanted to make a statement against Israeli occupation of the West Bank and Gaza.<sup>138</sup> In large part, it appeared to be just the sort of crime that the Hate Crimes Act of 2000 was intended to punish.<sup>139</sup>

Nevertheless, not every crime in which section 485 was used over the next nine years fit as conveniently into the intended applications as did the firebombing attack. Two similar incidents in which prosecutors drew diametrically opposed conclusions and made different charging decisions are illustrative of the degree to which the Hate Crimes Act is open to interpretation. In 2004, a Queens special education teacher was charged under the statute with scrawling the words “nigger,” “fuck,” and “pussi” on the wall of a school restroom.<sup>140</sup> The trial judge ruled that the charge could stand even though the graffiti did not appear to be directed at any specific victim.<sup>141</sup> That same year, two Staten Island teens were arrested for pouring gasoline in the shape of a massive swastika in an intersection, then setting it ablaze.<sup>142</sup> The district attorney declined to bring hate crime charges, explaining that those charges were not appropriate where a particular victim could not be discerned.<sup>143</sup> It is difficult to see much significant difference between the two crimes on the issue of whether a specific victim could be discerned; nonetheless, two district attorneys made entirely opposite charging decisions.

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<sup>137</sup> Elissa Gootman, *Hate-Crime Charges Filed in Vandalism of Synagogue*, N.Y. TIMES, Oct. 12, 2000, at B3. A fourth man was also arrested but not charged and released pending further investigation. *Id.*

<sup>138</sup> *People v. Assi*, 877 N.Y.S.2d 231, 234 (App. Div. 2009), *aff'd* 928 N.E. 2d 388 (N.Y. 2010).

<sup>139</sup> See *supra* Part II.B regarding the intent of the statute.

<sup>140</sup> *People v. Moorjaney*, No. 2098/04, 2006 N.Y. Misc. LEXIS 791, at \*1 (Sup. Ct. Mar. 24, 2006). Media accounts differ in the exact phrase scrawled, reporting it as “nigger die.” See, e.g., Celeste Katz & Austin Fenner, *Nab Teacher in Hate-Graffiti Attack*, DAILY NEWS (N.Y.), Mar. 13, 2004, at 2.

<sup>141</sup> *Moorjaney*, 2006 N.Y. Misc. LEXIS 791, at \*4 (“[T]here was sufficient evidence for the Grand Jury to conclude that the writer of the offensive words was motivated by a perception of the person or persons who used the third floor female bathroom; that would include, among others, all the people in the school, all the female people in the school, [and] all the black female people . . .”).

<sup>142</sup> Ikimulisa Livingston, *S.I. Swasti-Punks Duck ‘Hate’ Rap*, N.Y. POST, July 9, 2004, at 19.

<sup>143</sup> *Id.* (“‘Though the burning of the swastika was ‘insensitive, disgusting and offensive to any sensible person,’ in this case it didn’t justify hate-crime charges because it wasn’t aimed at any particular person or group,’ said Staten Island DA Daniel Donovan. ‘The hate-crime statute as written by state legislators does not support the filing of hate crime charges in this case,’ Donovan said.”).

While cases such as the two outlined above underscore the difficulty of applying the statute in a uniform fashion, it was another 2004 Queens case that shows just how far the envelope might be pushed in construing “hate.” Shirley Miller, an alleged scam artist accused of fleecing four older, lonely men out of hundreds of thousands of dollars by pretending to be their sweetheart, found herself charged not simply with grand larceny<sup>144</sup>—but grand larceny as a hate crime.<sup>145</sup> Miller pleaded guilty mid-trial in exchange for a four-month sentence.<sup>146</sup>

The Miller case is indicative of the particular susceptibility of the “age” category in the Hate Crimes Act to the prosecution of opportunistic hate crimes. Armed with this powerful tool to enhance criminal penalties, prosecutors have applied it zealously to cases where the facts fit the language of the statute. Prosecutors in at least two boroughs of New York City have obtained indictments on hate crime charges in violent muggings of elderly victims, where there is some evidence that the perpetrator targeted the elderly so as to minimize the possibility of resistance.<sup>147</sup> In Queens, District Attorney Richard Brown prosecuted several more female grifters like Miller, each time charging larceny as a hate crime.<sup>148</sup>

Nevertheless, application of the Hate Crimes Act to opportunistic bias crimes has not been limited to elderly victims. In Queens, District Attorney Brown—apparently

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<sup>144</sup> N.Y. PENAL LAW § 155.40 (McKinney 2011).

<sup>145</sup> Scott Shifrel, *Call Elderly Scam a Qns. Hate Crime*, DAILY NEWS (N.Y.), Oct. 9, 2004, at 14 (calling the tactic “a novel strategy” and quoting Queens DA Richard Brown as saying, “Such crimes of financial exploitation are commonly known as ‘sweetheart scams’ and are among the most devastating forms of elder abuse.”).

<sup>146</sup> Gersh Kuntzman, *‘Golden Oldie’ Bilk Gal: I Did It*, N.Y. POST, Oct. 15, 2005, at 5. Miller could have faced a maximum sentence of up to twenty-five years in prison. See Shifrel, *supra* note 145.

<sup>147</sup> See, e.g., Ikimulisa Livingston, *800G Rip-off of 93-yr.-old Is a Hate Crime*, N.Y. POST, Feb. 28, 2008, at 23 (Queens); *Man Is Charged with Hate Crimes in Attacks on 2 Elderly Women*, N.Y. TIMES, Apr. 29, 2007 (Queens); Melissa Grace et al., *Thug Chokes on His Tears; Granny-Bashing Ex-Con Says He Preyed on B’klyn Elderly to Feed Crack Addiction*, DAILY NEWS (N.Y.), Aug. 22, 2008, at 2; Webcrims Case Details (on file with author) (Brooklyn). Nevertheless, it is noteworthy that in a similar Manhattan case, the New York County District Attorney, Robert Morgenthau, did not seek hate crime charges. Melissa Grace, *Mugger of Elderly a Serial Thug*, DAILY NEWS (N.Y.), Aug. 27, 2009, at 29.

<sup>148</sup> Ikimulisa Livingston, *Teen Charged with \$1M Love Scam*, N.Y. POST, Oct. 6, 2006, at 27; Warren Woodbury, Jr. & Scott Shifrel, *Lost Love and Out 300Gs; Nab Woman in Grift Scam*, DAILY NEWS (N.Y.), Oct. 7, 2005, at 8. In at least one other Queens case, hate crime charges were applied to a scammer who, rather than preying upon loneliness, preyed upon the perceived gullibility of the elderly, disguising himself as a water man to gain entry to victims’ homes, then stealing their valuables. John Sullivan, *Imposter Sentenced for Burglaries*, N.Y. TIMES, Aug. 22, 2006, at B4.

among the most aggressive law enforcement officials when it comes to section 485—charged the members of an alleged auto insurance fraud ring under the statute, arguing that the defendants targeted Asian-Americans in the Flushing section of the borough.<sup>149</sup> The district attorney’s theory was that the defendants “created” phony accidents by deliberately colliding with Asian drivers, selecting them based on the belief that the language barrier made them easy targets and “that they were bad drivers and that they would be blamed by police and insurers for the accidents, instead of the culprits.”<sup>150</sup>

It was against this backdrop of inconsistent, and to some degree experimental charging under the Hate Crimes Act, that the attempted robbery of Michael Sandy took place. The Kings County District Attorney, Charles Hynes—himself the special prosecutor in a noted pre-Hate-Crimes-Act case of racial animus<sup>151</sup>—characterized his office’s approach in the Sandy case as pioneering. In a press release issued to announce the indictment of the three *Fox* defendants, Hynes suggested that his office’s use of the hate crime law in the case was nontraditional.<sup>152</sup> In interviews, officials in Hynes’ office told

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<sup>149</sup> Maria Alvarez, *DA: Scammers Targeted Asians*, *NEWSDAY* (N.Y.), Oct. 31, 2008, at A52.

<sup>150</sup> *Id.*

<sup>151</sup> Hynes was the special prosecutor in the 1987 trial of a group of white men who chased a black man to his death on a highway in the Howard Beach section of Queens. *Biography of Charles J. Hynes*, KINGS CNTY. DIST. ATTORNEY’S OFFICE, [http://www.brooklynda.org/hynes/da\\_corner.htm](http://www.brooklynda.org/hynes/da_corner.htm) (last visited Feb. 11, 2011); Denis Hamill, *Hell Night That Changed N.Y.C.: Atty’s on Both Sides Go Back Down Mean Streets. Howard Beach 20 Years Later*, *DAILY NEWS* (N.Y.), Dec. 17, 2006, at 22.

<sup>152</sup> Press Release, Kings County Dist. Attorney’s Office, Kings County District Attorney Charles J. Hynes Announces Indictments in Bias Murder: Plans to Apply Little-Used Section of Hate Crime Statute (Oct. 25, 2006), *available at* [http://www.brooklynda.org/News/press\\_releases\\_2006.htm#056](http://www.brooklynda.org/News/press_releases_2006.htm#056). The DA’s release, in fact, misstates the prosecutorial approach by suggesting that some “little-used” section of the statute made the charge possible in the case:

Typically, according to state law, Hate Crimes are charged when prosecutors believe the defendants acted out of bias against the victims’ race, color, national origin, ancestry, gender, religion, religious practice, age, disability or sexual orientation. But the less used section of the law calls for Hate Crimes to be charged when the defendant intentionally selects the person against whom the offense is committed or intended to be committed based on a belief about those same factors.

*Id.*

news reporters that the approach was novel<sup>153</sup> and the news media portrayed it as such.<sup>154</sup>

Even defendant Fortunato's unexpected trial gambit of proving his own homosexuality by calling as witnesses three sexual partners failed, in the end, to make a difference.<sup>155</sup> Fortunato was convicted of second-degree manslaughter as a hate crime.<sup>156</sup> Nevertheless, in interviews with newspapers that covered the trial, jurors said they obeyed the law as it was explained to them—but disagreed with it.<sup>157</sup>

Since *Fox*, there have been a few other incidents of relevance. In Suffolk County, Long Island, a Hispanic man was charged under the hate crime statute for sending threatening notes and hurling a log and a glass bottle at worshippers at a church he once attended.<sup>158</sup> The offender, Christian Mungia Garcia, allegedly told investigators he was angry at the church for aggressively pressuring its congregation for donations.<sup>159</sup> This particular fact pattern is likely quite unique, and—strictly speaking—falls outside our discussion of opportunistic bias crimes. This defendant's motivation was not a belief that his victim would make an easy, convenient, or resistance-free target. However, the district attorney's decision to pursue hate crime charges reflect a strained reading of the statute. The crime differed in a meaningful way from more prototypical acts

<sup>153</sup> The author, who was a news reporter at the time of the case, had conversations with members of Hynes's office to this effect. The source of these conversations is confidential.

<sup>154</sup> Ginsberg & Celona, *supra* note 6; Clyde Haberman, *An Easy Target, but Does that Mean Hatred?*, N.Y. TIMES, June 26, 2007, at B1; Bart Jones, *Murder Charges in Sandy Case; Using an Obscure Statute, Prosecutors Will Seek Murder as a Hate Crime Charges on 3 Suspects*, NEWSDAY (N.Y.), Oct. 26, 2006, at A16.

<sup>155</sup> Marzulli, *supra* note 13.

<sup>156</sup> *Inmate Information*, N.Y.S. DEP'T OF CORRECTIONAL SERVS., <http://nysdocslookup.docs.state.ny.us/GCA00P00/WIQ3/WINQ130> (last visited Feb. 11, 2011).

<sup>157</sup> Michael Brick, *To the Jury's Regret, a Hate Crime Conviction*, N.Y. TIMES, Oct. 12, 2007, at B2 (Quoting a juror as saying, "By the letter of the law, Fortunato was guilty, but none of us thought that he had any hatred or animosity toward homosexuals," and adding that the statute was "perhaps too broad."); John Marzulli & Scott Shifrel, *2nd Suspect Convicted in Gay Hate Slay*, DAILY NEWS (N.Y.), Oct. 12, 2007, at 18 (Quoting jury foreman Eric Zaccar as saying, "I still don't believe it's a hate crime but by the technicality of this ridiculous law . . . It's a good law when it applies to fat white guys with baseball bats beating up a black man. But when it applies to one gay person seeking out another gay person, it's absurd.").

<sup>158</sup> Matthew Chayes & Elizabeth Moore, *Cops: It Wasn't Racial Bias; Charged with Bias Crime Against Religious Practice; Suspect Was Upset He Was Rebuffed by Church*, NEWSDAY (N.Y.), Sept. 6, 2009, at A14.

<sup>159</sup> *Id.* (quoting the defendant as saying, in his statement to police, "I hate the church . . . I want everyone to know that the church is only after their money and that they should all leave the church and just read the Bible.").

of religious vandalism, where the perpetrator's "hate" is based purely on the religious identity of the members, rather than, as here, a specific policy, position, or activity of the particular religious institution. The soliciting of donations is a widespread practice among religious institutions; to use it as the basis for a hate crime charge is nearly as counterintuitive as charging a hate crime in a hypothetical case where a perpetrator eggs a church to communicate his disapproval of bingo night.

The other incident of relevance to this discussion provides an example of the reverse phenomenon seen in the church-harassment case and *Fox*—that of a district attorney choosing not to bring hate crime charges where, at least by the standards of other district attorneys, such charges would be appropriate. On Sept. 2, 2006, Ricardo Salinas, a Mexican-born cook at a Staten Island restaurant, was beaten and robbed by a trio of teens.<sup>160</sup> Salinas succumbed to a heart attack after the assault.<sup>161</sup> At arraignment, prosecutors, relying on statements made by one defendant, John Messiha, said that another defendant, Travis King, had suggested to Messiha and codefendant Daniel Betancourt that they rob a Mexican.<sup>162</sup> Nevertheless, the prosecutor did not seek, nor did the grand jury hand up, hate crime charges against the defendants.<sup>163</sup> A spokesman for the District Attorney's Office explained that the office exercised discretion in not applying the hate crime statute: "We saw it as a crime of opportunity, not a crime of hate. If they saw another guy walking down the street with \$20 in his hand, they might have robbed him first."<sup>164</sup>

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<sup>160</sup> Mike Jaccarino & Ernie Naspretto, *Murdered for \$60; Wife Hears His Cries for Help as Murdered S.I. Man Calls Home*, DAILY NEWS (N.Y.), Sept. 4, 2006, at 7.

<sup>161</sup> Peter Kadusin & Leo Standora, *3 Aimed to Rob a Mexican: DA*, DAILY NEWS (N.Y.), Sept. 6, 2006, at 8.

<sup>162</sup> *Id.* (quoting Assistant District Attorney Alex Schapiro as saying, "The defendants were playing video games and decided to rob somebody. They wanted it to be a Mexican man and that's when they went out and found Mr. Salinas."); Criminal Complaint at 2, *People v. Betancourt*, No. 2006RI007455 (Richmond Cnty. Crim. Ct. Sept. 4, 2006) (attributing to defendant Messiha the statement, "Travis said we should rob a Mexican. We were walking down Van Pelt [Avenue] and saw a Mexican. Travis said to get him . . .").

<sup>163</sup> Robert F. Moore, *DA: A Crime of Greed, Not Hate*, DAILY NEWS (N.Y.), Oct. 12, 2006, at 36 (quoting the DA, "[I]t is clear that the motivation for the attack on Mr. Salinas was robbery, not ethnicity."). The *Daily News* article incorrectly asserts that prosecutors no longer believed King made the statement about robbing a Mexican. In fact, this remained evidence in the case up to and including trial. Interview with William Smith, Dir. of Pub. Info., Richmond Cnty. Dist. Attorney's Office, in Brooklyn, N.Y. (Oct. 19, 2009).

<sup>164</sup> Interview with William Smith, *supra* note 163.



It is hard to find meaningful differences between *Fox* and the Betancourt, King, and Messiha case. In both cases, teenage perpetrators looking primarily for money decided to rob someone. In both cases, the defendants decided to rob a member of a particular group. In *Fox*, that plan stemmed from a belief that a gay man would be an easier target, one less likely to resist or report the crime. In the Staten Island case, the exact motive for robbing a Mexican remains shrouded in some uncertainty. Nevertheless, the district attorney's facile explanation that the motive remained "robbery, not ethnicity," does nothing to close the issue. Defendants could not plausibly have targeted a Mexican victim without at least some reason. If that reason was pure hate, the decision not to apply the statute is inexplicable. But even if that reason turned out to have been the belief that Mexicans—especially illegal laborers—carry cash, then the case fits squarely within the *Fox* mold. In that case, the decision not to charge can only be explained by the District Attorney's Office's apparent rejection of the applicability of the hate crime statute to opportunistic bias crimes.

#### IV. THE CONSEQUENCES OF POORLY DRAFTED STATUTES AND RECOMMENDED SOLUTIONS

That two district attorneys should reach opposite determinations on cases so similar, and which took place within five weeks of each other in the same year, indicates the problems created by the Hate Crimes Act of 2000. The law's failure to clearly include or clearly exclude opportunistic bias crimes has invited prosecutors to fill in the statute's black holes by exercising their own discretion. It is axiomatic that prosecutors enjoy unreviewable discretion over decisions whether to charge, and what charges to bring.<sup>165</sup> However, that discretion serves the public best when it is exercised in the

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<sup>165</sup> See *United States v. Lovasco*, 431 U.S. 783, 790 (1977) ("Judges are not free, in defining 'due process,' to impose on law enforcement officials our 'personal and private notions' of fairness and to 'disregard the limits that bind judges in their judicial function.'" (quoting *Rochin v. California*, 342 U.S. 165, 170 (1952))); *People v. DiFalco*, 377 N.E.2d 732, 735, 44 N.Y.2d 482, 486 (1978) ("The District Attorney has broad discretion in determining when and in what manner to prosecute a suspected offender." (citing *Lovasco*, 431 U.S. 783)); *Nieblas v. Kings County Dist. Attorney*, 619 N.Y.S.2d 703, 703 (App. Div. 1994) ("It is well-settled that the decision whether to prosecute is entrusted to the sole discretion of the District Attorney."); *People v. Harding*, 355 N.Y.S.2d 394, 397 (App. Div. 1974) (referencing the "recognizedly unfettered discretion of the District Attorney to prosecute or not to prosecute.").

context of a particular case presenting extraordinary circumstances. It does not serve the public when that discretion is exercised over so major a concern as determining the proper scope of an important legislative act. However, this note does not argue for a limitation of this discretion. Rather, it argues that the legislature is ultimately responsible for directing this discretion through carefully worded statutes.

The questions of whether opportunistic bias crimes should be punished as harshly as crimes of true hate is beyond the scope of this note. It is sufficient to note that colorable arguments exist on both sides. On the one hand, the belief or perception that certain groups make better crime targets can be as pernicious and destructive as the belief that those individuals are persons of lesser worth.<sup>166</sup> In fact, such a belief can be more harmful, because it provides a practical encouragement to commit a crime against those persons. However, it should be remembered that hate crime laws are not concerned with beliefs per se, but rather concrete acts committed in connection with beliefs.<sup>167</sup> A crime committed for a practical reason—however misinformed, prejudicial, or irrational that reason—tends not to generate the same level of revulsion as a crime committed out of pure hate, according to many commentators.<sup>168</sup>

In any event, the answer to the question is less important than the basic imperative that the answer be clear to law enforcement and the citizenry. What those on either side of the crimes-of-opportunity/crimes-of-hate debate should find patently unacceptable is the possibility that the legislature failed to translate its intent accurately into law. In *Fox*, prosecutors appeared to take just the opposite position—that the legislature might enact a statute to prohibit a particular species of conduct, but that by its plain language, that statute

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<sup>166</sup> Memorandum of Law in Opposition to Motion to Dismiss Hate Crime Counts by the People of the State of New York at 12-14, *People v. Fox*, 844 N.Y.S.2d 627 (Sup. Ct. 2007) (No. 8607/06) (citing Wang, *supra* note 16). Wang argues that hate crime participants, dating back to Jim Crow-era lynch mobs, commit the offenses for a variety of reasons other than simply hate, notably social acceptance and the knowledge that the crime may be tolerated by authority. Wang, *supra* note 16, at 1413 (“Those who insist on the pure ‘animus’ model also miss the complexity and range of perpetrators’ motivations for committing even ‘prototypical’ bias crimes.”).

<sup>167</sup> See *supra* Part I.C.

<sup>168</sup> See, e.g., LAWRENCE, *supra* note 55, at 79 (“The central point here is that as we punish bias crimes, we must understand precisely what we are punishing: purposeful or knowing, conscious criminal conduct grounded in racial animus.”).

might properly be used to prohibit another related, but distinct, species of conduct.<sup>169</sup> That conclusion is troubling.

The research incorporated into this note raises significant doubts about whether the legislature specifically intended to proscribe crimes of opportunity under the Hate Crimes Act of 2000. It shows that, at best, the legislature was simply unaware of the crimes-of-opportunity/crimes-of-hate distinction and never squarely addressed the issue. To be sure, evidence exists, most notably, the existence of the Assembly version of the bill, to suggest that the law was drafted purposefully to sweep in those crimes of opportunity. But the near absence of any mention of the issue in public discourse, legislative documents, or floor debate suggests that even if this were true, the vast majority of voting legislators perceived the issue in broader strokes.<sup>170</sup>

Whether the legislative misfire discussed here rises to the level of a major problem in construction of our criminal law depends upon one's perspective. The fact that some opportunistic bias crimes may be punished as severely as pure hate crimes is unlikely to stir much sympathy in the average observer. First, the issue is limited, by definition, to a particular subset of an already-rare breed of crime. Second, and more importantly, any person prejudiced by this issue will necessarily be a person not simply accused of a crime, but already *convicted* of a crime, who now argues that he should not additionally have been convicted of a hate crime. Put differently, this is not a problem that can befall the average, law-abiding, responsible citizen. It is a problem that can only afflict a criminal. For that reason alone, it is unlikely to be considered a major injustice.

Given these realities, the prospects for seeing the statute applied only as envisioned by its drafters are dim. The cases discussed herein show that, while some district attorneys will exercise restraint in applying the statute, some will instead

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<sup>169</sup> Memorandum of Law in Opposition to Motion to Dismiss at 18, *Fox*, 844 N.Y.S.2d 627 (“[A] general law may, and frequently does, originate in some particular case or class of cases which is in the mind of the legislature at the time, but, so long as it is expressed in general language, the courts cannot, in the absence of express restrictions, limit its application to those cases, but must apply it to all cases that come within its terms and its general purpose and policy.” (quoting *Jensen v. Gen. Elec. Co.*, 82 N.Y.2d 77, 86 (1993))).

<sup>170</sup> See N.Y. STAT. § 74 (McKinney 2011) (“A court cannot by implication supply in a statute a provision which it is reasonable to suppose the Legislature intended intentionally to omit; and the failure of the Legislature to include a matter within the scope of an act may be construed as an indication that its exclusion was intended.”).

choose not only to apply it as written, but also to find novel and innovative ways to do so. Significantly, those who do not exercise restraint will find few checks—short of that exercised by the voter—on their decision. As seen in *Fox*, courts will not—and should not—step in absent a clear indication that a district attorney is actually violating the language of a statute.<sup>171</sup>

The problem is not one with an easy solution. Given the well-established discretion accorded prosecutors, a district attorney may apply a statute like the Hate Crimes Act as written; *Fox* demonstrated that a court will not force a prosecutor to engage in a searching review of the legislative history when a statute's plain meaning is evident. Instead, the legislature—having created the problem—is the only body that can correct it. Sadly, it is a body unequal to the task. Even in a well-functioning, productive legislature, an elected official arguably gains no political advantage by amending the statute in this fashion. In a legislature such as New York's, where political infighting,<sup>172</sup> corruption,<sup>173</sup> and deal making<sup>174</sup> are the norm, the prospects are even grimmer. Accordingly, unless there is an astounding and unexpected surge in political courage in Albany, the flawed statute—one that casts a wider net than its authors intended—will remain the law.

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<sup>171</sup> See *supra* note 19 and accompanying text.

<sup>172</sup> Editorial, *Still Broken After All These Years*, N.Y. TIMES, Jan. 6, 2009, at A24.

<sup>173</sup> Tom Precious, *Bruno Convicted on 2 of 8 Fraud Counts; Ex-Majority Leader Faces Prison Term; Jury Decided He Deprived Public of "Honest Services" as Senator*, BUFFALO NEWS, Dec. 8, 2009, at A1.

<sup>174</sup> Martha T. Moore, *N.Y. Lawmakers Locked in Combat; Legislative Stalemate Leaves Residents Weary, Disgusted*, USA TODAY, July 2, 2009, at 3A ("Albany runs on the principle known as 'three men in a room.' The governor, Assembly speaker and Senate president make deals in private, then send bills to the Legislature 'as a rubber stamp,' says Larry Norden of the Brennan Center for Justice at New York University, whose study of state legislatures named New York's the 'most dysfunctional.'").

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