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## Including Gender in Bias Crime Statutes: Feminist and Evolutionary Perspectives

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# NOTES

## INCLUDING GENDER IN BIAS CRIME STATUTES: FEMINIST AND EVOLUTIONARY PERSPECTIVES

In December, 1989, Marc Lepine walked into an engineering class at the University of Montreal, armed with a rifle.<sup>1</sup> He divided the class into two groups, shouting, "I want the women."<sup>2</sup> As he shot each woman at point blank range, he shouted, "You're all a bunch of feminists. I hate feminists."<sup>3</sup> After he shot fourteen women, all between the ages of twenty-one and thirty-one, he shot himself.<sup>4</sup> Lepine had been denied admission to the engineering program at the University of Montreal. The police recovered a suicide note, which revealed that Lepine blamed feminists for ruining his life.<sup>5</sup> On the last page of his suicide note, he listed the names of fifteen prominent Canadian women that he despised because they were "feminists."<sup>6</sup>

In October, 1991, George Henard drove his pickup truck through the plate glass window of a restaurant in Texas.<sup>7</sup> Henard, thirty-five-years-old and unemployed, got out of his truck and with a semi-automatic weapon opened fire in the restaurant, shouting, "Wait till those f—— women in Belton [Texas] see this! I wonder if they think it was worth it!"<sup>8</sup> He killed twenty-two people, fourteen of whom were women.<sup>9</sup> Prior to the killings, Henard had watched the Clarence Thomas hearings on television and complained that Anita Hill's sexual harassment charges were "ridiculous" and that women were "taking over the territory that rightfully belonged to men."<sup>10</sup> Earlier that year, he had attempted to file a civil rights charge against "the white women of the world."<sup>11</sup>

In making the case that gender should be included as a protected category in state bias crime statutes, the above two scenarios provide perfect examples of crimes that are motivated

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1. See, JACK LEVIN & JACK McDEVITT, *HATE CRIMES: THE RISING TIDE OF BIGOTRY AND BLOODSHED* 90 (1993).

2. *Id.* at 90.

3. *Id.*

4. See *id.* at 91.

5. *Id.*

6. *Id.*

7. *Id.* at 93.

8. *Id.*

9. See *id.*

10. *Id.*

11. *Id.*

by gender bias. In both examples, the offender explained his reasons for committing the crime, which were rooted in bias against women as a group. Other clear-cut examples of crimes that could be characterized as bias crimes against women are serial stranger rapes and fraternity gang rapes.<sup>12</sup> Crimes, such as nonstranger rape and spousal abuse, however, raise more complex questions regarding characterization as bias crimes against women.<sup>13</sup>

Although violent attack is the number one health threat of American women,<sup>14</sup> the current debate centers around the issue of which types of gender-related violence, if any, should be included in state bias crime statutes. The views regarding the inclusion of gender in state bias crime statutes fall into three general categories. The first category holds that gender-related crimes are so distinct from other types of bias crimes that they should be completely excluded from bias crime statutes.<sup>15</sup>

The second category holds that only certain crimes relating to gender should be characterized as bias crimes; specifically, a gender-based bias crime would be one in which the perpetrator clearly is looking for any woman to victimize.<sup>16</sup> One example is the Central Park Jogger case, in which a group of teenage boys between the ages of fourteen and seventeen raped and brutally beat a twenty-eight-year-old woman jogger.<sup>17</sup> The group had gathered for a night of "wilding" — harassing and attacking strangers for sport.<sup>18</sup> On the night of the attack, they decided to "get a woman jogger."<sup>19</sup>

The third category of views wholeheartedly embraces the inclusion of gender as a protected category in bias crime statutes; under this view, bias crime statutes should encompass all gender-related crimes.<sup>20</sup> In contrast to the second view, which limits

12. See Steven Bennett Weisburd & Brian Levin, "On the Basis of Sex": Recognizing Gender-Based Bias Crimes, 5 STAN. L. & POL'Y REV. 21, 35 (1994); see also *infra* notes 254-55 and accompanying text.

13. See *infra* notes 260-69 and accompanying text.

14. See, e.g., Elizabeth A. Pendo, *Recognizing Violence Against Women: Gender and the Hate Crimes Statistics Act*, 17 HARV. WOMEN'S L.J. 157, 164 (1994).

15. See, e.g., Weisburd & Levin, *supra* note 12, at 33-34 (stating that "[s]ome groups, like the ADL [Anti-Defamation League], have taken the position that while gender-related crime represents a serious threat to society, it is a distinct type of victimization that should not be addressed as a form of bias crime").

16. See *id.* at 34.

17. See LEVIN & MCDEVITT, *supra* note 1, at 17.

18. *Id.*

19. *Id.* at 10.

20. See, e.g., Weisburd & Levin, *supra* note 12, at 34.

the types of crimes that may be characterized as bias crimes, the third view hold that all types of crimes committed against women have the potential of being characterized as bias crimes.<sup>21</sup> "Advocates for women victimized by violence contend that most violent crimes against women involve at least some degree of hatred, hostility, or disrespect for all women."<sup>22</sup> Although this third view holds that gender should be included as a category in bias crime statutes, and that all gender-related crimes have the potential to be bias crimes, this view does not hold that any crime that involves a female victim constitutes a bias crime. For example, in the case of self-defense, a man may assault a woman for context-specific reasons that do not involve gender bias, such as legal justification or provocation that is proportionate to the male's assaultive response.<sup>23</sup> The above example is a gender-related crime in that the victim's gender is a salient aspect of the offense. The above example, however, is not a gender-motivated crime. Gender-motivated crimes may be viewed as a subset of gender-related crimes, which involve the additional aspect of bias against the victim's gender.<sup>24</sup>

Part I of this Note briefly defines and summarizes the general characteristics of bias crimes, explains the rationale behind the enactment of bias crime statutes, and describes generally the types of statutes that states have enacted. Part II of this Note argues that feminist theory supports the proposition that state bias crime statutes should reflect the third view, that is, encompass all gender-related crimes as a protected category.<sup>25</sup> In Part III, this Note applies evolutionary theory to further support this proposition. Specifically, Part III describes how the different reproductive goals between men and women create a tendency for males to commit acts of violence against women.

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21. See *id.*

22. JACK O'MALLEY, A PROSECUTOR'S GUIDE TO HATE CRIMES, § VIII-12-13 (1994) (citing Lois Copeland & Leslie Wolfe, *Violence Against Women as Bias-Motivated Hate Crime: Defining the Issues*, CENTER FOR WOMEN POL'Y STUD. (1991)).

23. See Weisburd & Levin, *supra* note 12, at 41.

24. See *id.* at 27.

25. This note addresses crimes committed against women who are, in terms of biology and sexual identity, female. This paper does not address the growing "transgender" movement, which seeks to remedy discrimination against transsexuals, cross-dressers, and hermaphrodites. The term "transgendered" refers to neither "gender" nor "sexual orientation." The latter terms refer to sexual practice, rather than to sexual identity. See *The "Transgendered" Seek Status Under Law, in Society: Lines of Sexual Identity are Blurred Beyond Conventional "Either-Or"*, BALT. SUN, Sept. 8, 1996, at 21A. For an overview on the problem of bias crimes against homosexuals, see generally GREGORY M. HEREK & KEVIN T. BERRILL, HATE CRIMES: CONFRONTING VIOLENCE AGAINST LESBIANS AND GAY MEN (1992).

After addressing some of the more common arguments against the inclusion of gender in bias crime statutes in Part IV, this Note argues that gender should nonetheless be included in state bias crime statutes, and that statutes should encompass all types of gender-related crimes. In Part V, this Note addresses some limitations in the usage of feminist and evolutionary theory as they relate to the problem of "gendered essentialism," and argues for the recognition of the intersection between race and gender in the application of bias crime statutes.

## I. BACKGROUND

### A. *The Definition and Nature of Bias Crimes*

"Bias crimes," also known as "hate crimes," generally are defined as crimes "committed not out of animosity toward the victim as an individual, but out of hostility toward the group to which the victim belongs."<sup>26</sup> Specifically, a bias crime is often defined as:

[An] act of intimidation, harassment, physical force, or threat of physical force . . . motivated in whole or in part by hostility to [a particular group], with the intention of causing fear or intimidation, or to deter the free exercise or enjoyment of any rights or privileges secured by the Constitution or laws of the United States . . . .<sup>27</sup>

A bias crime, therefore, consists of two components: an underlying crime, and the perpetrator's selection of his victim based upon the victim's membership in a hated group.<sup>28</sup> Bias crimes usually fall under one of two main categories: (1) predatory bias crimes, in which the offenders are looking to attack any person belonging to a particular group; or (2) opportunistic bias crimes, in which events escalate out of proportion to the original conflict.<sup>29</sup> An example of an opportunistic bias crime is a minor

26. Pendo, *supra* note 14, at 159. For a summary of some recent bias crimes cases (which do not involve gender), see Anti-Defamation League Civil Rights Report, *ADL in the Courts: Litigation Docket 1995*.

27. *Id.* (quoting California Att'y Gen. Comm'n on Racial, Ethnic, Religious, and Minority Violence Final Rep. 4 (1986)).

28. See Kristin L. Taylor, Note, *Treating Male Violence Against Women as a Bias Crime*, 76 B.U. L. REV. 575, 577-78 (1996).

29. See O'MALLEY, *supra* note 22, at § II-5. The rarest types of bias crimes are "mission" bias crime, in which the perpetrator is seeking to rid the world of evil by getting rid of people in a despised group. LEVIN & MCDEVITT, *supra* note 1, at 89.

traffic accident involving a black man and a white man, resulting in the severe assault of the black man because the white man believed that black men should not be driving into "white territory."<sup>30</sup>

Bias crimes, regardless of whether they are predatory or opportunistic, share similar characteristics. Both categories of bias crimes usually involve violent assaults, which often consist of multiple attacks on the same victim.<sup>31</sup> In addition, these crimes typically are committed against historically oppressed groups; therefore, they are commonly characterized as acts of terrorism in which the perpetrator seeks to impose a social order that continues the oppression of that particular group.<sup>32</sup> The perpetrator of a bias crime acts out of both frustration and the desire to have power and domination over a particular group, viewing his victim as deserving of punishment.<sup>33</sup> The relation between the perpetrator and the victim may take several forms. The perpetrator may be a serial criminal (such as in the Marc Lepine case), a stranger to the victim, or an acquaintance of the victim.<sup>34</sup>

Regardless of the group against which a particular crime is being committed, bias crimes are typically committed by individuals or by small groups of people, rather than organized hate groups such as the Ku Klux Klan.<sup>35</sup> Often, the perpetrators of bias crimes are young males between the ages of fourteen and twenty-four, who commit the crimes for excitement as part of a social activity or act out of revenge based upon a perceived unfair benefit to the group to which the victim belongs.<sup>36</sup> The offenders typically have no prior record and are neither impoverished nor chronically unemployed; in other words, the offenders are not typical "career criminals."<sup>37</sup> Bias crimes produce heightened psychological trauma and affect the entire community; members of that community are made aware that at any time, they too

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30. See O'MALLEY, *supra* note 22, at § II-6.

31. *Id.* at 582, 584-85.

32. *Id.* at 585, 587.

33. See Weisburd & Levin, *supra* note 12, at 25.

34. See *id.* at 23.

35. Marguerite Angelari, *Hate Crime Statutes: A Promising Tool For Fighting Violence Against Women*, 2 AM. U. J. GENDER & L. 63, 69 (1994).

36. See Weisburd & Levin, *supra* note 12, at 25; O'Malley, *supra* note 22, at § II-5. The facts of the Central Park Jogger case involve many of the common elements of bias crimes. See LEVIN & McDEVITT, *supra* note 1, at 17-18.

37. O'MALLEY, *supra* note 22, at § II-5.

may be targets for crime solely because of an immutable characteristic.<sup>38</sup>

The commission of bias crimes against women may arise in a variety of situations, such as the following:

1. Fifty women hold a peaceful "take back the night" demonstration in a public park. Two men first heckle, and then throw bottles at the demonstrators.
2. A man sexually assaults a woman. During the attack, the man says that women think they know everything and that he is going to teach her and all women a lesson.
3. A couple has dated briefly. On their third date, the man comes on to the woman, and she refuses. The man says, "all you women are alike" and beats her up.
4. An African American woman is the only person of color and only female truck driver for a landscaping company. When the woman questions her white supervisor about work rules he is violating, the man shouts sexual and racial obscenities at her and beats the woman severely.
5. A female city traffic officer is ticketing an illegally parked car when the owner approaches. The man flies into a rage, calls the woman a derogatory term, threatens her, and tries to run her over with his car. He has a history of attacks against women.
6. Two men enter a restaurant with guns drawn and announce a stick-up. They order everyone to put their hands up. They empty the cash register and then order the women to step forward. The thieves take the women's jewelry and slap them, telling them to return to their places.<sup>39</sup>

These scenarios reveal two general types of bias crimes that are committed against women. In the first three scenarios, the motive of gender hatred is quite apparent based upon the words spoken during the commission of the crime. In the last three scenarios, the motive of gender hatred is not as apparent, although each perpetrator's selection of a female victim is a strong indication of gender hatred. Both types of crimes should be included in bias crime laws; however, in practice, it will be more difficult to prosecute the second type of crime, in which the

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38. See Weisburd & Levin, *supra* note 12, at 25.

39. O'MALLEY, *supra* note 22, at § VIII-14-15.

perpetrator does not utter any "magic words" that serve as clear evidence of gender hatred.<sup>40</sup>

Generally, the number of bias crimes increases during times in which intergroup conflicts are likely to arise. Ironically, it is "[a] climate of tolerance and inclusion, beginning in the late 1960s, [that] has created more and more *challenges* to the status quo and thus more opportunities for outsiders to be victimized."<sup>41</sup>

With the growth of the civil rights and feminist movement came the increased use of stereotyping by the dominant classes of society against oppressed groups, which facilitated the commission of acts of violence.<sup>42</sup> Therefore, it is likely that as women strive to achieve equality, they will be faced with the backlash of bias crimes. This backlash extends to other oppressed groups, as well as to women. For example, violence against Asian-Americans increased during the late 1980s, when U.S. auto manufacturers lost their market share.<sup>43</sup> Violence against homosexuals increased during the public debate regarding the Colorado and Oregon constitutional referenda on gay and lesbian rights.<sup>44</sup> As urban and suburban areas grapple with integration and white flight, violent racial confrontations increase.<sup>45</sup>

### B. *The Rationale Behind Bias Crime Statutes*

Bias crimes are pervasive in modern society.<sup>46</sup> The FBI reported that during 1995 alone, 7,947 bias crimes were reported by more than 9,500 police agencies in forty-five states and the

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40. See *infra* notes 260-69 and accompanying text.

41. LEVIN & McDEVITT, *supra* note 1, at 232-36. See also William Tafoya, *Rioting in the Streets: Deja Vu?*, in *BIAS CRIME: AMERICAN LAW ENFORCEMENT AND LEGAL RESPONSES* 54, 56 (Robert Kelley ed., 1991) (describing three major crime waves: after the Civil War, during the Prohibition era, and during the civil rights and feminist movements).

42. Levin and McDevitt noted that "[d]uring the 1960s and early 1970s, leaders of the women's movement were sometimes stereotyped—in cartoon fashion sporting horns, a tail, and the look of evil in their eyes—as ugly and vicious 'she-devils.'" Levin & McDevitt, *supra* note 1, at 27. Further, they noted that "[s]tereotypes turn particularly nasty whenever a vulnerable segment of society is regarded as threatening the power, prestige, or privileges of the dominant group." *Id.*

43. O'MALLEY, *supra* note 22, at § II-6; see also LEVIN & McDEVITT, *supra* note 1, at 57.

44. *Id.* at § II-7.

45. Michelle Campbell, *Hate Crimes in Illinois: 1.4 per day*, CHI. SUN-TIMES, Nov. 24, 1996, at A7.

46. But see, e.g., James B. Jacobs & Jessica S. Henry, *The Social Construction of a Hate Crime Epidemic*, 86 J. CRIM. L. & CRIMINOLOGY 366 (1996) (questioning the actual severity of the problem of bias crimes).



District of Columbia, which serve 75% of the U.S. population.<sup>47</sup> In 1994, 5,852 bias crimes were reported by more than 7,200 police agencies.<sup>48</sup> Since the 1980s, states have enacted legislation criminalizing bias crimes.<sup>49</sup> By 1996, forty-seven states (excluding Nebraska, Utah, and Wyoming) have some type of bias crime statute.<sup>50</sup> However, despite the widespread enactment of bias crime statutes within the past decade, twenty-one states do not recognize gender-motivated violence.<sup>51</sup> The primary rationale for bias crime statutes is that a crime becomes more heinous when the perpetrator selects a victim belonging to a particular group in order to establish and enforce a social hierarchy; the crime takes on an added antisocial aspect.<sup>52</sup> Perpetrators of bias crimes, in attempting to continue historical oppression, present greater harms to society and evidence greater moral culpability.<sup>53</sup> Other reasons for enacting bias crime statutes include controlling

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47. Associated Press, *Most Hate Crimes Are Racially Motivated*, *FBI Reports*, DALLAS MORNING NEWS, Nov. 5, 1996 at A4.

48. Debby Abe, *Hate Crime Reports in State Show Slight Decrease*, THE NEWS TRIB. (Tacoma, WA), Nov. 4, 1996 at B7. It is important to note that despite these statistics, it is difficult to determine how many bias crimes were actually committed. Many victims do not report bias crimes for various reasons, and many officers are not trained to recognize bias crimes. *Id.* In addition, although the Justice Department is required to gather bias crime statistics, whether states report their statistics to federal authorities depends on whether the state legislature requires them to do so. *Id.* Further, although some states do compile statistics on gender-biased crimes and report them to the FBI, the FBI is not required to compile them. The FBI is only required to compile statistics on crimes motivated by racial, ethnic, religious, and sexual orientation bias. *Id.*

Many states do not report bias crime statistics at all, due to the added cost, the time-consuming nature of investigating bias-motivated crimes, and the fact that many police officers believe that it is enough to investigate the crime in and of itself, without regard to the motive behind the crime. Aurelio Rojas, *Turning a Blind Eye to Hate Crimes: Most Attacks in California go Unprosecuted*, SAN FRANCISCO CHRON., Oct. 22, 1996 at A1.

49. Joseph M. Fernandez, *Bringing Hate Crimes Into Focus—The Hate Crime Statistics Act of 1990*, 26 HARV. C.R.-C.L. L. REV. 261, 266-67 (1991).

50. Taylor, *supra* note 28, at 575.

51. These states are: Alabama, Colorado, Connecticut, Florida, Idaho, Kansas, Maryland, Massachusetts, Missouri, Montana, Nevada, New Jersey, New York, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, South Dakota, Virginia, and Wisconsin. George P. Choudas, *Neither Equal Nor Protected: The Invisible Law of Equal Protection, The Legal Invisibility of its Gender-Based Victims*, 44 EMORY L.J. 1069, 1081 n.33 (1995).

52. Weisburd & Levin, *supra* note 12, at 22.

53. See Taylor, *supra* note 28, at 585-88. Bias crimes (i.e., a bias-motivated assault) differ from parallel crimes (i.e., simple assault) for several reasons including: (1) the nature of the injury sustained by the immediate victim of a bias crime exceeds the harm caused by a parallel crime, and (2) a bias crime results in palpable harm on the target community and society at large. Frederick M. Lawrence, *The Punishment of Hate: Toward a Normative Theory of Bias-Motivated Crimes*, 93 MICH. L. REV. 320, 342-48, 363 (1994).

community unrest and preventing retaliatory violence by the victimized groups.<sup>54</sup>

Bias crime statutes do not exist merely to protect minority groups from violence; these statutes also address other types of intergroup and intragroup violence. Therefore, bias crime statutes may be applied against a protected group under certain circumstances. For example, when a white motorist breaks down in a black neighborhood, and is attacked by a group of black teenagers who shout, "You don't belong here," "You're in our neighborhood," a bias crime has been committed.<sup>55</sup> Similarly, bias crimes may be committed by minority groups against other members of the same minority group, or against other minority groups. Crimes involving intragroup conflict are similar to crimes involving intergroup conflict in that the perpetrators of the crime are trying to reinforce or improve their status by using violence against those who are viewed as reducing their available resources.<sup>56</sup> Therefore, the inclusion of gender as a protected category, in theory, may result in the prosecution of women for bias crimes committed against men or against other women.

While it has been argued that state bias crime statutes are unconstitutional because they violate the First Amendment, this argument has been rejected by the Supreme Court. In *Wisconsin v. Mitchell*,<sup>57</sup> the Supreme Court held that Wisconsin's penalty enhancement statute, which provided for longer sentences in cases of "bias-inspired conduct," did not violate the First Amendment.<sup>58</sup> The Court, in recognizing that bias-inspired conduct resulted in "greater individual and societal harm,"<sup>59</sup> distinguished its holding in *Mitchell* from its prior holding in *R.A.V. v. City of St. Paul*.<sup>60</sup> In *R.A.V.*, the Court struck down a city ordinance because it constituted viewpoint discrimination. In other words, the

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54. Choundas, *supra* note 51, at 1092-93.

55. See Campbell, *supra* note 45.

56. See generally LEVIN & MCDEVITT, *supra* note 1, at 137-48 (discussing minority-on-minority bias crimes).

57. 113 S. Ct. 2194 (1993). This case involved a group of young black men and boys, who assaulted a white boy after discussing a scene in the film "Mississippi Burning" in which a white man beat a black boy who was praying. *Id.* at 2196. Mitchell, one member of the group, stated, "Do you all feel hyped up to move on some white people? . . . There goes a white boy; go get him." *Id.* at 2196-97. Mitchell was convicted of aggravated battery, which carried a maximum sentence of two years in prison. In applying the state penalty enhancement statute, the jury sentenced Mitchell to seven years in prison because he intentionally selected the victim on the basis of race. *Id.*

58. *Id.* at 2201-02.

59. *Id.* at 2202.

60. 505 U.S. 377 (1992).

ordinance "proscribed a class of 'fighting words' deemed particularly offensive by the city."<sup>61</sup> In contrast, the Court upheld the Wisconsin statute on the grounds that the statute prohibited certain types of conduct, and that a sentencing judge's consideration of the defendant's motive is consistent with federal and state anti-discrimination laws.<sup>62</sup> In sum, it appears that bias crime statutes will withstand constitutional scrutiny if they do not punish the offender for harboring biased thoughts, but rather if they punish the offender's criminal conduct in choosing a victim by reason of beliefs or hatred, and then committing a criminal act.<sup>63</sup> In other words, the discriminatory conduct involving victim selection does not fall under First Amendment protection.<sup>64</sup>

### C. State Bias Crime Statutes

Generally, bias crime statutes punish an offense as a bias crime when the defendant's actions falls into one of three categories: (1) the defendant was motivated by bias in committing the crime; (2) the defendant was motivated by bias and had

61. 113 S. Ct. at 2200 (quoting *R.A.V. v. City of St. Paul*, 505 U.S. at 342, 112 S. Ct. At 2547 (1992)).

62. See *id.* at 2199-200.

63. Examples of recent cases in which courts have applied this distinction are: *People v. A.G.*, 896 P.2d 1365 (Cal. 1995), and *In re Vladimir P.*, 670 N.E. 2d 839 (Ill. App. 1996). Some commentators, however, have criticized the creation of a distinction between *R.A.V.* and *Mitchell*. See, e.g., Craig Peyton Gaumer, *Punishment for Prejudice: A Commentary on the Constitutionality and Utility of State Statutory Responses to the Problem of Hate Crimes*, 39 S.D. L. REV. 1 (1994) (arguing against the enactment of hate crime laws because:

If a state can punish a defendant for being motivated by bigotry, then no constitutional barrier would appear to limit the state's ability to enhance the punishment of any act committed for a reason with which the majority of the electorate disagrees.

*Id.* at 3). Gaumer further argues that *Mitchell* is inconsistent with the "neutrality principle":

[S]tates would be permitted to pass laws permitting the sentencing authority to consider the defendant's motive, whatever it was, that makes him sufficiently villainous or dangerous to merit a term of imprisonment at the high end of a given sentencing range. States would not be permitted, however, to single out for special punishment only a narrow class of motives with which it takes issue.

*Id.* at 17. Other commentators, although arguing that the *Mitchell* rationale is flawed, maintain that penalty enhancement statutes may nonetheless be consistent with *R.A.V.* while permitting the punishment of hate crimes. See Kevin N. Ainsworth, Note, *Targeting Conduct: A Constitutional Method of Penalizing Hate Crimes*, 20 FORDHAM URB. L.J. 669 (1993) (providing a sample penalty enhancement statute).

64. See *People v. A.G.*, 896 P.2d 1365 (Cal. 1995); *In re Vladimir*, 670 N.E. 2d 839 (Ill. App. 1996).

the intent to intimidate, harass, or interfere with the victim's civil rights; or (3) the defendant has committed a per se violation because the law has created the presumption that certain crimes constitute bias crimes (such as spray painting a swastika on a synagogue).<sup>65</sup> In punishing the perpetrators of bias crimes, most statutes are based upon one of two models. One model applies to discriminatory selection, and punishes the defendant for selecting the victim based on race (or another protected category), regardless of the reason.<sup>66</sup> The other model is based upon group animus. This model punishes the defendant's animus toward the protected group if the animus was the central motivation for the commission of the crime.<sup>67</sup> The enactment of bias crime statutes based upon these two models results in statutes which take various forms.<sup>68</sup> One type of statute may criminalize the bias-motivated conduct itself. For example, a statute may criminalize bias-motivated conduct by (1) creating a separate offense in which the bias motive is an essential element of the offense; or (2) providing for penalty enhancements (either mandatory or discretionary) when a bias motive is present;<sup>69</sup> or (3) prohibiting particular acts generally associated with group bias, such as cross-burning.<sup>70</sup> Instead of criminalizing the bias-motivated conduct itself, a second type of statute creates a civil cause of action for damages or injunctive relief.<sup>71</sup> A third type of statute requires training for law enforcement officials in order to enable them to identify and to address bias crimes. Further, this type of statute could require educational efforts directed at both the perpetrator and the public in general.<sup>72</sup> Finally, some statutes merely require data collection and the reporting of bias crimes.<sup>73</sup>

Over half of the existing state bias crime statutes follow the 1981 model statute created by the Anti-Defamation League of B'nai B'rith (ADL), which provides in part:

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65. LU-IN WANG, HATE CRIMES LAW § 10.04 (1996).

66. See Lawrence, *supra* note 53, at 326-42. This model is based upon the Court's reasoning in *Mitchell*.

67. See *id.* The Hate Crime Statistics Act (HCSA) follows this approach. *Id.*

68. For a background on hate crimes legislation, see Marlene Z. Stanger, Note, *Hate Crimes Legislation: Panacea or Protractor of Societal Ills?*, 3 SAN DIEGO JUST. J. 419 (1995).

69. Approximately half of the existing bias crime statutes contain penalty enhancement provisions similar to the statute at issue in *Mitchell*. See Shirley S. Abrahamson et al., *Words and Sentences: Penalty Enhancement for Hate Crimes*, 16 U. ARK. LITTLE ROCK L.J. 515, 522 (1994).

70. WANG, *supra* note 65, at § 10.03.

71. See *id.* at § 9.02.

72. See *id.* at § 9.03.

73. See *id.* at § 9.05.

A person commits a crime of intimidation if, by reason of the actual or perceived race, color, religion, national origin or sexual orientation of another individual or group of individuals . . . <sup>74</sup>

The statute provides penalty enhancements for criminal activities motivated by intimidation (bias against a protected group), as well as providing civil remedies for victims of bias crimes.<sup>75</sup>

## II. FEMINIST THEORY SUPPORTS THE INCLUSION OF GENDER IN BIAS CRIME STATUTES

Several arguments, which are grounded in feminist theory, support the proposition that gender should be a protected category in bias crime statutes and that bias crime statutes should encompass all gender-related crimes.<sup>76</sup> A consideration of feminist theory, and feminist legal theory in particular, is important for reasons that extend far beyond the issue of bias crimes. Most significantly, a failure to consider feminist legal theory perpetuates "male supremacist jurisprudence," which "erects qualities valued from the male point of view as standards for the proper and actual relation between life and law."<sup>77</sup> According to Catharine MacKinnon, the effect of male supremacist jurisprudence is the continued subordination of women, even absent laws that explicitly subordinate women:

No law guarantees that women will forever remain the social unequals of men. This is not necessary, because the law guaranteeing sex equality requires, in an unequal society,

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74. Anti-Defamation League of the B'Nai B'Rith, ADL Hate Crime Statutes: A Response to Anti-Semitism, Vandalism, and Violent Bigotry at A-1 (Supp. 1990).

75. The aspect of civil remedies in the model statute is similar to federal bias crime statutes. Angelari, *supra* note 35, at 69-70. Federal bias crime statutes include the Religious Vandalism Act, the Hate Crimes Statistics Act, and the Violence Against Women Act. See Fernandez, *supra* note 49, at 263-68, 264 n.21.

76. For a concise overview of the different lines of feminist legal theory (liberal, cultural/difference, radical/dominance, and postmodern), see Nancy Levit, *Feminism For Men: Legal Ideology and the Construction of Maleness*, 43 UCLA L. REV. 1037, 1041-51 (1996). Modern feminist theory, however, is divided as a legal theory. Although most feminists agree that women are different from men and that this difference is important, they disagree as to which differences are most vital. See Robin West, *Jurisprudence and Gender*, in FEMINIST LEGAL THEORY: READINGS IN LAW AND GENDER 201, 206 (Bartlett & Kennedy eds., 1991).

77. Catharine A. MacKinnon, *Toward Feminist Jurisprudence* in FEMINIST JURISPRUDENCE 610, 611 (Patricia Smith ed., 1993).

that before one can be equal legally, one must be equal socially. So long as power enforced by law reflects and corresponds—in form and substance—to power enforced by men over women in society, law is objective, appears principled, becomes just the way things are. So long as men dominate women effectively enough in society without the support of positive law, nothing constitutional can be done about it.<sup>78</sup>

With regard to the issue of bias crimes in particular, the failure to incorporate feminist theory in the formulation of laws sends the message that hatred and violence against women is a subordinate matter of private, rather than public, concern:

Feminist theory emphasizes the value of direct and personal experience . . . as embodied in the phrase "the personal is political." This phrase reflects the view that the realm of personal experience, the "private" which has always been trivialized, particularly for women, is an appropriate and important subject of public inquiry, and that the "private" and "public" worlds are inextricably linked.<sup>79</sup>

This Note will discuss four arguments that support the inclusion of all gender-related crimes in bias crime statutes. First, crimes committed against women fit the characteristics of other types of bias crimes, particularly with respect to the issues of power and dominance and the subordination of women through group terrorism. Second, the exclusion of gender as a category of bias crimes is largely due to the fact that males have monopolized the power to name and categorize crimes. Because the power to name is male-dominated, the laws that are created as a result of the exercise of that power serve to perpetuate a social order that benefits men. Therefore, the exclusion of gender is a form of sex discrimination, which serves to reinforce the existing power disparity between men and women. Third, bias crime statutes that exclude gender while at the same time extend heightened protection to other groups violate a woman's autonomy. Finally, the exclusion of gender serves to reinforce the stereotypical dichotomy between the nature of men and women.

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78. *Id.*

79. Elizabeth M. Schneider, *The Dialectic of Rights and Politics: Perspectives From the Women's Movement*, in *FEMINIST LEGAL THEORY: READINGS IN LAW AND GENDER*, *supra* note 76, at 321.

### A. *Similarities Between Gender-Related Crimes and Other Bias Crimes*

Though some people may argue that bias crimes committed against women do not fit into the traditional bias crime mold,<sup>80</sup> significant similarities exist between bias crimes against women and bias crimes against already protected groups (such as racial minorities) to warrant the conclusion that gender should also be protected. Although these similarities exist, they should not be considered as a prerequisite for the inclusion of gender in bias crime statutes. In other words, bias crimes against women do not necessarily have to bear a close resemblance to the crimes committed against already protected groups in order to be included in bias crime statutes. Taking this point of view would be analogous to arguing that the only women who are entitled to the same benefits and protection as men are those who act like men—an argument that radical feminists find unsatisfying because many differences are “false differences” in that they have been socially constructed.<sup>81</sup> Rather, radical feminists at least would argue that it is illogical to exclude gender when such significant similarities do in fact exist, and probably would argue that excluding gender is illogical, even entirely absent such similarities.<sup>82</sup>

#### 1. *The Desire to Achieve and Maintain Power and Dominance*

As whites commit bias crimes against racial minorities in order to achieve and maintain power over particular minority groups, men commit bias crimes against women in order to achieve and maintain power over women. “In this society, power is commonly equated with domination and control over people or things.”<sup>83</sup> Gender may be viewed as an issue of power, namely,

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80. For example, some argue that gender-motivated violence differs from racially-motivated violence because those who perpetrate crimes against women do not “hate” all women in the same sense that a white supremacist “hates” all African-Americans or that an anti-Semite hates all Jews. Under this view, domestic violence and non-stranger rape would not fit the traditional bias-crime mold. See Weisburd & Levin, *supra* note 12, at 35. For a further discussion of the perpetrator’s “hate” motive, see *infra* Part IV.

81. MacKinnon notes: “Why should women have to be ‘like’ men to be treated as equal citizens? Why should sex inequality have to be ‘like’ racial inequality to be treated as invidious inequality?” CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED* 9 (1987).

82. See, e.g., MacKinnon, *supra* note 77 and accompanying text.

83. BELL HOOKS, *FEMINIST THEORY FROM MARGIN TO CENTER* 83 (1984).

male supremacy and female subordination.<sup>84</sup> Some feminists assert that this power inequality is the root of all forms of discrimination and violence, and that sexual coercion is the expression of male power over women.<sup>85</sup> According to the dominance theory, "cultural and sexual domination of men structures social and legal relations between the sexes."<sup>86</sup>

The exertion of power is often a result of "zero-sum thinking," a growing trend in our society. People view desired resources and statuses as being limited; in other words, the "pie" cannot increase, it can only be divided up among the various competitors.<sup>87</sup> Examples of "zero-sum thinking" include: the view that the economic success of one person necessarily involves the economic loss of another, and the view that one can gain moral worth only to the extent that another loses moral worth.<sup>88</sup> With regard to bias crimes, men's desires to dominate and control women by committing bias crimes against them is often rooted in the threat men feel because women are taking their rightful share of the economic pie. The bias crime itself reflects the phenomenon of "scapegoating"—projecting individual frustrations onto a particular group.<sup>89</sup> The increase in the number of women entering traditionally male-dominated territories, as well as the growth of a feminist movement, have likely resulted in increases in the number of bias crimes committed, due to the fact that more reasons exist to harbor biased views against women.<sup>90</sup> For example, as more women enter the corporate world, or strive to enter previously all-male universities, they may be viewed as consuming a larger share of the economic and academic pie and are thereby depriving males of the share they previously enjoyed.<sup>91</sup> The hostility that ensues is typically the most severe during periods of economic stagnation or decline.<sup>92</sup>

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84. See MACKINNON, *supra* note 81, at 40.

85. See, e.g., Wendy E. Stock, *Feminist Explanations: Male Power, Hostility, and Sexual Coercion*, in *SEXUAL COERCION* 61 (Grauerholz & Koralewski eds., 1991).

86. Levit, *supra* note 76, at 1048 (discussing pornography, prostitution, restrictions on abortion, sexual harassment, and inadequate responses to violence against women as social institutions that contribute to the oppression of women).

87. LEVIN & MCDEVITT, *supra* note 1, at 54-55.

88. *Id.*

89. Although data collection and reporting of bias crimes against women have been a fairly recent practice, and therefore no long-term trends can be studied, it is most likely safe to infer that bias crimes against women are not a new phenomenon. See *infra* Part III (discussing the evolutionary basis for committing bias crimes against women).

90. See LEVIN & MCDEVITT, *supra* note 1, at 60-61.

91. See *id.* at 60.

92. See *id.* at 131-32, 231-32.



The individual threat and frustration, which motivates men to commit bias crimes against women, may be caused by differences in their status or skills that result from economic or political conflicts.<sup>93</sup> Because men have traditionally held the position of the breadwinners of the family, they may feel intense resentment when the American dream fails to materialize.<sup>94</sup> When hard work fails to improve the quality of life, men may seek alternative ways of improving their economic position, such as challenging those who are "different."<sup>95</sup> Those viewed as "different" could include career-oriented women who do not fit into the stereotypical dichotomy.<sup>96</sup> Not only are these women viewed as different, they are also viewed as invading a man's domain by being in the workforce, and in some cases, by holding supervisory positions over men. The idea that women may also have benefitted through the use of "reverse discrimination" fuels men's hatred.<sup>97</sup> In addition to economic and political conflicts, the individual threat and frustration that motivates men to commit bias crimes against women may also be caused by interpersonal conflicts, such as a woman's infidelity to her husband or boyfriend, a woman's taking an aggressive role in the relationship, or ending the relationship against his wishes.<sup>98</sup> These behaviors may signify a woman's growing lack of dependence on a man; violence often ensues because the man cannot accept the woman's rejection of his dominant role.<sup>99</sup>

In addition to venting personal frustrations and attempting to resolve conflicts in ideology, men may resort to committing bias crimes against women in order to gain status within a group of males; committing such crimes serves as a way for the entire group of males to exert their dominance over women, as well as a way for individual males to prove their masculinity by showing

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93. See Taylor, *supra* note 28, at 596 n.155.

94. LEVIN & McDEVITT, *supra* note 1, at 51-54.

95. *Id.*

96. Crimes based on racial bias also stem from differences in socio-economic status. For example, a nineteen year-old Vietnamese immigrant, who was attending a party at a country club, was beaten to death by a group of white men, one of whom was the groundskeeper at the country club. See Dwight Greene, *Hate Crimes*, 48 U. MIAMI L. REV. 905, 905-06 (1994).

97. See Taylor, *supra* note 28, at 579-89, n.32.

98. Cf. Weisburd & Levin, *supra* note 12, at 28 (asserting that gender-related homicide most often occurs in the context of intimate relationships).

99. Cf. *id.* (stating that lethal violence is often a result of perceived rejection of male dominance).

others that they are capable of controlling women.<sup>100</sup> Fraternity gang rapes are primary examples of this phenomenon.<sup>101</sup> The characteristics of fraternities—group loyalty and secrecy, the routine use of violence and physical force, and intergroup competition—create an environment conducive to crimes against women.<sup>102</sup> Further, a “mob mentality” operates in a fraternity. Even at the slightest suggestion of violence, the group will commit the crime because no one wants to be seen as the weak one who backs down.<sup>103</sup>

Unfortunately, zero-sum thinking is not only reflected in individual behavior; it is also reflected in the courts. Court proceedings reinforce the notion that those women who possess traditional feminine qualities and live their lives accordingly are “good,” whereas those who do not are “bad.” The good woman is one who is a faithful wife and mother, who remains in the private sphere of the home.<sup>104</sup> Studies have shown that married women defendants who are economically dependent on their husbands receive lighter sentences because “their family was thought to exert a degree of control over their behaviour and guide them into better ways.”<sup>105</sup> This leniency, however, did not occur with regard to married male defendants.<sup>106</sup> On the other hand, studies have shown that working women who have abandoned the private sphere of the home come under closer scrutiny by judges in divorce and separation proceedings when these women also have young children.<sup>107</sup> Under zero-sum thinking, “bad” women pose a threat to the benefits that males receive under the current male-dominated structure of law; therefore, it is necessary to punish “bad” women to a greater extent than those who are “good,” even given the same circumstances.<sup>108</sup> “In short, a women’s social

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100. See Martha T. McCluskey, *Privileged Violence, Principled Fantasy, and Feminist Method: The Colby Fraternity Case*, 44 ME. L. REV. 261, 305 (1992).

101. See *id.* at 304 (noting that of fifty reported campus gang rapes most occurred at fraternity parties).

102. See Terry Nicole Steinberg, *Rape on College Campuses: Reform Through Title IV*, 18 J.C. & U.L. 39, 43 n.24 (1991).

103. See Patricia Yancey Martin and Robert A. Hummer, *Fraternities and Rape on Campus*, in *VIOLENCE AGAINST WOMEN: THE BLOODY FOOTPRINTS* 120-29 (Pauline B. Bart & Eileen Geil Moran eds., 1993).

104. See NGAIRE NAFFINE, *LAW & THE SEXES: EXPLORATIONS IN FEMINIST JURISPRUDENCE* 137, 140-42 (1990).

105. *Id.* at 139.

106. See *id.* at 140.

107. See *id.* at 141.

108. See *id.* at 142 (noting that “[b]ad women are women gone astray” and “have abandoned their femininity and hence their right to be given the law’s protection or favor”).

nicensess [and "respectability"] matter[s] more to [a] court than her criminality."<sup>109</sup>

When the law fails to punish the "bad" women, men may carry out the punishment themselves. The types of crimes committed against women to punish them, particularly rape, are highly power-motivated. According to one study, self-reported sexually aggressive men, those most likely to rape, "are [also] more likely to hold traditional gender role attitudes."<sup>110</sup> Another study indicated that "power rapes," in which "[s]exuality becomes an expression of conquest and a means of compensating for underlying feelings of inadequacy and expressing mastery, control, and authority," account for 55% of all rapes.<sup>111</sup> While it may be argued that all rapes have a power element, "power rapes" are distinct from other types of rapes in several ways. In contrast to other types of rapes such as "anger rapes" and "sadistic rapes,"<sup>112</sup> a common fantasy among power rapists is that the victim initially resists the sexual advances of the rapist, but the rapist overpowers her.<sup>113</sup> Eventually, the victim becomes sexually aroused and enjoys the rape.<sup>114</sup> This belief reinforces the rapists' sense of power in that they believe that they are giving women what they want, but do not realize they want.<sup>115</sup> Usually, the power rapist exerts only as much force as needed to gain sexual compliance.<sup>116</sup> The goal of the power rapist is not to harm the victim physically, but to possess her sexually, which is achieved through "verbal threats, intimidation with a weapon, or physical force if necessary."<sup>117</sup>

109. *Id.* at 144.

110. Patricia A. Harney & Charlene L. Muehlenhard, *Rape*, in *SEXUAL COERCION* *supra* note 85, at 12.

111. Stock, *supra* note 85, at 62-63 (describing other types of rapes, which include anger rape, which account for 40% of all rapes, and sadistic rapes, which account for 5% of all rapes). For discussion on the problems related to prosecuting rape as a bias-motivated crime, see *infra* Part IV.

112. See Stock, *supra* note 85, at 62-63 (describing the characteristics of anger rapes and sadistic rapes; see also JOHN M. MACDONALD, *RAPE: CONTROVERSIAL ISSUES — CRIMINAL PROFILES, DATE RAPE, FALSE REPORTS AND FALSE MEMORIES* 50-51 (1995) (describing a widely-known study by Groth regarding the classification of rapists).

113. See JULIE A. ALLISON & LAWRENCE S. WRIGHTSMAN, *RAPE: THE MISUNDERSTOOD CRIME* 56-57 (1993).

114. See *id.*

115. See generally MACDONALD, *supra* note 112, at 58-59 (describing the relation between pornography and media violence and rape).

116. See Weisburd & Levin, *supra* note 12, at 30.

117. ALLISON & WRIGHTSMAN, *supra* note 113, at 56. The power rapist's use of only enough force necessary to achieve sexual possession is consistent with evolutionary theory. See *infra* Part III.

The inclusion of gender in bias crime statutes is necessary to combat the male desire to maintain dominance over women. To combat male violence on a personal level, it is necessary to combat this dominance on a legal level.<sup>118</sup> Some commentators have argued against penalty enhancement statutes for bias-motivated crimes on the grounds that "[f]ighting hate crime isn't as simple as going out and getting a new hate crime statute. Instead, we ought to concentrate on changing the consciousness and nature of the prosecutorial aim of the criminal justice system."<sup>119</sup> Although it is true that it is necessary to change society's consciousness in order to remedy the problem of bias crimes, the mere existence of gender as a protected category in bias crime statutes will indeed serve as a vehicle to begin this change. Regardless of whether the law is shown to have a deterrent effect, the structure and language of the law has an important symbolic impact; "penalty enhancement statutes provide a much needed incentive for police and prosecutors to take violent crimes against women seriously."<sup>120</sup>

## 2. *The Subordination of Women Through Sexual Terrorism*

The corollary to male power and dominance is female subordination. This subordination is maintained through sexual terrorism, which reinforces conformity to the "good woman" role. Sexual terrorism — the rape and threat of rape of women by men — is analogous to racial terrorism, such as the use of lynchings, either actual or threatened, by whites against blacks.<sup>121</sup> Although the male perpetrator may commit a nonsexual crime against the female victim, the possibility of rape always exists. The specter of rape is pervasive in the lives of women; forty-four percent of U.S. women will be victims of rape or attempted rape at least once in their lives.<sup>122</sup> Similar to lynching, which disproportionately affected blacks, women are targeted for rape based on a particular immutable characteristic — their gender:

[Women are seen as] collectively liable for the rapists' problems . . . . In other cases, victims [were] thought to represent all women, and rape [was] used to punish, humili-

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118. See *supra* notes 77-79 and accompanying text.

119. Greene, *supra* note 96, at 911.

120. Angelari, *supra* note 35, at 100.

121. See Weisburd & Levin, *supra* note 12, at 37 (citing Catherine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L.J. 1281, 1303 (1991)).

122. *Id.* at 29 (citing MacKinnon, *supra* note 121, at 1301).

ate, and "put them in their place." In both cases, women [were] seen as a class, a category, not as individuals.<sup>123</sup>

Sexual terrorism is fueled by various factors such as ideology (the notion that males are superior), propaganda (popular culture and pornography), indiscriminate and amoral violence, and society's perception of the terrorist and the terrorized.<sup>124</sup> In particular, sexual terrorism is based in part on the view that those sexually terrorized are somehow responsible for their victimization and that the offenders are merely "sick" and deserve compassion and treatment rather than punishment.<sup>125</sup> Particularly in the case of power rapes, women may be viewed as responsible for their victimization if they possess characteristics that are deemed masculine; sexual terrorism serves to prevent women from emasculating men.<sup>126</sup>

As with lynching and rape, social control and terrorism over a particular group is a predominant aspect of all bias crimes. The manifestation of this social control is in the psyches of the victims; they live in a climate of terror. Victims of bias crimes suffer from added psychological and emotional anguish because they are powerless to change the aspect of their selves that incited the violence, and because these crimes may occur at any time without any act of provocation on the part of the victim.<sup>127</sup> The victim's mere existence and possession of certain characteristics, and being at the wrong place at the wrong time, is enough provocation in the eyes of the perpetrator of the bias crime.<sup>128</sup> In addition, the victim's added psychological pain stems from the fact that the victim's group has faced historical discrimination.<sup>129</sup>

As a result of the terroristic effect of bias crimes on women, the threat of violence dictates how they will lead their lives.<sup>130</sup> For example, they may not go out alone after dark. They may

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123. Pendo, *supra* note 14, at 166 n.48 (quoting Diana Scully & Joseph Marolla, *Riding the Bull and Gilley's: Convicted Rapists Describe the Rewards of Rape*, 32 SOC. PROB. 252, 261 (1985)) (alteration in original).

124. See Stock, *supra* note 85, at 72.

125. See *id.*

126. See *infra* notes 270-87 and accompanying text.

127. See Weisburd & Levin, *supra* note 12, at 25-26.

128. See *id.* at 24.

129. See Pendo, *supra* note 14, at 161.

130. Cf. generally Nancy Wilmsen Thornhill & Randy Thornhill, *An Evolutionary Analysis of the Psychological Pain Following Rape: I. The Effects of Victim's Age and Marital Status*, in HUMAN NATURE: A CRITICAL READER 229 (Laura Betzig ed., 1997) (studying rape survivors lifestyle changes occurring as a result of the psychological pain of rape).

not take certain jobs that may expose them to potential violence by men. They may carry weapons. They may dress in ways that allows them to quickly escape violence, substituting sensible shoes and slacks for high-heeled shoes and slender skirts, which inhibit their ability to run. They may interact with men differently because they are constantly afraid of sending the message that they were "asking for" whatever violence that may befall them.<sup>131</sup>

The inability of women to use bias crime laws to seek redress furthers their oppression. It is ironic to note that although bias crime laws themselves may be characterized as "feminine" because they address the emotional, psychological aspect of crime, most bias crime laws exclude women as a protected category.<sup>132</sup> Bias crime laws recognize the emotional difference between spray painting a swastika on a synagogue, and spray painting graffiti on a post office.<sup>133</sup> Legally, however, both acts are similar in that they are characterized as vandalism.<sup>134</sup> Under a theoretically "male" approach to law, which is objective, dispassionate, and rational,<sup>135</sup> both acts would be punished in the same manner. When the law chooses to recognize a "female" approach and make exceptions to the generally "male" approach by recognizing the added harm that results from a crime motivated by group hatred, however, it nonetheless oppresses women by excluding them from receiving the benefit of this exception. Therefore, the inclusion of gender will remedy the subordination that exists on the face of bias crime statutes that do not include gender.

### *B. The Denial of the Power to Name, and its Consequences*

The perpetuation of male power and dominance, and female subordination, on both the personal and legal levels, results from the power disparity that exists in the formation of laws. "Language matters. Law matters. Legal language matters."<sup>136</sup> These statements convey the idea that it is important to examine the

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131. For a discussion of the lingering effect of rape on victims, see ALLISON & WRIGHTSMAN, *SUPRA* NOTE 113, AT 147-72.

132. See *supra* note 51 and accompanying text.

133. See *Wisconsin v. Mitchell*, 508 U.S. 476, 487-88 (1993) ("[T]his conduct is thought to inflict greater individual and societal harm.").

134. See *infra* note 139; see also CATHARINE A. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* 162-63 (1989) (noting the objectivity and rationality of liberal legalism).

135. See *infra* notes 136-43 and accompanying text.

136. Lucinda M. Finley, *Breaking Women's Silence in Law: The Dilemma of the Gendered Nature of Legal Reasoning*, in *FEMINIST LEGAL THEORY* 571 (D. Kelly Weisberg ed., 1993).

nature of legal reasoning and the manifestation of that reasoning through the use of language.<sup>137</sup> Throughout history, legal reasoning and legal language have been predominantly male.<sup>138</sup> In fact, many feminists argue that the rationality of law itself is "male."<sup>139</sup> The problem that arises when law is defined according to the male perspective has been explained as follows:

Legal language frames the issues, it defines the terms in which speech in the legal world must occur, it tells us how we should understand a problem and which explanations are acceptable and which are not. Since this language has been crafted primarily by white men, the way it frames the issues, the way it defines the problems, and the speakers and speech it credits, do not readily include women.

Legal language commands: . . . be "objective" and avoid the lens of nonmale experience; invoke universal principles such as "equality" and "free choice"; speak with the voice of dispassionate reason; be simple, direct, and certain; . . . and most of all, tell it and see it "like a man" — put it in terms that relate to men and to which men can relate.<sup>140</sup>

Because the law is written in terms that center around a male reference point, women's experience is at best relegated to disadvantageous treatment and at worst completely ignored.<sup>141</sup> The male possession of the power to name results in the creation of "symbolic constructs that have simultaneously used men as the norm and denigrated any departure from the norm."<sup>142</sup> Often, these constructs will not reflect explicit gender stereotyping. "Instead, the stereotyping will occur without explicit references to gender, or will involve a gender stereotype couched in purportedly neutral language."<sup>143</sup>

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137. See *id.*

138. For example, according to Blackstone, the legal definition of a "person" was a property-owning man. NAFFINE, *supra* note 104, at 60.

139. See e.g., Sally Haslanger, *On Being Objective and Being Objectified*, in *A MIND OF ONE'S OWN: FEMINIST ESSAYS ON REASON AND OBJECTIVITY* 85, 85 (Antony & Witt eds., 1993); Judith A. Baer, *How is Law Male? A Feminist Perspective on Constitutional Interpretation*, in *FEMINIST JURISPRUDENCE* 147 (Leslie Friedman Goldstein ed., 1992).

140. Finley, *supra* note 136, at 577-78.

141. See generally CAROL SMART, *LAW, CRIME AND SEXUALITY: ESSAYS IN FEMINISM* 128 (1995) (documenting the use of law as a source of women's oppression in the 19th century and arguing that despite reforms, modern law still operates to oppress women).

142. Martha Minow, *Feminist Reason: Getting It and Losing It*, in *FEMINIST LEGAL THEORY: READINGS IN LAW AND GENDER*, *supra* note 76, at 357, 358.

143. Levit, *supra* note 76, at 1103.

There are several examples in legal history in which the male's power to name resulted in subordination of women. The development of law in the early periods of capitalism reflected the already existing patriarchal society.<sup>144</sup> The laws enacted reinforced the separate spheres ideology by restricting women from competing with males struggling to earn wages.<sup>145</sup> Despite the growing opportunities to enter the public world of commerce, the law kept women in the private sphere of the home.<sup>146</sup> In modern law, the choice of terminology such as "domestic violence" puts the focus on the domestic aspect of the crime rather than the violent aspect, which also results in the perpetuation of the separate spheres ideology.<sup>147</sup> This shift in focus reinforces women's subordination because of the historical reluctance of the law to reach into the private sphere of the home, and the notion that, at home, men are "free to come and go [and act] as [they] choose."<sup>148</sup> With regard to rape, the effect of the law has been to draw attention away from the male's coercive behavior and to focus on the legal adequacy of the victim's response to his actions, which is based on male notions of what constitutes an adequate showing of nonconsent.<sup>149</sup>

Not surprisingly, the effect on women of the male power to name is reflected even in the recent laws that relate to bias crimes. The federal Hate Crimes Statistics Act (HCSA),<sup>150</sup> which requires the reporting of data on crimes that are motivated by bias against race, religion, sexual orientation, or ethnicity, excludes gender as a protected category.<sup>151</sup> Curiously though, in

144. See SMART, *supra* note 139, at 131-45.

145. See *id.* at 142-43.

146. See Janet Rifkin, *Toward a Theory of Law and Patriarchy*, in FEMINIST LEGAL THEORY, *supra* note 136, at 412, 414-16.

147. See *id.*

148. Finley, *supra* note 136, at 577.

149. See generally Susan Estrich, *Rape*, in FEMINIST JURISPRUDENCE, *supra* note 77, at 158 (using rape law to illustrate sexism in criminal law); see also Pendo, *supra* note 14, at 171 (quoting Catharine MacKinnon, *Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence*, in FEMINIST LEGAL THEORY: READINGS IN LAW AND GENDER, *supra* note 76, at 189).

150. 28 U.S.C. § 534 (b)(1) (1993).

151. The HCSA states in part:

[T]he Attorney General shall acquire data, for the calendar year 1990 and each of the succeeding 4 calendar years, about crimes that manifest evidence of prejudice based on race, religion, sexual orientation, or ethnicity, including where appropriate the crimes of murder, non-negligent manslaughter, forcible rape; aggravated assault, simple assault, intimidation; arson; and destruction, damage or vandalism of property . . .

*Id.*



describing the types of crimes that may constitute "hate crimes," the HCSA includes forcible rape.<sup>152</sup> In effect, the HCSA states that the forcible rape of a woman can *never* be motivated by a general bias against women unless the woman also fits into one of the existing protected categories.<sup>153</sup> Therefore, excluding gender from state bias crime laws only serves to legitimate the idea that it is men who are entitled to define the groups that are potentially targets of hate and the types of acts by which that hate may be expressed.

Further, the exclusion of gender is the use of law (specifically, the power to name), as a vehicle for the perpetuation of sex discrimination. This discrimination is not a question of morality but a question of politics.<sup>154</sup> Two seemingly logical arguments may be made in support of the idea that the exclusion of gender is not sex discrimination. Approaching these arguments in light of feminist theory, however, reveals that these arguments cannot stand. First, one may argue that because there is a distinct difference between bias crimes committed against women and bias crimes committed against other groups,<sup>155</sup> it is not sex discrimination to exclude gender from bias crime statutes. However, Catharine MacKinnon, and other radical feminists would argue that this alleged difference is actually created by gender differences in legal power. Men have power over the law so they determine what constitutes difference, and then go on to claim that this difference matters. In other words, "[i]nequality comes first; differences come after."<sup>156</sup> Under the dominance theory, "[g]ender is an inequality of power, a social status based on who is permitted to do what to whom;"<sup>157</sup> the concept of "gender difference" is merely a construct.<sup>158</sup>

Second, one may argue that excluding gender from bias crime statutes is not sex discrimination because this exclusion does not preclude women from seeking a remedy through other effective legal paths. A feminist response to this argument may be

152. *Id.*

153. Pendo, *supra* note 14, at 166. Therefore, applying the HCSA, any forcible rape would be deemed to be motivated by the woman's inclusion in a category other than gender. This application of the law reflects the problem of "gender essentialism." See *infra* Part V.

154. See Catharine A. MacKinnon, *Difference and Dominance: On Sex Discrimination*, in *FEMINIST LEGAL THEORY*, *supra* note 136, at 276, 285.

155. See *supra* note 15 and accompanying text.

156. MacKinnon, *supra* note 81, at 8.

157. *Id.*

158. *Id.* at 8-9.

explained by the following analogy: Under the Jim Crow system, blacks and whites are permitted to travel on trains together as long as blacks ride in a separate, "colored" car. Although both groups of people will reach the same destination, this system is not equal because those who traveled in the "colored" car will be deprived of certain privileges that those in the "white" car had, such as better service. Similarly, a system that tells women that they are permitted to prosecute men for the violence they inflict upon them only if they use "regular" criminal law, rather than "special" bias crime law to which other groups are entitled, is a denial of certain privileges. These privileges may involve the ability of a nonmarried woman, or a woman who is not in a long-term relationship, to seek injunctive relief against a man for domestic violence.<sup>159</sup> These privileges may also involve the ability for a woman to prosecute a man for acquaintance rape or marital rape — with the result that the man is required to serve a penalty that is just as severe as in stranger rapes.<sup>160</sup> Under both examples in the above analogy, the inequality in legal power (between blacks and whites, and between men and women), resulted in construction of supposed differences between the groups,<sup>161</sup> which did not result in the complete denial of a vehicle, but nonetheless resulted in giving the minority group a slightly different, less appealing vehicle. The inequality in remedies available to women is the result of the inequality of legal power.

### C. *The Recognition of Woman's Autonomy*

The denial of women's power to name, which results in the absence of gender as a protected category in many states' bias crime statutes, is a severe limitation on women's autonomy. The right of individual autonomy is defined as:

[The] right to make otherwise morally permissible decisions about matters deeply affecting one's own life without interference by controlling threats and bribes, manipulations, and willful distortion of relevant information.

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159. See Angelari, *supra* note 35, at 100-01 (arguing that bias crime laws have the potential to close the gaps that remain despite the existence of laws that address violence against women).

160. *Id.*

161. MacKinnon argues that because "[w]omen are measured according to our correspondence with man, our equality judged by our proximity to his measure," differences between women and men are male-created differences. MacKinnon, *supra* note 154, at 278.

...  
 To say that a person is autonomous . . . is not to *describe* the person . . . [I]t is to *grant* the person a *right* to control certain matters for himself or herself.<sup>162</sup>

The corollary to this right is that others are prohibited from interfering with a person's autonomy by means of intimidation and physical harm.<sup>163</sup> The perpetrator's motivation in the commission of a gender-related bias crime is to terrorize and to oppress women into behaving the way the perpetrator wants them to behave, according to long-established social hierarchies. Bias crimes are stark examples of interferences with a woman's autonomy.

According to a liberal feminist viewpoint, both men and women are autonomous; women are just as rational as men and therefore should have equal opportunity to exercise their autonomy.<sup>164</sup> Three arguments, which may be made in support of the full inclusion of gender, arise from this basic premise. The first argument is that the law should recognize and reflect women's equal power to name because a woman is as rational and autonomous as a man. Due to the commonality between men and women in their possession of autonomy, there is no reason why women should be limited by male-constructed categories in defining bias crimes. In fact, bias crime laws should be the result of equal contributions of the male and female perspectives.<sup>165</sup> The second argument is that despite physical differences between men and women such as the inherent "rapability" of women, bias crime laws should grant equal protection to both because both possess autonomy, the core quality of humanity.<sup>166</sup> The third argument

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162. Thomas E. Hill, Jr., *The Importance of Autonomy*, in WOMEN AND MORAL THEORY 129, 134 (Kittay & Meyers eds., 1987).

163. See *id.*

164. See Patricia A. Cain, *Feminism and the Limits of Equality*, in FEMINIST LEGAL THEORY, *supra* note 136, at 237, 238-39.

165. See generally Haslanger, *supra* note 139 (arguing that a feminist perspective should challenge the preoccupation with the significance of "reason," which reflects a bias toward men); see also Levit, *supra* note 76, at 1045 (discussing difference theory, which is premised upon the notion that women and men display different emotional and cognitive patterns, and speak in a "different voice").

166. Under the liberal feminist view, men and women should be treated equally, even if they are different in some ways, because both possess autonomy/rationality. See Wendy W. Williams, *The Equality Crisis: Some Reflections on Culture, Courts, and Feminism*, in FEMINIST LEGAL THEORY: READINGS IN LAW AND GENDER, *supra* note 76, at 26-27 (discussing why the equality approach is better than the "special treatment" model with regard to the issue of pregnancy). Similarly, women's "rapability" should not be a reason to single out women for different treatment in bias crime statutes. See *id.*

is that women should be treated equally with other groups that have been afforded heightened protection by bias crime laws, such as racial and religious groups.<sup>167</sup> Women as a group are equal to racial and religious groups because all three groups are comprised of people who possess the individual right of autonomy. Those who share the same characteristics, namely, historical oppression, therefore should be afforded the same treatment and protection under the law.

#### *D. Combating the Reinforcement of Gender Stereotypes*

Women's autonomy is further curtailed by the existence of gender stereotypes that reinforce male dominance. "Gender stereotyping is pervasive, persistent, subtle, and often unconscious . . . . [M]any subtle gender stereotypes are socially entrenched and legally enforced."<sup>168</sup> The nature of the typical man and woman has often been described as a dichotomy. A man is characterized as physically strong, aggressive, rational, and independent.<sup>169</sup> In contrast, a woman is characterized as his polar opposite: physically weak, passive (an apt target for a man's anger), irrational, and dependent on men.<sup>170</sup> John Stuart Mill, as well as Catharine MacKinnon, have argued that the dichotomy that society perceives between men and women actually may not reflect the true nature of women.<sup>171</sup> Rather, social causes have played a major role in constructing women to be passive and weak in comparison to men.<sup>172</sup> Men have engaged in the practice of "mental enslavement" over women through the use of their legal power, which was derived from the advantages of their physical power.<sup>173</sup>

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167. See Choundas, *supra* note 51, at 1094. See also Weisburd & Levin, *supra* note 12, at 34 (arguing that because bias crime laws recognize categories that are not recognized as suspect or quasi suspect classifications in equal protection jurisprudence, and because gender is included in other anti-discrimination laws, gender should also be included in bias crime laws).

168. Levit, *supra* note 76, at 1098-99 (discussing Title VII cases as examples of stereotyping).

169. See John Stuart Mill, *THE SUBJUGATION OF WOMEN* 16-23 (1869).

170. See *id.*

171. According to Mill, "[w]hat is now called the nature of women is an eminently artificial thing — the result of forced repression in some directions, unnatural stimulation in others. *Id.* at 22.

172. This dichotomy results in disadvantages not only to women, but also to men. See Levit, *supra* note 76, at 1054-79.

173. Mill, *supra* note 169, at 16.

Applying Mill's and MacKinnon's arguments to the context of criminal law, if women are aware that the laws purporting to protect them against male violence do not afford adequate protection in practice, women will be passive and refrain from seeking legal redress because they do not stand to benefit from the law. Because of the tendency for men to victimize women due to the disparity in strength and aggression,<sup>174</sup> laws must afford adequate protection for women against violence by men. Women's passivity is, in effect, further reinforced by the law because passivity is the only sensible choice that the law presents. One clear example of the effect that social and legal construction has on women's behavior is that despite the high incidence of rape, few women seek legal action against the alleged rapist, and those who do so often find themselves put on trial instead.<sup>175</sup> In addition, commentators have argued that the legal formulation of the Violence Against Women Act (VAWA),<sup>176</sup> which does address "crime[s] of violence motivated by gender," does not afford adequate protection to women because it is limited in several ways.<sup>177</sup>

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174. See *infra* Part III.

175. See Estrich, *supra* note 149.

176. Violent Crime Control and Law Enforcement Act of 1994, tit. IV, Pub. L. No. 103-322, 1994 U.S.C.C.A.N. (108 Stat.) 1796, 1902 (codified as amended in scattered sections of 42 U.S.C.). For summary of the legislative history of VAWA, see Victoria F. Nourse, *Where Violence, Relationship, and Equality Meet: The Violence Against Women Act's Civil Rights Remedy*, 11 WIS. WOMEN'S L.J. 1 (1996). The Violence Against Women Act provides the first federal civil rights remedy to victims of gender-motivated violence. *Id.* If a plaintiff can show that either the crime or the victim was purposely chosen because of the victim's gender, a claim under VAWA exists. *Id.* at 29 (quoting S.11, sec. 301(d)(1)). The act must be "committed because of gender or on the basis of gender," which means that the act must be "due, at least in part, to an animus based on the victim's gender." *Id.* VAWA encompasses "acts used to enforce, by violence, stereotypical gender-roles, to punish the victim for the exercise of rights guaranteed to all citizens, or to use forced sex as a weapon of intimidation or degradation." *Id.* at 31.

177. See, e.g., David Frazee, Note, *An Imperfect Remedy for Imperfect Violence: The Construction of Civil Rights in the Violence Against Women Act*, 1 MICH. J. GENDER & L. 163 (1993). Frazee argues that although "on paper" VAWA fills the gender gap in current civil right laws, there are limits in its application. For example, "[d]iscrimination is measured by a differential treatment test which asks whether a person would not have experienced an action 'but for' an identified characteristic." *Id.* at 212-41. The result of this differential treatment is that legal identity does not coincide with true identity, and a plaintiff who belongs to more than one group must show that the action was based upon characteristics of only one group — the problem of gender essentialism. See *id.* In addition, VAWA creates a force requirement, so that crimes of violence must be violent felonies, which excludes most domestic violence cases. *Id.* Finally, VAWA "subtly incorporates discourses of racism into its conception of violence against women." *Id.* In addition to some commentators' criticisms of the application of VAWA, the basis for VAWA has been under attack. The Supreme Court's recent ruling in *Lopez*, threatens Congress' power to pass the civil rights remedy using the Commerce Clause. See Kerrie E. Maloney,

As a result of the mental enslavement of women through social and legal constructs, it is impossible to know the true nature of women unless these constructs are lifted. In order to dismantle the existing stereotypical dichotomy about the nature of men and women, the formulation of laws must recognize not only the causal relation between the amount of protection the law affords to a particular group and the behavior of *individuals* in that group, but also the relation between the law and the *society's* perception and behavior toward that group. Specifically, if the laws are weak in that they afford little protection to women who are targets of bias crime, society will likely conclude that it is legitimate to express one's bias against women by physically harming them.<sup>178</sup> In this respect, the law may serve merely to reaffirm a person's already-existing biased beliefs about the nature of women and how they should be treated.

Including gender as a category in bias crime statutes is one step toward dismantling the stereotypes about men and women. For example, statutes that include all gender-related crimes as potential bias crimes and provide for penalty enhancements would force police officers and prosecutors to take seriously all violent crimes against women, regardless of whether the acts are sexual or nonsexual.<sup>179</sup> In addition, the inclusion of gender in bias crime statutes would improve the collection of data on crimes against women, and perhaps encourage the FBI to report statistics on gender-motivated crimes in its compilation of nationwide bias crime statistics.<sup>180</sup> The collection and dissemination of data, and the characterization of data as gender-based violence, would also force people to see such violence as a form of gender oppression and that "half of the population is, as a class, at serious risk of [being the victim of] a hate crime."<sup>181</sup> Finally, the inclusion of

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Note, *Gender-Motivated Violence and the Commerce Clause: The Civil Rights Provision of the Violence Against Women Act After Lopez*, 96 COLUM. L. REV. 1876 (1996) (arguing that the Congress did act within its authority in enacting VAWA). Some lower courts are also attacking the basis of the VAWA. The court in *Brzonkala v. Virginia Polytechnic and State Univ.*, 935 F. Supp. 779 (W.D. Va. 1996) held that although the plaintiff successfully stated a claim for a violation of VAWA (she successfully alleged a gender-motivated crime), the VAWA was an unconstitutional exercise of Congress' power because it was unjustified under either the Commerce Clause or the Enforcement Clause of the Fourteenth Amendment. Other courts, however, hold that the civil rights remedy provided by VAWA has a rational basis sufficient to support Congress' exercise of power under the Commerce Clause. See *Jane Doe v. John Doe*, 929 F. Supp. 608 (D. Conn. 1996).

178. See Weisburd & Levin, *supra* note 12, at 27.

179. Pendo, *supra* note 14, at 100-01.

180. See *supra* notes 46-48 and accompanying text.

181. Pendo, *supra* note 14, at 178.

gender may result in increased public education efforts on bias crimes against women. Public education serves to discourage crimes by those whose stereotypical views have yet to become deeply entrenched. For example, in Massachusetts, public education and law enforcement have been shown to discourage the "less determined perpetrators" of bias crime, according to the annual report of the Governor's Task Force on Hate Crime.<sup>182</sup>

### III. EVOLUTIONARY THEORY SUPPORTS THE INCLUSION OF GENDER IN BIAS CRIME STATUTES

Evolutionary theory, in combination with feminist theory, can provide a fuller picture of the nature and causes of bias crimes. Factors related to the commission of bias crimes against women such as the desire to achieve and maintain power and dominance over women, the subordination of women through sexual terrorism, the limiting of women's autonomy, and the reinforcement of the stereotypical dichotomy, may also be explained in evolutionary terms. According to evolutionary theorists, sexual drive and reproductive strategy is the driving force behind human behavior; sexual drive is an "emotional superstructure" that serves biological ends, of which the actor does not even need to be aware.<sup>183</sup> Because "natural selection puts a premium on the behaviour patterns that lead to maximal reproductive success,"<sup>184</sup> which males and females define differently, males generally are more aggressive and violent than women.

The existence of a gender gap of violence generally comes as no surprise; society has recognized that on the whole, men are more violent and aggressive than women.<sup>185</sup> Many studies have shown that males have a tendency to be more aggressive than women,<sup>186</sup> and that this tendency is present even during the early years of childhood.<sup>187</sup> Cross-cultural surveys also have shown that

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182. *Fewer Hate Crimes, But More Violent Ones Reported in Mass.*, THE NEWS OBSERVER (Raleigh, NC), November 17, 1996, at A8.

183. GEORG BREUER, *SOCIOBIOLOGY AND THE HUMAN DIMENSION* 147 (1982).

184. *Id.*

185. Psychologists define "aggressiveness" as the "infliction of harm on another." Browne, *Sex and Temperament in Modern Society: A Darwinian View of the Glass Ceiling and the Gender Gap*, 37 ARIZONA L. REV. 971, 1017 (1995).

186. See VIRGINIA HELD, *FEMINIST MORALITY: TRANSFORMING CULTURE, SOCIETY, AND POLITICS* 138 (1993); BREUER, *supra* note 183, at 156 (noting several "generally male" traits of behavior that are observable in the vast majority of the species: males are more easily aroused and more active in courtship, take more risks in getting a mate, and not very selective in choosing mating partners).

187. Browne, *supra* note 185, at 1018.

this tendency exists across various cultures; societies in which men rarely attack or rape women are the exception rather than the norm.<sup>188</sup> In fact, studies have shown that "[a]t birth, a child's sex is one of the most accurate discriminators of criminal behavior" and that violent crime, in particular, is male-dominated.<sup>189</sup> Other biological factors that account for the gender difference in violence and crime include the male's greater vulnerability to environmental stress and developmental difficulties, and the male's higher rate of prenatal and perinatal complications and disorders.<sup>190</sup> Based on the numerous studies documenting the gender gap of violence, it should also come as no surprise that most bias crimes are committed by men.<sup>191</sup> Evolutionary theory may be useful in explaining the male tendency for aggression and the commission of violent crimes against both women and men, which stem from feelings of hatred and frustration in not being able to achieve reproductive success by nonviolent means, and the evolutionary need to find other methods of achieving reproductive success when faced with competition from other males.<sup>192</sup> Specifically, evolutionary theory may indicate a psychological adaptation to commit gender-related bias crimes. According to evolutionary theorists, all males are "programmed to adjust their [reproductive] strategy to achieve egg fertilizations."<sup>193</sup> In the case of humans, males are unable to detect when a woman will become pregnant; therefore, the ideal reproductive strategy is to have exclusive, continuous access to a female when she is not pregnant.<sup>194</sup> The drive toward maintaining exclusive and continuous access may result in committing acts of violence.

#### A. *Background on Evolutionary Theory*

Evolutionary theory deals with "the extent to which human cultures, and the behaviors which are part of them, can be accounted for by genetic determinism," which is defined as "forms of behavior that unfold along a fixed path and cannot be signifi-

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188. Smuts, *Male Aggression Against Women: An Evolutionary Perspective*, 3 HUMAN NATURE 1, 2 (1992).

189. DEBORAH W. DENNO, BIOLOGY AND VIOLENCE FROM BIRTH TO ADULTHOOD 17 (1990).

190. *Id.* at 17-18.

191. See *supra* note 36 and accompanying text.

192. See *infra* notes 246-57 and accompanying text.

193. JOHN H. BECKSTROM, DARWINISM APPLIED: EVOLUTIONARY PATHS TO SOCIAL GOALS 50 (1993).

194. See *id.*



cantly altered by environmental contingencies."<sup>195</sup> The four main forces operate to influence evolutionary change are: mutation, gene flow, random drift, and selection.<sup>196</sup> With regard to explaining the tendency of males to commit bias crimes against women, the concept of adaptation is particularly important. The term "adaptation," in the evolutionary sense, refers to the "fit of an organism to its environment by means of characteristics usually widely shared throughout a species."<sup>197</sup> The "fit" of an organism to its environment is achieved by a process of natural selection in order to "solve" a particular environmental problem.<sup>198</sup> The "problem," according to evolutionary theorists and sociobiologists, is how to maximize reproductive success.<sup>199</sup>

Evolutionary theorists assume that the evolutionary goal of the human species is the maximization of reproductive success.<sup>200</sup> While both men and women seek to maximize their reproductive success, they are inherently at odds with each other because they have different reproductive interests; in other words, they have differing views on what constitutes "success."<sup>201</sup> This difference is caused by the fact that men can reproduce hundreds of times a year, while women can reproduce only once a year.<sup>202</sup> Thus, the parental investment of men is much lower than the parental investment of women; men, from an evolutionary perspective, are more concerned with quantity while women are more concerned with quality.<sup>203</sup> As women can reproduce only once a year, they are more sexually reserved, or "coy" — they are much more choosy about their mates than men.<sup>204</sup> In addition, the differences in biological roles — namely, that women must bear and feed their

195. GOLDSMITH, *THE BIOLOGICAL ROOTS OF HUMAN NATURE* 72.

196. *Id.* at 29-31.

197. KONNER, *THE TANGLED WING: BIOLOGICAL CONSTRAINTS ON THE HUMAN SPIRIT* 21.

198. GOLDSMITH, *supra* note 195, at 33-35.

199. KONNER, *supra* note 197, at 15.

200. For further background on evolutionary reproductive strategy, see BECKSTROM, *supra* note 194, at 47-51. For a description of the research strategy used for testing the proposition that humans behave in a way that maximizes reproductive success, see William Irons, *Cultural and Biological Success*, in *HUMAN NATURE*, *supra* note 188, at 36.

201. Smuts, *supra* note 188, at 3 (citing Hammerstein and Parker, 1987).

202. WRIGHT, *THE MORAL ANIMAL* 35.

203. See *id.* at 42. The term "parental investment" is defined as "the contributions a parent makes to one offspring's reproductive success at a cost to its own ability to invest in other offspring." Douglas T. Kenrick, ET. AL., *Evolution, Traits, and the Stages of Human Courtship: Qualifying the Parental Investment Model*, in *HUMAN NATURE*, *supra* note 188, at 214.

204. WRIGHT, *supra* note 202, at 46.

children — create an inherent power imbalance between men and women.<sup>205</sup>

*B. Reproductive Goals and the Commission of Bias Crimes Against Women*

According to the theory of evolutionary adaptation, a particular behavioral feature must have a specific purpose and must not be explicable by chance.<sup>206</sup> "Psychological adaptations are specifically engineered to produce specific environmental information and to guide feelings, emotions, learning, and behavior toward specific reproductive ends."<sup>207</sup> Specifically, violent behavior — which may from a male's feelings of hatred and frustration that arises when he fares poorly in competition with other males, or when nonviolent mating strategies fail — may be used to increase reproductive success.<sup>208</sup> Reproductive success depends on the male's ability to exert power over females and to compete with other males. Violent acts may be used to ensure that females conform to their passive role, to challenge female coyness and sexual reserve, and to gain social status among other males.<sup>209</sup> Because men are "evolutionarily programmed" to use the most effective means possible to keep women under control, the law should recognize this tendency and punish men who resort to violence to exert such control.<sup>210</sup>

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205. BENOKRAITIS AND FEAGIN, *MODERN SEXISM: BLATANT, SUBTLE, AND COVERT DISCRIMINATION* 60 (1995).

206. Thornhill & Thornhill, *Coercive Sexuality of Men: Is There Psychological Adaptation to Rape?*, in *SEXUAL COERCION*, *supra* note 85, at 106.

207. Thornhill & Thornhill, *The Evolutionary Psychology of Men's Coercive Sexuality*, 15 *BEHAVIORAL AND BRAIN SCIENCES* 363, 364 (1992).

208. *See* Stock, *supra* note 85, at 64-67.

209. *See* Smuts, *supra* note 188, at 28. While biological reasons may exist to explain violence against women, the environment also serves to reinforce these tendencies. Several aspects of modern culture legitimize hate against women: comedians capitalizing on group intolerance, "slasher" films that place the assault and torture of women in erotic contexts, music lyrics, and radio and television programs. *See* LEVIN & MCDEVITT, *supra* note 1, at 34-41.

210. Although one may argue that because men are "evolutionarily programmed" to be violent, the law should forgive and accept this behavior rather than punish it. This argument, however, focuses solely on the perpetrator of the crime to the further detriment of the victim. *See, e.g.*, Lawrence, *supra* note 53 (noting that the purpose of criminal law is to achieve "just punishment").

### 1. *The Use of Violence to Enforce Gender Dichotomy*

The stereotypical dichotomy of male and female nature operates in favor of a male's reproductive success. Although men have been found to be "generally more eager and less discriminating sexually,"<sup>211</sup> while women are in comparison choosier about their sexual partners,<sup>212</sup> societal stereotypes about what constitutes proper male and female characteristics enable males to achieve their evolutionary reproductive goals. A woman's passivity and her acceptance of male aggression as normal behavior enables men to gain sexual access and control.<sup>213</sup> When the dichotomy begins to break down, however, males may seek to reestablish it through the use of violence. The threat of diminished reproductive success may be "translated" by evolution into hatred of women who do not fit stereotypical roles.

Female independence and autonomy are threats to male reproductive success. For example, "unattached" females are often targets of male violence. Orangutan chimpanzee females who travel alone are vulnerable to assault by males.<sup>214</sup> Female baboons who stray too far from their "protector" will be threatened and if they do not respond, they will be subjected to a "neckbite," which is symbolic of the male's power over her.<sup>215</sup> In Yanomamo culture, men will not protect unattached women who are kidnapped by men of another village.<sup>216</sup> One possible explanation for such behavior is that women are expected to mate more or less exclusively with their protector, and those who are unattached and who have no protector are, in a sense, reproductively independent. Therefore, males have no evolutionary interest in mating with such females because their paternity cannot be ensured.<sup>217</sup> In addition, males who commit violence against independent females reap benefits for the entire male community because it helps to ensure paternity. All women in the community are discouraged from deviating from male control.<sup>218</sup>

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211. Kenrick, ET. AL., *supra* note 128, at 214.

212. *Id.*

213. Under this dichotomy, society rewards men for violent and aggressive behavior, and punishes such behavior in women. Taylor, *supra* note 28, at 592-93.

214. Smuts, *supra* note 188, at 12.

215. *Id.*

216. *Id.*

217. See Thornhill & Thornhill, *supra* note 204, at 104.

218. See Smuts, *supra* note 188, at 8 (discussing how male chimpanzee violence influences the behavior of female chimpanzees).

With regard to modern culture, studies have shown that wife beating increases when female dependence is minimal.<sup>219</sup> When women are less economically dependent on men, they are "more likely to defy male attempts to control them, and some men may respond by resorting to violence."<sup>220</sup> In addition, the majority of wife beatings have been shown to reflect the husband's attempt to discourage his wife's infidelity.<sup>221</sup> With regard to rape, it is used as a form of punishment when their spouses are unfaithful; it is used as a way to "get even" — perhaps in both an emotional sense and in a reproductive sense. Bias crimes, therefore, may be seen as symbolic acts that "remind" women not to stray too far from accepted norms of behavior.<sup>222</sup> Because what a culture considers "masculine" shapes how an individual male feels about his virility, women who behave too much like men threaten men at their very core.<sup>223</sup>

## 2. *The Use of Violence to Challenge Female Coyness*

According to evolutionary theory, males benefit from sexual aggressiveness because their goal is to disseminate their genes as widely as possible.<sup>224</sup> Because females' reproductive goals differ from males due to their inherently greater parental investment,<sup>225</sup> evolutionary theorists argue that females must be more choosy about their mates.<sup>226</sup> While coyness may be viewed as a source

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219. *Id.* at 24.

220. *Id.*

221. *Id.* at 13.

222. Marc Lepine and George Henard killed women because they were feminists and were taking over male territory. See *supra* notes 1-11 and accompanying text. From an evolutionary perspective, their actions may be a psychological adaptation; they feel rage because these types of women threaten their reproductive success. Independent women are more likely to be choosier about their mates because they are likely to have higher levels of self-esteem and self-confidence. Economic and emotional independence may be seen as related to reproductive independence; the more independent a woman is, the greater her control over with whom she mates. The public killing of these types of women serves to warn other women who choose to reject male dependency. The slow destruction of their self-esteem and self-confidence as a result of such violence serves to increase overall male access to females.

223. Held, *supra* note 186, at 149.

224. See Thornhill & Thornhill, *supra* note 206, at 94-94.

225. For a background on parental investment and sexual selection theory, see David M. Buss, *Sex Differences in Human Mate Preferences: Evolutionary Hypotheses Tested in 37 Cultures*, in *HUMAN NATURE*, *supra* note 128, at 175-78.

226. According to one study that surveyed thirty-seven cultures regarding mate preference, females place greatest importance on resource acquisition. *Id.* at 181. In thirty-six out of the thirty-seven cultures surveyed, females valued "good financial

of power and dominance that females have over males, a female's ability to choose which male's genes she will carry can be overridden by male violence. According to evolutionary theorists, males use various mating tactics to break down the female barrier of coyness, or mate selectivity. Such tactics include honest advertisement and courtship, deceptive advertisement and courtship, and coercion.<sup>227</sup> These tactics are often used together to maximize reproductive success.<sup>228</sup> Bias crimes may be viewed as expressions of contempt for female coyness when nonviolent mating strategies fail to achieve reproductive success.<sup>229</sup> Women therefore, are in a Catch-22 situation — if they are too "masculine," they are subjected to violence, and if they are too "feminine" they are also subject to violence.

Sexual violence is typically used to break through the female coyness barrier. Such violence has been defined as male sexual coercion, which is the "male use of force, or its threat, to increase the chances that a female will mate with the aggressor or to decrease the chances that she will mate with a rival, at some cost to the female."<sup>230</sup> The use of sexually coercive behavior is predominantly male.<sup>231</sup> To ensure reproductive success when other methods fail, men often resort to rape.<sup>232</sup> According to some evolutionary theorists, "[m]en have certain psychological traits that evolved by natural selection specifically in the context of coercive sex and made rape adaptive during human evolution."<sup>233</sup> When men's evolved individual interests will be served, men will be motivated to coerce sex.<sup>234</sup> Strong evidence supports this theory. For example, both rapists and nonrapists are sexually aroused by coerced sex, in addition to consensual sex.<sup>235</sup> Male sexual psychology does not require female consent for arousal. In addition, men are more aroused by visual and fantasized sexual stimuli, and are more likely than females to infer the presence of sexual interest in a member of the opposite sex even when in fact it does not exist.<sup>236</sup> Finally, according to a study conducted by

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prospects" more than males did. *Id.* In addition, in thirty-four cultures, females valued ambitiousness and industriousness more than males did. *Id.* at 183.

227. Thornhill & Thornhill, *supra* note 206, at 98.

228. *Id.*

229. See BART AND MORAN, *supra* note 103, at 28.

230. Smuts, *supra* note 188, at 3 (citing Smuts & Smuts, 1992).

231. Thornhill & Thornhill, *supra* note 206, at 107.

232. See *id.* at 98.

233. Thornhill & Thornhill, *supra* note 207, at 363.

234. Thornhill & Thornhill, *supra* note 206, at 98.

235. *Id.* at 101-02.

236. Thornhill & Thornhill, *supra* note 207, at 366.

psychologist Mary Koss, one in twelve male college students admitted to committing acts that met the legal definition of rape.<sup>237</sup> In addition, Koss's study showed that one in four women surveyed was a victim of rape or attempted rape, and that eighty-four percent of those raped knew their attacker.<sup>238</sup>

While female coyness may be viewed as a means by which females exert control over their own reproduction,<sup>239</sup> rape and other acts of violence may be viewed as a means by which males reinforce their ultimate control over women's reproduction. Both the desire to control women, and the desire to have a sexual experience with the goal of passing genes on to the next generation, may be concurrent evolutionary motivations behind the act of rape.<sup>240</sup> The act of rape, from an evolutionary point of view, may be an act committed by men as a group against women as a group to vent reproductive frustrations.<sup>241</sup> Each incidence of rape produces a terroristic effect that reminds women of the dangers of being too coy. Young women, particularly those between the ages of fifteen and twenty-nine, are by far the most likely to be raped.<sup>242</sup> The fact that those women who are most likely to be raped are also those who are in their peak reproductive years is no coincidence, according to evolutionary theorists.<sup>243</sup> While any rape is traumatic, women who are raped while in their peak reproductive years face heightened trauma.<sup>244</sup>

237. Pendo, *supra* note 14, at 169.

238. *Id.*

239. See BREUER, *supra* note 183, at 159-64.

240. See BECKSTROM, *supra* note 193, at 55-57.

241. See Thornhill & Thornhill, *supra* note 206, at 100 (arguing that males with low socioeconomic status will have a greater motivation for rape because of their diminished access to "preferred mates").

242. Thornhill & Thornhill, *An Evolutionary Analysis of the Psychological Pain Following Rape: I. The Effects of Victim's Age and Marital Status*, in *Human Nature*, *supra* note 128, at 230-31.

243. *Id.* at 233.

244. See BECKSTROM, *supra* note 193, at 48-51. Thornhill & Thornhill explain that in human evolutionary theory, rape reduces female fitness in a number of ways, such as:

- (1) Rape may lead to the victim's injury.
- (2) Rape may reduce a woman's ability to choose the timing and circumstances for reproduction, as well as the man who fathers her offspring. When rape leads to conception and gestation of a zygote, women may expend their limited reproductive effort in the wrong (for successful reproduction) circumstances and with the wrong male.
- (3) Rape also circumvents a woman's ability to use copulation as a means of securing material benefits from men for herself or her genetic relatives

Thornhill & Thornhill, *supra* note 128, at 227-28. In addition to age, other factors influencing a rape victim's mental trauma include: "mateship status," "rape credibility," and "the nature of the sex act during rape." Thornhill & Thornhill, *Rape-Victim Psychological*

### 3. *The Use of Violence to Improve Status Among Other Males*

Although males use violence against women as a way to ensure that women will submit to male aggression and attempts at reproduction, males also use violence against women as a way to exert their superior status over other males, thus further ensuring reproductive success.<sup>245</sup> Men, in their interaction with other men, tend to display more "egoistic dominance" in that their behavior reflects an attempt to control others for selfish ends.<sup>246</sup> In contrast to women, men enhance their reproductive success by both competing and cooperating with other males; "[d]ominance assertion in male groups is more likely to lead to enhanced reproductive success than it is in female groups."<sup>247</sup> Among young males (the typical perpetrators of bias crimes), the assertion of dominance is through physical acts and other power-related components of dominance behavior.<sup>248</sup> Through the assertion of dominance and competition among other males, males display the resources that females desire in mates.<sup>249</sup>

With regard to bias crimes, men often engage in intragroup competition.<sup>250</sup> Those males who are initiators of violence or take the lead role in perpetrating the violence may be viewed by other males as more powerful and of a higher status.<sup>251</sup> Those males who are able to easily gain sexual access and have "conquered"

*Pain Revisited*, in HUMAN NATURE, *supra* note 128, at 239. The degree of "psychological pain" is evaluated based on thirteen variables. See Thornhill & Thornhill, *An Evolutionary Analysis of Psychological Pain Following Rape: I. The Effects of Victim's Age and Marital Status*, *supra* note 128, at 229..

245. Because the sex ratio for most species is 1:1, the excessive reproductive success of any one male must come at the expense of other males. DAVID P. BARASH, *SOCIOBIOLOGY AND BEHAVIOR* 223-24 (1982). "In many species dominant males try to prevent low-ranking ones from mating. In some primitive species, when probability of fertilization is high (oestrus), dominant males try to monopolize females." BREUER, *supra* note 183, at 163. Competition, among males, therefore, appears inevitable.

246. Browne, *supra* note 185, at 1024.

247. *Id.* at 1024-26.

248. *Id.* at 1027-28.

249. See Buss, *supra* note 225, at 190. In fact, one study has shown that characteristics related to dominance and social status are associated with male attractiveness across a wide range of cultures, suggesting that females are attracted to males who show characteristics of social dominance. See Kenrick, Sadalla, Groth, & Trost, *Evolution, Traits, and the Stages of Human Courtship: Qualifying the Parental Investment Model*, in HUMAN NATURE, *supra* note 128, at 214-15, 219-21.

250. See Martin & Hummer, in *VIOLENCE AGAINST WOMEN: THE BLOODY FOOTPRINTS*, *supra* note 103, at 117-20.

251. See *id.* at 122.

several women may also be viewed as having a higher status. Thus, those males who possess superior status will be less likely to be challenged by other males, who may attempt to take "their" women.<sup>252</sup> In other words, males further ensure their paternity by elevating their status within the group. In societies that have mating systems in which males invest parentally, sexual jealousy serves the function of guarding a mate from intrasexual competitors; sexual jealousy may be explained on the grounds that males do not want to make a parental investment on a child that is not theirs.<sup>253</sup> The drive to ensure paternity is so strong that studies have shown that many homicides and acts of violence stem from male sexual jealousy.<sup>254</sup> In some cultures, a groom pays a special price to ensure that his future wife is not carrying someone else's genes.<sup>255</sup>

Although men compete with each other in their efforts to improve their status within the group, men also cooperate with each in order to maintain group status. To ensure that women are sexually controllable, both individual males and groups of males may use violence to punish socially deviant women. For example, gang rape is the solidarity of men in keeping women as a group from participating in political and social life as equals."<sup>256</sup> In addition, in small societies, "the fact that men can overwhelm women in violent encounters looms large in gender politics."<sup>257</sup>

#### IV. ADDRESSING COMMON ARGUMENTS AGAINST INCLUSION

Evolutionary theory suggests that males have the tendency to be more aggressive than women, and that males are more likely to resort to violence to fulfill their reproductive goals.<sup>258</sup> Bias crime laws that protect women as a class from gender-related violence are necessary to counteract this tendency. A punishment system, such as enhanced penalties for bias-motivated crimes, may serve to decrease the incidence of bias crimes against women. The inclusion of gender as a protected category in bias crime laws must also be coupled by adequate publicity and enforcement of such laws: "If adequate publicity is given to an

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252. See *id.* at 123-24.

253. Buss, *supra* note 225, at 177.

254. *Id.*

255. BARASH, *supra* note 245, at 237-38 (1982) (citing customs in some African cultures).

256. Smuts, *supra* note 186, at 27-28.

257. *Id.*

258. See *supra* Part III.



appreciable increase in likelihood and/or severity of punishment [for bias crimes against women] and all other factors affecting [the rate of bias crime commission], the rate will decrease."<sup>259</sup> Although arguments may be made against inclusion of gender-related crimes in bias crime statutes, these arguments may be addressed and refuted using both feminist and evolutionary theory.

#### A. *Lack of Victim Interchangeability in Certain Cases*

The "compromise" view holds that although gender should be included in bias crime statutes, only certain types of gender-related crimes should be covered.<sup>260</sup> Under this view, random crimes committed against strangers that are extremely violent and often serial in nature should be included, while crimes such as non stranger rape and domestic violence should not be included.<sup>261</sup> The rationale for this distinction is that the former types of crimes involve victim interchangeability, while the latter do not. Bias crime statutes do not cover crimes that are committed in which a person is victimized for reasons pertaining to that individual; therefore, if the crime involves a personal relationship dynamic through which the victim may contribute to her own victimization, there is no interchangeability and the crime is not viewed as a bias crime.<sup>262</sup>

One argument against maintaining this distinction is that the relation between the victim and the attacker is irrelevant in bias crimes committed against already protected groups. For example, "[b]urning a cross in the neighbor's yard, desecrating a classmate's place of worship or harassing a co-worker with racial taunts are all understood as hate crimes despite the relationship between the defendant and the victim."<sup>263</sup> In fact, the relationship between the victim and the offender makes the crime "more heinous because the sense of shared connection and shared

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259. See BECKSTROM, *supra* note 193, at 54 (offering a sociobiological prediction on rape reduction through the use of a punishment system).

260. See *supra* note 16 and accompanying text.

261. See Weisburd & Levin, *supra* note 12, at 35; LEVIN & MCDEVITT, *supra* note 1, at 15-18 (describing the Central Park Jogger case as an example of a crime that qualifies as a gender-bias crime). Massachusetts is attempting to move away from the view that only certain types of gender-related crimes should be covered by bias crime laws. It is seeking to expend its bias crime law to include gender, and Governor William Weld has stated that the category of gender would probably cover most domestic violence cases. THE NEWS OBSERVER, *supra* note 182.

262. See Weisburd & Levin, *supra* note 12, at 38.

263. See Pendo, *supra* note 14, at 168.

community implied in social familiarity is viciously shattered."<sup>264</sup> Further, from a historical standpoint, victim interchangeability has not been viewed as a problematic issue. The lynching of Emmett Till in the South in the 1950s is one example. Emmett Till was not selected at random; he was selected because he was a black man who whistled at a white woman and transgressed strict social norms. The lynching of Emmett Till sends a different message than the lynching of a random black person who did not commit such a social transgression.<sup>265</sup> Similarly, an African-American family may be targeted for violence by their neighbors because they are the first minority family to move into a particular neighborhood. The perpetrators of the crimes may not harbor a hatred of all African-Americans—they may only hate those who cross the line into white territory. Such crimes are nonetheless categorized as bias crimes.<sup>266</sup> Analogously, crimes in which the woman victim and the offender are non-strangers (such as acquaintance rape and domestic violence), should be treated in the same manner as crimes committed against racial groups in which the offender and the victim are acquaintances or have some type of relation to each other.

Another argument, which is grounded in feminist theory, is that this distinction fails to recognize the underlying commonalities between crimes committed against strangers and crimes committed against non strangers. In both cases, it is often the case that the male offender commits the crime in order to enforce the dichotomy that defines the "proper" nature of men and women.<sup>267</sup> Regardless of whether the crime is committed against a stranger or non stranger, the offender is seeking to validate his world view by exerting control over certain women, which represent the group of women who do not fit into his world view. In addition, by shifting the focus away from distinguishing between sexual and nonsexual crimes, the crimes become an expression of male dominance rather than a sexual act.<sup>268</sup> Some commentators focus on the effect of the crime on the victim:

[A] gender-related crime such as rape or domestic violence should not be precluded from bias crime characterization merely because the perpetrator does not necessarily hate all

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264. *Id.*

265. See Weisburd & Levin, *supra* note 12, at 37.

266. O'MALLEY, *supra* note 22, at §VIII (indicating that racial integration of neighborhoods leads to "move-in violence," which is one cause of race-based bias crimes).

267. See Taylor, *supra* note 28, at 598-99 n.177.

268. Angelari, *supra* note 35, at 104.

women, or because he may not specifically intend his action to have any effect on women as a gender class. Whether or not the attacker's "primary motivation" is hatred toward all women, the offense may still be a bias crime because it directly reinforces the subjugated status of women and has the effect of terrorizing the entire community.<sup>269</sup>

Evolutionary theory also supports the argument that victim interchangeability exists even in crimes involving non strangers. Under evolutionary theory, all men benefit when a man targets a woman for violence; the attack serves to discourage women from wandering too far away from males and thus ensures paternity.

### *B. The Problem of Rape*

A particularly problematic area is whether rape should be included as a crime covered under bias statutes that include gender as a category.<sup>270</sup> One argument is that the only type of rape that should be included in bias crime statutes is stranger rape; non stranger rape does not involve victim interchangeability and thus cannot be a bias crime against women as a class.<sup>271</sup> Another argument is that rape should be treated separately because it is impossible to distinguish between bias-motivated rapes and non bias-motivated rapes; separate criminal laws punishing rape are adequate.

Some feminists argue that all rape, and perhaps all intercourse and all sexuality, is an inherently gender-biased act. According to MacKinnon, male sexuality, to a significant extent, is activated by violence against women; "[s]exuality is a form of power" and is the "linchpin of gender inequality."<sup>272</sup> Thus, there is no legal distinction between rape and consensual sex because "under patriarchy consensual sex is a myth for women who do not

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269. Weisburd & Levin, *supra* note 12, at 36. Although the effect on the victim is a important factor to consider, it is also important that this factor does not become the primary factor. Focusing solely on the effect on the victim may create a slippery slope in which cases that are not truly bias crimes are nonetheless characterized as such. It is therefore important to consider and weigh the totality of various factors. See *infra* notes 287-98 and accompanying text. In other words, the mere showing that a crime reinforces the subjugated status of women, alone, may result in bias crime statutes that are overinclusive. The plaintiff should be able to show various factors that indicate some element of hatred.

270. See, e.g., Eric Rothchild, *Recognizing Another Face of Hate Crimes: Rape as a Gender-Bias Crime*, 4 MD. J. CONTEMP. LEGAL ISSUES, 231 (1993).

271. See Weisburd and Levin, *supra* note 12, at 38.

272. HELD, *supra* note 186, at 139.

have freedom of choice."<sup>273</sup> According to Andrea Dworkin, all sexual intercourse is a violation; "intercourse is the pure, sterile, formal expression of men's contempt for women."<sup>274</sup> Under a personal construct theory, men use rape as "an attempt to keep women in a state of fear and powerlessness and to protect male power in a patriarchal society."<sup>275</sup> Under these views, for example, one could argue that if every successful rape prosecution resulted in an enhanced penalty because they are inherently gender-biased, then it would make more sense to increase the penalties under already existing rape statutes than to include rape as a crime covered under bias crime statutes.

Taking the above view, however, fails to consider a number of issues. First, the above view is somewhat illogical—it holds that because all rape is bias-motivated, it therefore should be excluded from bias crime statutes. Logically, it would seem that if the commission of a particular crime is rife with gender bias, it would strongly support the inclusion of that crime in bias crime statutes. Second, the fact that penalty enhancements for rape may be achieved outside a bias crime statute is irrelevant in determining whether rape should be included; "an important purpose of bias crime legislation is to articulate the message that the status-based victimizations are *themselves* worthy of individual treatment due to the perpetrator's particularly depraved discriminatory motive."<sup>276</sup> Third, instead of excluding all types of rape based on the theoretical view that all rape and all sex is inherently gender-biased, the law should treat rape as any other bias crime—which would result in a case-by-case analysis of the evidence surrounding the rape at issue to determine whether a bias motive was involved.<sup>277</sup>

Some courts draw the distinction between stranger rapes and acquaintance rapes, holding that in stranger rapes, it is easier to infer gender-based animus. In *Brzonkala v. Virginia Polytechnic and State University*,<sup>278</sup> the District Court of the Western District of Virginia stated that "all rapes are not the same," and that "gender animus more likely played a part in these rapes than in other types of rapes."<sup>279</sup> The rape involved in this case was a

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273. SMART, *supra* note 139, at 111.

274. Andrea Dworkin, *Occupation/Collaboration* 161,163, in INTERCOURSE (1987).

275. Stock, *supra* note 85, at 67.

276. Weisburd & Levin, *supra* note 12, at 41 (emphasis added).

277. *See id.*

278. 935 F. Supp. 779 (W.D.Va. 1996).

279. *Id.* at 784.

gang rape, which, according to the court "generally is more egregious than one-on-one rape" because it "indicates a conspiracy and disrespect for that woman."<sup>280</sup> Further, the court determined that gang rapes "are probably closer to stranger rapes" and that "stranger rapes generally more likely than date rape involves gender animus."<sup>281</sup> In addition to comparing gang rape to stranger rape, the court also focused on other factors such as the words spoken by the offenders before and after the attack. One offender, after raping the victim, stated, "You better not have any f—— diseases." The court reasoned that this statement further evidences the offender's disrespect.<sup>282</sup> Another offender, before the attack, stated, "I like to get girls drunk and f—— the s—— out of them," which the court found to also indicate disrespect for women in general.<sup>283</sup>

While it may be argued that stranger rapes and gang rapes more strongly indicate the offender's hatred of women than in one-on-one acquaintance rapes, bias crime statutes should not entirely preclude plaintiffs from the opportunity of attempting to prove gender hatred in the latter types of cases. Because courts require "subjective proof on a case-by-case basis that the criminal was motivated by a bias against the victim's gender," a plaintiff may be able to show through other types of evidence that an acquaintance rape was motivated by gender bias.<sup>284</sup> In addition, from an evolutionary standpoint, there is no significant difference between stranger and non stranger rapes because the underlying motivation is the same for both. In both cases, the rape of any woman in reproductive age stems from male inability to achieve reproductive success through nonviolent means.<sup>285</sup> Further, all males benefit from the rape of females because it strongly discourages females from deviating from male control, thereby ensuring paternity.<sup>286</sup>

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280. *Id.*

281. *Id.*

282. *Id.* at 785.

283. *Id.*

284. *Id.* at 784. The court in *Brzonkala* considered factors such as the language used by the perpetrator, the severity of the attack (including mutilation), the lack of provocation, previous history of similar incidence, absence of apparent motive, and common sense. *Id.* These factors should also be given equal consideration in cases involving acquaintance rape.

285. See *supra* notes 239-43 and accompanying text.

286. See *id.*

### C. *Difficulty in Proving Gender Bias*

Another common view regarding the inclusion of gender in bias crime statutes is that gender should not be included because in general, it is difficult to prove gender bias. This difficulty alone, however, should not be a sufficient reason to exclude gender. Although some may argue that the offender may not harbor a conscious hatred of women and therefore should not be prosecuted under a bias crime statute, which punishes the discriminatory motive, this argument may be attacked in several ways.

First, various factors may be examined, which would strongly suggest the existence of a gender-based motive:<sup>287</sup> the lack of provocation; the offender's previous history of committing bias crimes; severity of the harm; and absence of apparent motive (such as battery without robbery).<sup>288</sup> Other factors include: whether the victim and offender are of different sexes; whether the offense is linked to a day or event that is significant to that group;<sup>289</sup> whether the victim's group has been involved in recent public or political activity that makes the group a likely victim of hate-motivated violence;<sup>290</sup> whether the crime occurred in a setting in which the victim was a minority;<sup>291</sup> and whether the offender recognized the victim to be a member of a targeted group.<sup>292</sup>

Sexist and demeaning language such as words, symbols, or acts that may be offensive to an identifiable group, also may be particularly indicative of gender bias.<sup>293</sup> Usually, evidence of a

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287. O'MALLEY, *supra* note 22, at § V.

288. Angelari, *supra* note 35, at 99.

289. For example, men may attack women participating in a "Take Back the Night" demonstration. See *supra* note 39 and accompanying text.

290. See *supra* note 39 and accompanying text.

291. For example, a female victim may work in a traditionally male-dominated field, and be assaulted during working hours by those who did not approve of her working in that field and attempted to drive her out.

292. For example, the offender may perceive that women who take engineering classes are feminists and is seeking to attack feminists. See *supra* notes 1-6 and accompanying text.

293. Sexist and demeaning language alone, however, is not likely to rise to the level of a bias crime. In *People v. A.G.*, 896 P.2d 1365 (Cal. 1995), the California Supreme Court held that speech alone is not sufficient to constitute a bias crime unless the plaintiff can show that the speech itself threatened violence against a specific person or group, and that the offender had the apparent ability to carry out the threat. *Id.* at 1368. The court interpreted the term "threat" as "expression of intent to inflict evil, injury, or damage another." The reasonable person must foresee that the words spoken will result in physical violence upon that person. *Id.* at 1371. Therefore, common "street harassment" is not likely to be viewed by courts as a bias crime. See *id.*

bias motivation is found in the language used before, during, and after the attack, which mirrors other types of bias crimes.<sup>294</sup> The fact that sexist and demeaning language permeates our society should not prevent it from being used as evidence of gender bias; "[i]t is unfortunately true that hatred towards women is often expressed in ways that most Americans hear uncritically."<sup>295</sup> The permeation of our culture with language and symbols that evidence hatred and extreme disrespect for women should instead point towards society's general tolerance of bias crimes committed against women, and the need for bias crime statutes to include protection on the basis of gender.

In addition, a prosecutor may be able to prove gender bias by showing that the offender adhered to a rigid view of the nature of men and women, and believed that women who did not follow the stereotypical dichotomy were bad and deserved to be punished or put back in their place.<sup>296</sup> Another factor to consider may be the differences in socioeconomic positions between the offender and the victim, which indicate, for the biased male, an "unnatural" power disparity.<sup>297</sup> Finally, some prosecutors also ask the victim what they think is the reason for the crime, in order to further assist in a determination of whether a bias crime has occurred.<sup>298</sup>

The presence of the above factors strongly indicates that the offender was motivated by hatred of women or a particular group of women. To be found guilty of a bias crime, the offender need not be wholly motivated by hate; mixed motives will not preclude prosecution under bias crime statutes.<sup>299</sup> Precedent suggests that a "but for" causation is not necessary; as long as the offender was motivated at least in *part* by hate, the offender may be guilty of committing a bias crime by reason of the victim's actual or perceived status.<sup>300</sup> Further, it is not likely that the offender must

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294. O'MALLEY, *supra* note 22, at § VIII.

295. *Id.*

296. See Taylor, *supra* note 28, at 603.

297. See *supra* notes 83-118, 209-221 and accompanying text..

298. Kristan Trugman, *Youths Attack Radio Reporter, Newsman Injured at NE High School*, THE WASHINGTON TIMES, November 15, 1996 at C7.

299. See O'MALLEY, *supra* note 22, at § VI-4.

300. See *id.* (analogizing the analysis of Title VII cases with bias crime cases); see also *id.* at § V-2. In *People v. A.G.*, the California Supreme Court stated:

[W]e do not find in the statutes or the Constitution a requirement that the prohibited motivation be the predominant or exclusive cause of the offense. Instead, a crime with multiple concurrent causes is still done 'because of bias, and properly chargeable under [the California bias crime statutes] if the prohibited bias was a substantial factor in the commission of the crime.'

896 P.2d 1365, 1379 (Cal. 1995).

harbor a hatred for all women — in many cases, crimes committed with a hatred of a certain group of women were characterized as bias crimes.<sup>301</sup>

Currently, the burden typically lies on the plaintiff to prove beyond a reasonable doubt both the elements of the underlying crime and the hate motivation behind the crime.<sup>302</sup> In some cases, a prosecutor could easily prove both; in cases in which the offender says the "magic words," the motivation behind the crime is self-evident. Examples of such situations are: when men heckle at women holding a "Take Back the Night" demonstration and then throw bottles at them; when a man sexually assaults a woman and says that he is going to teach all women a lesson; and when a man assaults a woman on their third date when she refuses to have sex, and says "all you women are alike."<sup>303</sup> In most cases, however, the offender's hatred is not as explicit—the offender may not utter magic words that indicate a hatred of women or a particular group of women.<sup>304</sup> The severity of the harm, the terroristic effect of the crime, and the possible presence of the other factors listed above, however, would strongly indicate that the offender's motive in committing the crime is, at minimum, comprised of the desire to subordinate women, and likely is comprised of the desire to express his hatred of women.

Because proving a hate motivation is difficult in many cases,<sup>305</sup> the allocation of the burdens of proof and presumptions

301. See, e.g., *supra* note 1 and accompanying text (evidencing a hatred not of all women, but of "feminists"). Evolutionary theory suggests that women of reproductive age are likely targets for violence. See also notes 242-44 and accompanying text.

302. See, e.g., *Cotton v. Duncan*, No. 93-C-3875, 1993 WL 473622 (N.D. Ill. Nov. 15, 1993). The court, however, held that because the Illinois hate crime law does not speak to the issue, and because the hate crime law is remedial, a complaint will not be dismissed merely because the plaintiff did not plead all the elements of the underlying crime in the complaint. *Id.*

303. See hypothetical situations #1-3, *supra* note 39 and accompanying text; see also *supra* notes 1-11 and accompanying text.

304. See hypothetical situations #4-6, *supra* note 39 and accompanying text.

305. In addition to the fact that the offender may not explicitly utter words showing hatred of women, there are other reasons why motive is difficult to prove and why bias crimes are difficult to prosecute in general. First, victims may not want to prosecute the crime as a bias crime because they fear retaliation—a well-grounded fear because those who commit bias crimes are likely to repeat and escalate their offenses. See O'MALLEY, *supra* note 22, at § V-2. In addition, victims may feel uncomfortable talking to the police because they have been previously harassed by the police themselves. See Debby Abe, *Reported Hate Crimes Plummet in Tacoma, Some Fear Incidents Aren't Called In*, THE NEWS TRIBUNE, October 9, 1996, at B1. Another major problem in prosecuting bias crimes is that prosecutors are often under pressure to minimize the appearance of intergroup conflict. In one case, a Vietnamese man was killed, and the police later discovered a letter in which the alleged assailant stated, "Oh, I killed a Jap. ... I stabbed him to death. Then



becomes crucial. In these more difficult cases, the current allocation of the burdens of proof greatly disadvantage the victim. If bias crime laws are to serve as a truly useful vehicle for remedying bias crimes, the burdens of proof and the presumptions that arise need to be more evenly distributed. This is particularly true in the case of bias crimes against women, because many cultures accept male aggression and violence as part of normal behavior.<sup>306</sup> One suggestion is that after the plaintiff proves the elements of the underlying crime beyond a reasonable doubt, and sufficiently alleges a claim of gender bias,<sup>307</sup> the presumption arises that the crime was motivated in whole or in part by hatred. The burden would then lie on the defendant to rebut that presumption by showing beyond a reasonable doubt that the crime was not motivated by hate, but by other factors. This approach encourages a more thorough analysis of the criminal defendant's motive, and prevents having the victim's success hinge primarily on the presence of certain magic words.

#### V. THE INTERSECTIONALITY OF GENDER AND RACE

Although feminist theory and evolutionary theory are useful in making the case for the inclusion of gender in bias crime statutes, these theories are limited in the sense that they do not take into account "gender essentialism."<sup>308</sup> Feminist theory is "essentialist" because it assumes that the norm is a white

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I wanted to go back and look so we did and he was [dying] just then taking some bloody gasps of air so I nudged his face with my shoe a few times." The police arrested the alleged author of the letter, and found white supremacist posters and neo-Nazi literature in his apartment. The police initially denied that this was a bias crime, and only after the Vietnamese community threatened to publically protest did the police eventually classify it as a bias crime. See Aurelio Rojas, *Turning a Blind Eye to Hate Crimes: Most Attacks in California go Unprosecuted*, THE SAN FRANCISCO CHRONICLE, October 22, 1996, at A1. Finally, the reluctance to prosecute certain types of bias crimes, such as crimes against homosexuals, may reflect an anti-gay sentiment among the police. See Lisa Black, *Gay Rights Advocates Outraged — Harassment Response is Too Tame, They Say*, CHICAGO TRIBUNE, August 25, 1996 at A1.

Even in seemingly "clear" cases, determining motive is difficult. In one case, the windows of a black family's home were smashed—this family was the only black family living on the block. Although this crime appeared to be a clear case of racial hatred, police later discovered that the crime was gang-motivated, rather than race-motivated. Campbell, *supra* note 45.

306. See *supra* note 213 and accompanying text.

307. For example, the plaintiff could show the presence of the several factors listed, which would indicate a desire to subordinate women or to force them into conforming into the offender's world view.

308. Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, in FEMINIST LEGAL THEORY, *supra* note 76, at 238.

woman.<sup>309</sup> Evolutionary theory is also essentialist because it is based on a colorless norm; the ancestral community, upon which evolutionary theory is based, did not involve the concept of race as we define it today.<sup>310</sup> Bias crime statutes that include gender as a protected category should also take into account the possibility that a victim of a bias crime may fit into more than one category; for example, the victim of a bias crime may be a woman of color, who was attacked for reasons relating to both gender and race.

For women of color, gendered essentialism, or gendered racism, is the idea that "those in power positions . . . usually white men, have two different ways to control or oppress them."<sup>311</sup> While white women need only concern themselves with fighting gender oppression, women of color must fight on two fronts. Feminists, in fighting for women's rights, have made several assumptions that have excluded certain groups of women. These assumptions include:

1. Women can be talked about "as women."
2. Women are oppressed "as women."
3. Gender can be isolated from other elements of identity that bear on one's social, economic, and political position such as race, class, and ethnicity: hence sexism can be isolated from racism, classism, etc.
4. Women's situation can be contrasted to men's.
5. Relations between men and women can be compared to relations between other oppressor/oppressed groups (whites and Blacks, Christians and Jews, rich and poor, etc.).<sup>312</sup>

Feminist analysis, in presuming that the norm behind "women's" experience is that of a white, middle class, heterosexual, Christian, and able-bodied person, creates the same problem that it has been trying to avoid — "the adoption of unstated reference points that hide from view a preferred position and shield it from challenge by other plausible alternatives."<sup>313</sup> Gender essentialism,

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309. *Id.* at 240.

310. See BREUER, *supra* note 183, at 82-83.

311. BENOKRAITIS & FEAGIN, *supra* note 205, at 146.

312. Harris, *supra* note 308, at 257 n.29.

313. Martha Minow, *Feminist Reason: Getting It and Losing It*, in FEMINIST LEGAL THEORY, *supra* note 134, at 339; See also Marlee Kline, *Race, Racism, and Feminist Legal Theory*, in FEMINIST LEGAL THEORY, *supra* note 134, at 376-79 (criticizing MacKinnon for failing to sufficiently incorporate the perspectives and experiences of women of color in her theoretical framework).

therefore, results in the oppression of women who do not fit into the presumed norms. The application of feminist theories does not take into account, for example, that the rape of a woman of color is an act of gender as well as racial hatred.<sup>314</sup> In using feminist theory to influence law, feminists must take into account the "intersectionality" of gender and race if they are to avoid being just a group reformers "who have failed to do more than impose their own point of view."<sup>315</sup>

Feminists are not the only group to have overlooked the concept of intersectionality in formulating its theories; courts also do not embrace this concept. Courts have refused to recognize compound discrimination against black women, have not allowed the use of statistics in showing a disparate impact on women if the plaintiff is claiming discrimination as a *black* woman, and have refused to allow a black woman to represent a class of blacks due to class conflicts in cases in which sex additionally disadvantaged black women.<sup>316</sup> One recent example of the limitations of bias crimes laws is seen in *People v. Nitz*.<sup>317</sup> In this case, the defendant, a white man who lived across the street from a black woman, was found guilty of disorderly conduct. On one occasion, the defendant threw rocks at the woman's house and called her a "black nigger bitch" several times, in addition to shouting "if it wasn't for the nigger moving in the neighborhood we wouldn't have all these problems . . . What they needs to do is go back to Africa."<sup>318</sup> On another occasion, the defendant spit on the woman's doorstep and again called her a "black bitch" and a "f—— nigger bitch."<sup>319</sup> On a third occasion, the defendant accused the woman of calling the police to get his car towed. He confronted her and told her she was a "damned nigger bitch" and that he would "get" her.<sup>320</sup> The Appellate Court of Illinois, Third District, found the defendant guilty of committing a race-based bias crime. The facts of this case, however, appear to strongly

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314. See BENOKRAITIS & FEAGIN, *supra* note 205, at 156-60 (noting that black women are twice as likely to be rape victims as white women).

315. See Minow, *supra* note 134, at 345. Postmodern feminism, the most recent line of feminist thought, centers around the essentialism issue: "there is no monolithic female experience, but many experiences that vary according to a woman's race, class, ethnicity, and culture." Levit, *supra* note 76, at 1049-51.

316. Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex*, in FEMINIST LEGAL THEORY, *supra* note 136, at 62-63.

317. No. 3-96-0276, 1996 WL 663760 (App. Ct. Ill. Nov. 15, 1996). *People v. Nitz*, 674 N.E.2d 802 (Ill. 1996).

318. *Id.* at 804.

319. *Id.*

320. *Id.*

indicate gender bias in addition to racial bias. Curiously, however, although the Illinois hate crime statute protects against both race and gender bias, the case was prosecuted only as a race-bias case, and the penalty imposed on the defendant only reflected racial bias.

A latent gender bias is built into the conception of bias crimes in that the "paradigmatic bias crime victim appears to be male."<sup>321</sup> For example, the Hate Crimes Statistics Act requires the victim's identity to be severed into discrete categories, which "leads to an artificial and incomplete view of the victim and of the crime,"<sup>322</sup> and fails to recognize gender bias although it does list forcible rape as a hate crime.<sup>323</sup> One possible way to avoid essentialism in the application of bias crime statutes is to create a "layered" penalty enhancement system. For example, if a prosecutor can prove that the offender's motivation in committing an assault against the victim was based on racial and gender hatred, the offender would be subject to two additional penalties above the penalty imposed for the underlying crime — a penalty for racial bias, and a penalty for gender bias. This "layering" of penalties is consistent with criminal law theory and the rationale for bias crime statutes.<sup>324</sup> Assuming that one reason why bias crime statutes exist is the recognition that crimes committed with a bias motive are more heinous than those committed without such a motive, it follows that crimes that are committed with more than one bias motive are even more heinous than those committed with only one bias motive. Further, the layering of penalties serves to recognize the full identity of individuals, and that they may be victims of discrimination based upon their membership in more than one oppressed group. In addition, such a penalty system does not force victims to choose between bringing a case as a woman or as a person of color.

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321. See Weisburd & Levin, *supra* note 12, at 39.

322. Pendo, *supra* note 14, at 180-81.

323. See *supra* notes 148-51 and accompanying text.

324. The two critical requirements for the achievement of "just punishment" through criminal law are: (1) punishing only the guilty, and (2) meting a punishment that is proportional to the crime committed. Lawrence, *supra* note 53, at 350. The theory of proportional punishment "satisfies the offender's debt under a debt-based notion of retribution because the offender has been required to 'pay' the relative amount of punishment that corresponds to the relative amount of harm that he caused society." *Id.* Therefore, under this theory if a defendant causes harm to two groups, then the defendant should "pay twice."

## CONCLUSION

Women, as a group, are often targets of violence by men. This violence is primarily based upon the fact that they are women. The men who commit acts of bias-motivated violence often seek to maintain power and dominance over women through the use of sexual terrorism, reinforce their stereotypical and socially constructed views about the nature of men and women, to vent their own personal frustrations that are based upon a failure to achieve reproductive success, to exert their superior status in comparison to other men, or to punish women who choose to compete in areas traditionally reserved for men. The effect of such violence, if left unaddressed, will perpetrate a reign of terror over all women.

In order for women to achieve equality, the law must protect them from acts of violence that are based on immutable characteristics. In addition, bias crime laws should include gender as a protected category and encompass all gender-related crimes, and in their application, should account for the intersectionality of race and gender.

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