

FINANCIAL CRIMES AGAINST THE ELDERLY AS A HATE
CRIME IN NEW YORK STATE

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INTRODUCTION

In the last few decades, legislators have raised concerns regarding the increase of hate crimes within the nation.¹ As a result, federal and state governments enacted a variety of statutes addressing this issue.² Such legislation often creates new types of crime, enhances criminal penalties for crimes associated with hate, or mandates reporting hate crimes to the appropriate authority.³ Hate crimes are defined as crimes against a protected class, along the lines of race, ethnicity, religion, gender, sexual orientation, or age.⁴

This paper addresses issues of financial crimes against the elderly on both federal and state levels, with a particular focus on New York State; describes types of hate crime statutes, and their application to financial crimes against the elderly; discusses the social impact of such crimes; and proposes prevention measures for this problem.

I. FEDERAL HATE CRIME STATUTES

Over the last forty years, the federal government enacted a number of statutes focusing on hate crimes.⁵ One of the first statutes addressing hate crimes is 18 U.S.C. § 245, which Congress incorporated in the Civil Rights Act of 1968.⁶ The statute “prevent[s] and punish[es] . . . violent interference with an individual’s exercise of specified civil rights when the interference is motivated by the

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¹ See, e.g., Helia Garrido Hull, *The Not-So-Golden Years: Why Hate Crime Legislation Is Failing a Vulnerable Aging Population*, 2009 MICH. ST. L. REV. 387, 401 (2009).

² See *id.* at 400, 401, 403, 405, 409.

³ See *id.* at 401, 403, 409.

⁴ See *id.* at 397.

⁵ See *id.* at 400, 401, 403, 405.

⁶ Civil Rights Act of 1968, Pub. L. No. 90-284, 82 Stat. 73; see Hull, *supra* note 1, at 400;

person's 'race, color, religion, or national origin.'"⁷ Further, in 1990, Congress passed the Hate Crime Statistic Act,⁸ which requires "the U.S. Attorney General to acquire and publish annual data about crimes that 'manifest evidence of prejudice based on race, [gender and gender identity,] religion, [disability,] sexual orientation, or ethnicity.'"⁹ Congress passed the Hate Crimes Sentencing Enhancement Act ("HCSEA") in 1994.¹⁰ The HCSEA increased the penalties for "defendants who target[ed] their victims because of an identifiable characteristic, such as their race, ethnicity, religion, gender, or sexual orientation."¹¹ Before 2009, "[c]ritics . . . argued that [federal law] is outdated because [some statutes] fail[] to incorporate crimes motivated by the victim's gender, sexual orientation, or disability."¹²

Numerous "attempts to expand the scope of federal hate crime legislation . . . were unsuccessful."¹³ These attempts included the Hate Crimes Prevention Act of 1997,¹⁴ the Hate Crimes Prevention Act of 1999,¹⁵ and the Local Law Enforcement Hate Crimes Prevention Act of 2007.¹⁶ "Each of these federal hate crime bills died in committee."¹⁷ In 2009, however, "President Barack Obama signed into law the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act, which expanded the categories of protected victims to include those targeted because of actual or perceived gender, sexual orientation, gender identity, and disability."¹⁸ However, federal "policymakers still fail to recognize that the rapidly

⁷ Hull, *supra* note 1, at 400, 401 ("Includ[ing] enrollment in public education, participation in state programs, obtaining private or state employment, participation in jury service, interstate travel, and use or enjoyment of public accommodations."). See 18 U.S.C. § 245(b)(2) (2012).

⁸ See Hate Crime Statistics Act, Pub. L. No. 101-275, 104 Stat. 140.

⁹ See Hull, *supra* note 1, at 401.

¹⁰ 28 U.S.C. § 994 (2012). The act was inspired by the United States Supreme Court decision in *Wisconsin v. Mitchell*, where the Court unanimously upheld that a Wisconsin statute, which enabled judges to increase the sentence of defendants found guilty of any crime if the defendant intentionally selected his victim on account of race or some other prohibited characteristic, was constitutional. See *Wisconsin v. Mitchell*, 508 U.S. 476, 480, 490 (1993).

¹¹ Lisa M. Fairfax, *The Thin Line Between Love and Hate: Why Affinity-Based Securities and Investment Fraud Constitutes a Hate Crime*, 36 U.C. DAVIS L. REV. 1073, 1076 (2003).

¹² Hull, *supra* note 1, at 405.

¹³ Avlana Eisenberg, *Expressive Enforcement*, 61 UCLA L. REV. 858, 867 (2014).

¹⁴ Hate Crimes Prevention Act of 1997, H.R. 3081, 105th Cong. (1997).

¹⁵ Hate Crimes Prevention Act of 1999, S. 622, 106th Cong. (1999).

¹⁶ Local Law Enforcement Hate Crimes Prevention Act of 2007, H.R. 1592, 110th Cong. (2007).

¹⁷ Eisenberg, *supra* note 13, at 867 n.30; Jordan Blair Woods, *Ensuring a Right of Access to the Courts for Bias Crime Victims: A Section 5 Defense of the Matthew Shepard Act*, 12 CHAP. L. REV. 389, 399 (2008).

¹⁸ Eisenberg, *supra* note 13, at 867; see 18 U.S.C. § 249 (2012).

expanding elderly population [also deserves] similar protections from hate crimes.”¹⁹ To date, none of the federal statutes include age.²⁰

II. STATE HATE CRIME STATUTES

At the present time, most of the states have enacted hate crime statutes.²¹ Only Georgia lacks a hate crime statute.²² “All states that have enacted hate crime legislation address crimes motivated by the victim’s race, religion, or ethnicity.”²³ Thirty-two states have statutes that address sexual orientation;²⁴ thirty-one states address disability;²⁵ twenty-nine address gender.²⁶ Only a few states include

¹⁹ Hull, *supra* note 1, at 407.

²⁰ See, e.g., 18 U.S.C. § 249(a)(1) (2012) (noting the traits protected under the Hate Crimes Prevention Act and omitting age as a qualifying trait); see Hull, *supra* note 1, at 407; *Hate Crime Laws*, U.S. DEP’T OF JUST., <https://www.justice.gov/crt/hate-crime-laws> (last updated July 28, 2017) (summarizing federal hate crimes laws and omitting age among the criteria listed).

²¹ See ALA. CODE § 13A-5-13(a)(1) (2018); ALASKA STAT. § 12.55.155(c)(22) (2018); ARIZ. REV. STAT. ANN. §§ 41-1750(A)(3), (F) (2018); ARK. CODE ANN. § 16-123-106(a) (2018); CAL. PENAL CODE § 422.55(a) (West 2018); COLO. REV. STAT. §§ 18-9-121(1), (2) (2018); CONN. GEN. STAT. § 46a-58(a) (2018); CONN. GEN. STAT. § 53a-181j (2018); DEL. CODE ANN. tit. 11, § 1304(a)(2) (2018); D.C. CODE § 22-3701(1) (2018); FLA. STAT. § 775.085 (2018); GA. CODE ANN. § 17-10-17(a) (2018); HAW. REV. STAT. § 706-662(6)(b) (2018); IDAHO CODE § 18-7902 (2018); 720 ILL. COMP. STAT. 5/12-7.1(a) (2018); IND. CODE ANN. § 10-13-3-1(2) (West 2018); IOWA CODE § 712.9 (2018); IOWA CODE § 729A.2 (2018); KAN. STAT. ANN. § 21-6815(c)(2)(C) (2018); KY. REV. STAT. ANN. § 532.031(1) (West 2018); LA. STAT. ANN. § 14:107.2(A) (2018); ME. REV. STAT. ANN. tit. 17-A, § 1151(8)(B) (2018); ME. REV. STAT. ANN. tit. 25, § 1544 (2018); MD. CODE ANN., CRIM. LAW § 10-304 (West 2018); MASS. GEN. LAWS ch. 265, § 39(a) (2018); MICH. COMP. LAWS § 750.147b(1) (2018); MINN. STAT. § 609.749(3)(a)(1) (2018); MINN. STAT. § 609.2231(4) (2018); MINN. STAT. § 626.5531 (2018); MISS. CODE ANN. § 99-19-301(1) (2018); MO. REV. STAT. §§ 557.035(1), (2) (2018); MONT. CODE ANN. § 45-5-222(1) (2018); NEB. REV. STAT. § 28-111 (2018); NEV. REV. STAT. § 193.1675(1) (2018); N.H. REV. STAT. ANN. § 651:6(I)(f) (2018); N.J. STAT. ANN. §§ 2C:16-1(1), (2), (3), (4) (West 2018); N.M. STAT. ANN. § 31-18B-3(A) (2018); N.Y. PENAL LAW §§ 485.05(1)(a), (b), (2) (McKinney 2018); N.C. GEN. STAT. § 14-3(c) (2018); N.C. GEN. STAT. § 14-401.14(a) (2018); N.C. GEN. STAT. § 99D-1(a)(1) (2018); N.D. CENT. CODE §§ 12.1-14-04(1), (2) (2018); OHIO REV. CODE ANN. §§ 2927.12(A), (B) (LexisNexis 2018); OKLA. STAT. tit. 21, §§ 850 (A), (B), (C) (2018); OR. REV. STAT. § 166.155(1) (2018); 18 PA. CONS. STAT. § 2710(a) (2018); 12 R.I. GEN. LAWS §§ 12-19-38(a), (c) (2018); S.D. CODIFIED LAWS § 22-19B-1 (2018); TENN. CODE ANN. § 40-35-114(17) (2018); TEX. CODE CRIM. PROC. ANN. art. 42.014(a) (West 2018); TEX. PENAL CODE ANN. § 12.47(a) (West 2018); UTAH CODE ANN. § 76-3-203.3 (LexisNexis 2018); UTAH CODE ANN. § 76-3-203.4 (LexisNexis 2018); VT. STAT. ANN. tit. 13, § 1455 (2018); VA. CODE ANN. §§ 18.2-579(A), (B) (2018); WASH. REV. CODE §§ 9A.36.080(1)(c), (2), (3) (2018); W. VA. CODE §§ 61-6-21(a), (b), (d) (2018); WIS. STAT. § 939.645(b) (2018); WYO. STAT. ANN. § 6-9-102(a) (2018).

²² Cf. Hull, *supra* note 1, at 409 (indicating more than just Georgia as states that lack hate crime legislation, but those other states have since enacted hate crime statutes).

²³ *Id.*

²⁴ See *Anti-Defamation League State Hate Crime Statutory Provisions*, ANTI-DEFAMATION LEAGUE, <https://www.adl.org/sites/default/files/documents/assets/pdf/combating-hate/2014-adl-updated-state-hate-crime-statutes.pdf> (last updated Sept. 2014).

²⁵ See *id.*

²⁶ See *id.*

age as a protected category.²⁷ Among them are the District of Columbia, Florida, Iowa, Louisiana, Minnesota, Nebraska, Texas, Oregon, Vermont and New York.²⁸

A. *New York State Hate Crime Act of 2000*

In 2000, the New York Senate enacted the Hate Crime Act that protects certain New Yorkers from crimes committed out of bias and hate.²⁹ The Hate Crime Act specifies that a hate crime is committed when the defendant commits an enumerated substantive offense and selects the victim based upon a belief or perception regarding such characteristics as “race, color, national origin, ancestry, gender, religion, religious practice, *age*, disability or sexual orientation of a person, regardless of whether the belief or perception is correct.”³⁰

Even after the passage of the Hate Crimes Act, hate crimes continue to pose a serious threat to people. According to the FBI’s recently released *2014 Hate Crime Statistics*, a report about bias-motivated incidents throughout the nation, “5,479 criminal incidents and 6,418 offenses . . . motivated by bias toward race, gender, gender identity, religion, disability, sexual orientation, and ethnicity [were reported] in 2014.”³¹ Although hate crimes have declined nationally from 6,628 criminal hate crime incidents involving 7,699 offenses reported in 2010,³² in New York State, the hate crimes rate has

²⁷ See D.C. CODE §§ 22-3704(a), (b) (2018); FLA. STAT. §§ 775.085(1)(a), (b)(1) (2018); IOWA CODE § 729A.2 (2018); LA. STAT. ANN. § 15:1204.2(B)(4) (2018); MINN. STAT. § 609.749(3)(a)(1) (2018); NEB. REV. STAT. § 28-111 (2018); N.Y. PENAL LAW §§ 485.05(1)(a), (b), (4)(a) (McKinney 2018); OR. REV. STAT. § 181A.225(1)(c) (2018); TEX. CODE CRIM. PROC. ANN. art. 42.014(a) (West 2018); VT. STAT. ANN. tit. 13, § 1455 (2018).

²⁸ See D.C. CODE §§ 22-3704(a), (b); FLA. STAT. §§ 775.085(1)(a), (b)(1); IOWA CODE § 729A.2; LA. STAT. ANN. § 15:1204.2(B)(4); MINN. STAT. § 609.749(3)(a)(1); NEB. REV. STAT. § 28-111; N.Y. PENAL LAW §§ 485.05(1)(a), (b), (4)(a); OR. REV. STAT. § 181A.225(1)(c); TEX. CODE CRIM. PROC. ANN. art. 42.014(a); VT. STAT. ANN. tit. 13, § 1455. Hawaii enacted a separate statute that enhances imprisonment when a crime is committed against the elderly. See HAW. REV. STAT. § 706-662(5) (2018).

²⁹ See 2000 N.Y. Laws 107.

³⁰ See N.Y. PENAL LAW § 485.05(1)(a) (emphasis added).

³¹ See Press Release, Federal Bureau of Investigation, FBI Releases 2014 Hate Crime Statistics (Nov. 16, 2015), <https://www.fbi.gov/news/pressrel/press-releases/fbi-releases-2014-hate-crime-statistics>.

³² See U.S. DEP’T OF JUSTICE, FBI UNIFORM CRIME REPORT: HATE CRIME STATISTICS, 2010 (2011), <https://ucr.fbi.gov/hate-crime/2010/narratives/hate-crime-2010-incidents-and-offenses.pdf>. In 2011, “6,222 hate crime incidents involv[ing] 7,254 offenses” were reported. See U.S. DEP’T OF JUSTICE, FBI UNIFORM CRIME REPORT: HATE CRIME STATISTICS, 2011 (2012), https://ucr.fbi.gov/hate-crime/2011/narratives/incidentsandoffenses_final.pdf. In 2012, “5,796 criminal incidents involving 6,718 offenses were reported.” Press Release, Federal Bureau of Investigation, FBI Releases 2012 Hate Crime Statistics (Nov. 25, 2013), <https://www.fbi.gov/news/pressrel/press-releases/fbi-releases-2012-hate-crime-statistics>. In 2013, “5,928 criminal incidents involving 6,933 offenses” were reported. Press Release, Federal Bureau of

sporadically increased throughout the years.³³ For example, in 2011, there were 556 hate crimes reported; this number increased by 31.6 percent in 2012.³⁴

III. TYPES OF HATE CRIMES STATUTES

“In theory, hate crime laws protect against crimes motivated by enmity or animus against a protected class.”³⁵ In reality, not every hate crime statute requires animus.³⁶ Both state hate crime laws and federal laws differ from statute to statute, “but they can be divided into two main categories:” (1) animus-based, and (2) discriminatory-selection statutes.³⁷ The animus-based statutes are “those that define hate crimes as motivated substantially or in part by ‘animus’ or ‘prejudice’ against the victim because of the victim’s group membership.”³⁸ “A typical animus-based hate crime statute requires proof of ‘prejudice,’ ‘bigotry and bias,’ or ‘hostility’ based on the victim’s group identity.”³⁹

These statutes insist that the prosecutor prove that the defendant targeted the victim based on group identity and that hatred or prejudice was a central motivating factor in the crime. By contrast, discriminatory selection statutes do not require proof of animus, but only that the defendant intentionally selected the victim because of the victim’s protected characteristic.⁴⁰

Under this type of statute, a crime “may appear less like a hate crime and more like a crime of opportunity.”⁴¹

Most statutes, including federal statutes, are non-animus based,

Investigation, FBI Releases 2013 Hate Crime Statistics (Dec. 8, 2014), <https://www.fbi.gov/news/pressrel/press-releases/fbi-releases-2013-hate-crime-statistics>.

³³ See MARY SCHMITT, HATE CRIME IN NEW YORK STATE 2013 ANNUAL REPORT, DIVISION OF CRIMINAL JUSTICE SERVICES, OFFICE OF JUSTICE RESEARCH & PERFORMANCE 12 (Oct. 2014), <http://www.criminaljustice.ny.gov/crimnet/ojsa/hate-crime-in-nys-2013-annual-report.pdf>.

³⁴ See NYS DIV. OF CRIMINAL JUSTICE SERV., HATE CRIME INCIDENTS IN NEW YORK BY REPORTING AGENCY, <http://www.criminaljustice.ny.gov/crimnet/ojsa/hatecrimeincidents2013.pdf> (last updated May 20, 2014); SCHMITT, *supra* note 33, at 12.

³⁵ See Hull, *supra* note 1, at 397.

³⁶ See *id.* “The Hate Crimes Statistics Act defines hate crimes as: ‘crimes that manifest evidence of prejudice based on race, religion, sexual orientation, or ethnicity.’” *Id.* “Under 18 U.S.C. § 245, the primary law under which federal prosecution of hate crimes is carried out, a victim is not expressly required to present evidence of the defendant’s bias or animus.” *Id.*

³⁷ See Eisenberg, *supra* note 13, at 870–72.

³⁸ *Id.* at 870.

³⁹ *Id.* at 871.

⁴⁰ *Id.*

⁴¹ *Id.* at 872.

and “do not require that a defendant act with prejudice or bias toward his [or her] victim.”⁴² This type of statute requires only that the defendant deliberately select his or her victim based on the victim’s identity class.⁴³ “Because the reasons behind the defendant’s selection do not matter, this [type of statute] does not require prosecutors to prove that hatred or animus motivated the defendant’s actions.”⁴⁴ One of the states that does not require animus is New

⁴² Fairfax, *supra* note 11, at 1102. Thirty-three states “do not require defendants to exhibit any discriminatory motive beyond the discrimination involved in selecting a victim.” *Id.* at 1103–04, 1103 n.160; *see* ALA. CODE § 13A-5-13(c) (2018); ALASKA STAT. § 12.55.155(c)(22) (2017); CAL. PENAL CODE § 422.75 (West 2018); COLO. REV. STAT. § 18-9-121(2) (2017); DEL. CODE ANN. tit. 11, § 1304(a)(2) (2018); IDAHO CODE § 18-7902 (West 2017); 720 ILL. COMP. STAT. ANN. 5/12-7.1(a) (2017); IND. CODE § 10-13-3-1 (West 2018); IOWA CODE ANN. § 729A.2 (West 2017); KAN. STAT. ANN. § 21-6815(c)(2)(C) (West 2018); KY. REV. STAT. ANN. § 532.031(1) (West 2017); LA. STAT. ANN. §14:107.2(A) (2018); ME. REV. STAT. ANN. tit. 17-A, § 1151(8)(B) (2017); MD. CODE ANN. CRIM. LAW § 10-304 (LexisNexis 2018); MICH. COMP. LAWS § 750.147b (2018); Minnesota Sentencing Guidelines § 2.D.3.b(11) (Minn. Sentencing Guidelines Comm’n 2017); MINN. STAT. ANN. §§ 609.2231(4), 609.2333, 609.595(1a)(a), 609.749(3)(a)(1) (West 2018); MO. ANN. STAT. § 557.035 (West 2017); MONT. CODE ANN. § 45-5-222(1) (2017); NEB. REV. STAT. ANN. § 28-111 (LexisNexis 2017); NEV. REV. STAT. § 193.1675(1) (2017); N.J. STAT. ANN. § 2C:16-1 (West 2017); N.Y. PENAL LAW § 485.05(1)-(2) (McKinney 2018); N.C. GEN. STAT. § 15A-1340.16(d)(17) (2017); N.D. CENT. CODE ANN. § 12.1-14-04 (West 2017); OKLA. STAT. tit. 21, § 850(A)-(C) (2018); OR. REV. STAT. ANN. §§ 166.155(1), 166.165(1) (2017); S.D. CODIFIED LAWS § 22-19B-1 (2018); TENN. CODE ANN. § 40-35-114(17) (2017); UTAH CODE ANN. § 76-3-203.3 (LexisNexis 2017); VA. CODE § 18.2-57(A)-(B) (2017); WASH. REV. CODE § 9A.36.080 (2017); W. VA. CODE § 61-6-21(d) (2018); WIS. STAT. § 939.645(1)(b) (2017). Only the statutory language of the District of Columbia and fourteen states specifically require that some bias or animus towards the victim motivate the defendant’s conduct. *See* ARIZ. REV. STAT. ANN. § 13-701(D)(15) (2018) (requiring malice towards the victim); ARK. CODE ANN. § 16-123-106(a) (2018) (requiring the defendant to be motivated by animosity); CONN. GEN. STAT. §§ 53a-181j(a), 53a-181k(a), 53a-181l(a) (2018) (requiring conduct based on bigotry or bias); D.C. CODE § 22-3701(1) (2018) (requiring that the defendant demonstrate prejudice); FLA. STAT. § 775.085(1)(a) (2018) (requiring evidence of prejudice); HAW. REV. STAT. §§ 706-662(6)(b), 846-51 (2017) (requiring hostility); MASS. GEN. LAWS ch. 265, § 39(a) (2018) (requiring conduct motivated by bigotry or bias); MISS. CODE ANN. § 99-19-305(2)(b) (2017) (requiring that the defendant act maliciously); N.H. REV. STAT. ANN. § 651:6(I)(f) (2018) (requiring hostility); OHIO REV. CODE ANN. § 2927.12 (LexisNexis 2018) (requiring intimidation); 18 PA. CONS. STAT. § 2710(a) (2018) (requiring malicious intent); 12 R.I. GEN. LAWS §§ 12-19-38(a), (c), (d) (2018) (requiring hatred or animus); TEX. PENAL CODE ANN. § 12.47(b) (West 2018); TEX. CODE CRIM. PROC. ANN. § 42.014(a) (West 2018) (requiring bias or prejudice); VT. STAT. ANN. tit. 13, § 1455 (2018) (requiring malicious motivation). Pennsylvania’s statute requiring malicious intent was held unconstitutional by Pennsylvania’s Supreme Court. *See* *Marcavage v. Rendell*, 936 A.2d 188, 194 (Pa. Commw. Ct. 2007), *aff’d* 951 A.2d 345 (Pa. 2008).

⁴³ *See* Fairfax, *supra* note 11, at 1104.

⁴⁴ Fairfax, *supra* note 11, at 1105 n.165

See, e.g., *United States v. Woodlee*, 136 F.3d 1399, 1413 (10th Cir. 1998) (finding that defendant’s actions were “racially motivated” when he selected victim because of their race); *People v. McCall*, No. D035520, 2001 Cal. App. Unpub. LEXIS 2639, at *11 (Oct. 16, 2001) (stating that hate or animus may or may not be component of defendant’s actions); *State v. Choppy*, 539 S.E.2d 44, 51 (N.C. Ct. App. 2000) (noting that defendant must target victim because of race, animus not required); *State v. Hatcher*, 524 S.E.2d 815, 817 (N.C. Ct. App. 2000) (finding no need to prove that defendant harbors animosity

York.⁴⁵

IV. FINANCIAL CRIMES AS HATE CRIMES

Discriminatory-selection type statutes may apply to financial crimes, such as larceny, theft, security fraud, mortgage or investment fraud and others. Defendants who have committed one of those crimes can additionally be charged with such crimes as a hate crime when they intentionally “selected a victim based on the perception that it was easier or more profitable to commit a crime against a member of a given group.”⁴⁶ Even when they “did not manifest feelings of hostility or prejudice towards the victim or his group.”⁴⁷ In such a case, the perpetrator “is motivated by a desire to maximize his potential for success and the defendant uses a person’s group membership as a proxy for the relative likelihood of that success.”⁴⁸ Such defendants “appear to select their victims not because of any prejudice or animus towards them, but because of a ‘rational’ assessment of the relative ease of defrauding victims of a particular group.”⁴⁹

For example, in New York, Queens District Attorney, Brown, charged the members of an auto insurance fraud scheme under the hate statute, arguing that the defendants targeted Asian-Americans.⁵⁰

The district attorney’s theory was that the defendants “created” phony accidents by deliberately colliding with Asian drivers, selecting them based on the belief that the language barrier made them easy targets and “that they were bad drivers and that they would be blamed by police and insurers for the accidents, instead of the culprits.”⁵¹

In New York State, the Hate Crime Act of 2000 is a non-animus-based statute and is applicable to larceny committed against the

toward race or ethnic group); *In re Joshua H.*, 17 Cal. Rptr. 2d 291, 302 (Cal. Ct. App. 1993) (stating that selection of victim, not reason for selection, triggers additional punishment under hate crime statute); *Oregon v. Plowman*, 838 P.2d 558, 563 (Or. 1992) (noting that defendant “need not hate at all” to commit hate crime; defendant must hold no opinion other than his perception of victim’s characteristic).

Id.

⁴⁵ See N.Y. PENAL LAW §§ 485.05(1), (2) (McKinney 2018).

⁴⁶ See Fairfax, *supra* note 11, at 1106.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.* at 1107.

⁵⁰ See Alex Ginsberg, *Hate Is Enough: How New York’s Bias Crimes Statute Has Exceeded Its Intended Scope*, 76 BROOK. L. REV. 1599, 1627 (2011).

⁵¹ *Id.*

protected class.⁵²

Generally, non-animus-based statutes support the extension of hate crime legislation to opportunistic crimes.⁵³ However, it is sometimes difficult to charge a defendant who has been accused of a financial crime with a hate crime under an animus-based statute, or to enhance sentencing under 18 U.S.C.S. Appx. § 3A1.1 Hate Crime Motivation or Vulnerable Victim for targeting certain groups.⁵⁴ Nevertheless, in *United States v. Medrano*,⁵⁵ the United States Court of Appeals for the Ninth Circuit affirmed the lower court's decision enhancing sentencing pursuant to 18 U.S.C.S. Appx § 3A1.1.⁵⁶ Ms. Medrano, a bank employee, pled guilty to fifteen counts of embezzlement under 18 U.S.C. § 656 for stealing \$219,615.78 from customers' accounts.⁵⁷ "Medrano had targeted . . . Spanish-speaking migrant farm workers, who had come to the United States from one of the poorest areas in Mexico, who were unsophisticated in American banking practices, many of whom were illiterate."⁵⁸ Ms. Medrano was not charged with a hate crime, but her sentencing was enhanced on the theory that her victims were vulnerable.⁵⁹ The crime did not involve animus, however, the defendant's purposeful selection of her victims qualified her for the penalty enhancement.⁶⁰

Many states have enacted legislation allowing judges to impose sentencing enhancements for crimes that involve such targeting.⁶¹ However, not every state has discriminatory selection statutes.⁶²

⁵² See *id.* 1601–02, 1626.

⁵³ See *id.* at 1608.

⁵⁴ 18 U.S.C. app. § 3A1.1 (2012). See, e.g., *United States v. Stover*, 93 F.3d 1379, 1386–88 (8th Cir. 1996) (citations omitted); *United States v. Boylan*, 5 F. Supp. 2d 274, 283 (D.N.J. 1998) (citations omitted). In October 2004, the federal Sentencing Guidelines system, in its then form as a mandatory requirement that federal judges had to follow, was held unconstitutional under the separation of powers doctrine. See *United States v. Detwiler*, 338 F. Supp. 2d 1166, 1168 (D. Or. 2004). However, the Supreme Court in 2005 clarified the issue. The Court ruled that the provision in the federal sentencing guidelines system that made the guidelines mandatory was to be severed and the rest of the guidelines were to be considered advisory to judges, opposed to mandatory. See *United States v. Booker*, 543 U.S. 220, 245–46 (2005) (citations omitted). Therefore, the federal sentencing guidelines are still intact, but in an advisory capacity. See *id.*

⁵⁵ *United States v. Medrano*, 241 F.3d 740 (9th Cir. 2000).

⁵⁶ See *id.* at 743–44, 746 (citations omitted). The case was overturned by *United States v. Contreras* to the extent it conflicted with the court's interpretation of U.S.S.G. § 3B1.3 Abuse of Position of Trust or Use of Special Skill. See *United States v. Contreras*, 593 F.3d 1135, 1136 (9th Cir. 2010) (citations omitted).

⁵⁷ *Medrano*, 241 F.3d 740 at 742; see 18 U.S.C. § 656 (2012).

⁵⁸ *Id.*

⁵⁹ See *id.* at 742–43.

⁶⁰ See *id.* at 746 (citations omitted).

⁶¹ See Fairfax, *supra* note 11, at 1076–77.

⁶² See Frederick M. Lawrence, *The Punishment of Hate: Toward a Normative Theory of Bias-*

Moreover, not every jurisdiction applies the law in the same way. For example, in *United States v. Boylan*, the defendant, a former municipal court judge for Jersey City, plead guilty to wire fraud in connection with a scheme in which he propositioned dozens of women to have sex with him in exchange for taking care of their traffic tickets.⁶³ The court held that “while Boylan may have generally chosen ‘single, poor, Hispanic or light-skinned black females,’ . . . it does not appear beyond a reasonable doubt that the primary motivation for the offense was a hatred of the [victims].”⁶⁴ Thus, because the former municipal judge was not convicted of a hate crime, the sentencing adjustment under 18 U.S.C.S. Appx. § 3A1.1(a) for targeting protected class did not apply.⁶⁵ But, the court applied a sentencing increase based on the victims’ vulnerability under 18 U.S.C.S. Appx. § 3A1.1(b), alleging that the victims were vulnerable.⁶⁶

The Securities and Exchange Commission (“SEC”), though it does not charge with hate crimes, investigates similar crimes when its examiners suspect financial abuse of a vulnerable client.⁶⁷ The SEC characterizes such acts as affinity fraud. “Affinity fraud refers to investment scams that prey upon members of identifiable groups, such as religious or ethnic communities, the elderly, or professional groups.”⁶⁸ “The SEC has investigated and taken quick action against affinity frauds targeting a wide spectrum of groups.”⁶⁹

For example, in 2012, in the Northern District of Georgia, the SEC brought an action against a ponzi-scheme promoter who targeted African-American churchgoers and defrauded them for over \$11 million.⁷⁰ In 2013, the SEC “obtained an emergency court order to

Motivated Crimes, 93 MICH. L. REV. 320, 336 (1994).

⁶³ See *United States v. Boylan*, 5 F. Supp. 2d 274, 276, 279 (D.N.J. 1998); *A Former Judge Admits Propositioning Women*, N.Y. TIMES (Jan. 24, 1998), <http://www.nytimes.com/1998/01/24/nyregion/metro-news-briefs-new-york-a-former-judge-admits-propositioning-women.html>.

⁶⁴ *Boylan*, 5 F. Supp.2d at 283.

⁶⁵ See *id.*

⁶⁶ See *id.*

⁶⁷ See Richard Eisenberg, *Why Elder Financial Abuse Is Such a Slippery Crime*, FORBES (Feb. 13, 2015), <https://www.forbes.com/sites/nextavenue/2015/02/13/why-elder-financial-abus-e-is-such-a-slippery-crime/#642fa16d6f90>.

⁶⁸ *Affinity Fraud: How to Avoid Investment Scams That Target Groups*, SEC. EXCH. COMM’N (Oct. 9, 2013), <https://www.sec.gov/investor/pubs/affinity.htm> [hereinafter *Affinity Fraud*].

⁶⁹ *Id.*

⁷⁰ See Complaint at 1, SEC v. City Capital Corp., 2012 U.S. Dist. LEXIS 194704 (N.D. Ga. Aug. 9, 2012) (1:12-cv-1249-WSD). The SEC’s complaint alleges that City Capital, Taylor and Connor violated Sections 5(a), 5(c) and 17(a) of the Securities Act of 1933, and Section 10(b) of the Securities Exchange Act of 1934 (“Exchange Act”) and Rule 10b-5 thereunder. See *id.* at 13, 14, 15, 16. The complaint also alleges that Taylor and Connor violated Section 15(a)(1) of the Exchange Act and aided and abetted violations of Section 10(b) of the Exchange Act and

halt a hedge fund investment scheme by a former Marine . . . who ha[d] been masquerading as a successful trader to defraud fellow veterans, current military, and other investors.”⁷¹ The SEC warns that “[s]enior citizens also are not immune from such schemes.”⁷²

Hate crimes taking the form of financial crimes or crimes of opportunity deserve more systematic attention. “Studies indicate that such fraud is growing rapidly and has a significant impact on its immediate victims and society in general.”⁷³ Perpetrators of such crimes are more blameworthy because they understand the harmful impact of bias-inspired crimes, but nevertheless commit the act.⁷⁴ “This kind of reckless disregard for the consequences of their actions provides additional support for” increasing the punishment for such opportunistic actions under hate crime laws.⁷⁵ Elderly people are specifically vulnerable to such crimes.

V. AGE AS A CHARACTERISTIC COVERED BY THE HATE CRIME ACT

“[M]any elders are susceptible to exploitation for reasons associated with aging, [however, not enough has been] done to address the problem.”⁷⁶ “While states and the federal government have passed hundreds of laws protecting children based on the assumption that they are vulnerable and unable to protect themselves, older, at-risk adults have been comparatively ignored even though they are vulnerable for some of the same reasons.”⁷⁷ The Federal Elder Justice Act was enacted in 2010;⁷⁸ however, it is not enough to fully protect elders. Given that at this time, there are many baby boomers at or nearing retirement age, it is likely that courts will soon see more cases concerning crimes against the elderly.

Elderly people are vulnerable to fraud and financial exploitation in large part because of their mental and physical condition, and

Rule 10b-5 thereunder. *See id.* at 14, 15, 17. The complaint seeks disgorgement, financial penalties and permanent injunctive relief against all defendants, as well as officer and director bars against Taylor and Connor. *See id.* at 19.

⁷¹ Press Release, Sec. Exch. Comm’n, SEC Halts Ex-Marine’s Hedge Fund Fraud Targeting Fellow Military (Aug. 6, 2013), <https://www.sec.gov/news.pres-release/2012-149>.

⁷² *Affinity Fraud*, *supra* note 68.

⁷³ *Fairfax*, *supra* note 11, at 1141.

⁷⁴ *See id.* at 1142.

⁷⁵ *Id.*

⁷⁶ See Andrew Jay McClurg, *Preying on the Graying: A Statutory Presumption to Prosecute Elder Financial Exploitation*, 65 HASTINGS L.J. 1099, 1103 (2014).

⁷⁷ *Id.*

⁷⁸ Federal Elder Justice Act of 2010, Pub. L. No. 111-148, 124 Stat. 119. *See id.* at 1103 n.17 (“The Elder Justice Act of 2010 was enacted as part of the Patient Protection and Affordable Care Act.”).

memory loss. “[E]lders are also often physically and socially isolated,” making them vulnerable to people who are otherwise untrustworthy.⁷⁹ “Many live alone, having outlived their partners and friends. Their isolation gives perpetrators free rein to influence them and gain access to their private affairs without outside scrutiny.”⁸⁰ Those same conditions contribute to under-reporting crimes against the elderly.⁸¹ For those reasons, law must protect the elderly from criminals who specifically target elders due to their vulnerability.

Currently, only a few states have hate crime laws that include age as a protected category. “These states include the District of Columbia, Florida, Iowa, Minnesota, Nebraska, New York, Texas, and Vermont.”⁸² In 2000, New York State enacted the Hate Crime Act to protect the elderly from crimes committed out of bias and hate.⁸³ The first provision of Section 485.05 specifies that a hate crime is committed when the defendant commits an enumerated substantive offense and selects the victim based upon a belief or perception regarding such characteristics as “race, color, . . . religion . . . age, [and] disability.”⁸⁴ The second provision specifies that a hate crime is committed when the defendant commits the enumerated substantive offense because of such a *belief*.⁸⁵ For an act to constitute a hate crime, “discriminatory selection may be behind either the choice of victim,”⁸⁶ or discrimination may be the basis of “the decision to commit the crime at all.”⁸⁷ Larceny against elders falls into the first provision.

The statute also includes definitions. The statute specifically defines two terms used in the list of characteristics: *age*, meaning

⁷⁹ *Id.* at 1108.

⁸⁰ *Id.*

⁸¹ *See id.* at 1109.

⁸² Hull, *supra* note 1, at 415.

⁸³ *See* N.Y. PENAL LAW § 485.05 (McKinney 2018).

⁸⁴ *Id.* § 485.05(1)(a) (emphasis added).

⁸⁵ *See id.* § 485.05(1)(b).

⁸⁶ *Id.* § 485.05(1)(a) (“[A person is guilty of] a hate crime when he or she commits a specified offense and . . . intentionally selects the person against whom the offense is committed or intended to be committed in whole or in substantial part because of a belief or perception regarding [specified attributes (race, color, national origin, ancestry, gender, religion, age, disability or sexual orientation)] of a person, regardless of whether the belief or perception is correct.”); *see* GOVERNOR’S PROGRAM BILL MEMORANDUM #1RR, Assemb. 30002, 193rd Sess. (2000), *reprinted in* N.Y. STATE LEGISLATIVE ANNUAL 2001, at 81 [hereinafter GOVERNOR’S PROGRAM BILL MEMORANDUM #1RR].

⁸⁷ Ginsberg, *supra* note 50, at 1610. Legislative materials explain that the law was intended to recognize the harm that hate crimes have on a society. GOVERNOR’S PROGRAM BILL MEMORANDUM #1RR, *supra* note 86, at 81.

someone who is “sixty years old or more” and *disability*, meaning someone with “a physical or mental impairment that substantially limits a major life activity.”⁸⁸ Clearly, based on the text of the statute, law drafters intended to give more protection to senior citizens⁸⁹ from crimes listed in the statute,⁹⁰ including *larceny* and *grand larceny*.⁹¹

Hate crimes law intends to protect vulnerable individuals; as professor Hull argues: “[I]t makes no sense to protect a frail individual from physical and psychological harm because the individual is a woman or African American, or Jewish, but not to protect the frail individual who is uniquely vulnerable due to age.”⁹² In many cases, “elderly [people] . . . actually suffer greater injury” than younger victims of financial crimes; therefore, the Hate Crime Act “include[s] protection for individuals based on age.”⁹³

VI. FINANCIAL CRIMES AGAINST THE ELDERLY UNDER THE NEW YORK HATE CRIME ACT

The New York Hate Crime Act: (1) does not require a showing of animus for conviction on a hate crime charge; (2) includes age (defined as sixty years or older) as a protected category; and (3) larceny as a crime that can be charged in conjunction with a hate crime.⁹⁴ The Hate Crime Act contains both traditional hate crimes and crimes of opportunity.⁹⁵ The application of the hate crime statute is clear as to offences such as assault, manslaughter, harassment or

⁸⁸ N.Y. PENAL LAW §§ 485.05(4)(a), (b).

⁸⁹ See Brian S. MacNamara, *New York's Hate Crimes Act of 2000: Problematic and Redundant Legislation Aimed at Subjective Motivation*, 66 ALB. L. REV. 519, 529 (2003) (Looking at [the bill drafting process] from a purely political perspective, hate crime legislation offers many advantages to elected officials. In backing such legislation, it is easy to satisfy a given constituency by including it in the protected class. Making a crime against a member of that class - which is purely motivated by the victim's membership in that particular group - a more severely punished act suggests that the group as a whole is deserving of special protections. This, in turn, might make it easier for the group to gain special accommodations in other areas of the law.”).

⁹⁰ Nothing in the legislative history relates to older people, except for the text of the statute. See MacNamara, *supra* note 89, at 524–25; N.Y. PENAL LAW § 485.05.

⁹¹ N.Y. PENAL LAW §§ 485.05(1), (3).

⁹² Hull, *supra* note 1, at 416.

⁹³ *Id.*

⁹⁴ See N.Y. PENAL LAW §§ 485.05(1)(a), (b), (3), (4)(a). According to New York's hate crime statute, “[a] person commits a hate crime when he or she . . . intentionally selects the person against whom the offense is committed . . . because of a belief or perception regarding the race, color, national origin, ancestry, gender, religion, religious practice, age, disability or sexual orientation of a person.” *Id.* § 485.05(1)(a); see MacNamara, *supra* note 89, at 522–25; Eisenberg, *supra* note 13, at 897–98 (providing a critical discussion of New York's hate crime statute).

⁹⁵ See N.Y. PENAL LAW § 485.05(3).

menacing, and rape, but less clear as to larceny offenses.⁹⁶

[T]he text of [New York Penal Law] section 485.05 makes no distinction between crimes of pure hate and crimes of opportunity. In requiring simply that the victim be selected, or the crime be committed because of a belief or perception regarding a person's race, [age,] or other characteristics, it embraces both traditional hate crimes and . . . opportunistic bias crimes.⁹⁷

In order to understand the legislative intent and applicability of the law, we need to examine the legislative history and applicable common law explaining the statute. The legislative materials relevant to the Hate Crimes Act of 2000 offer almost no indication that the bill's drafters or supporters envisioned the application of the law to extend to opportunistic hate crimes.⁹⁸ In fact, "[a] review of the legislative history suggests that crimes of pure hate were the primary type of offenses the legislature sought to punish."⁹⁹ Letters included in the Governor's bill jacket can provide additional insights into the law's purpose. Only one letter raised a concern related to crimes of opportunity. The letter from the Roman Catholic Bishops of New York State noted that the bill does not "distinguish between an isolated offense and deep-seated bias."¹⁰⁰ This letter shows a weak support that the law drafter may have intended to include crimes of opportunity. But, it is not entirely clear whether or not the bill drafters had in mind to include crimes of opportunity.

According to Ginsberg, "the legislative history tells us that the crimes-of-hate/crimes-of-opportunity distinction was a nuance that almost escaped the bill's public debate and discussion."¹⁰¹ In order to interpret the law, we need to look at applicable case law. In such a situation, the "appellate courts' interpretations [can] provide some of the best [explanations] as to the legislative intent of a statute, and [resolve] doubts as to a statute's meaning."¹⁰² Unfortunately, "the New York appellate courts have had precious little opportunity to

⁹⁶ *See id.*

⁹⁷ Ginsburg, *supra* note 50, at 1610–11.

⁹⁸ *See* Ginsburg, *supra* note 50, at 1614.

⁹⁹ *Id.* at 1611. "The Governor's Memorandum in Support, in deconstructing section 485.05(2), states that this section, which establishes the evidentiary burden to be met, 'is designed to ensure that only those who are truly motivated by invidious hatred are prosecuted for committing hate crimes.'" *Id.* at 1614.

¹⁰⁰ Press Release, N.Y. State Catholic Conference, Statement of the Roman Catholic Bishops of New York State on Legislation regarding Bias-Related Offenses (Nov. 16, 1999) (on file with author).

¹⁰¹ *See* Ginsberg, *supra* note 50, at 1611.

¹⁰² *Id.* at 1611.

consider the Hate Crimes Act.”¹⁰³ The most relevant case is *People v. Fox*.¹⁰⁴

In *Fox*, “the defendants . . . claimed that . . . their selection of . . . the victim of their criminal scheme was motivated by opportunistic calculation, not hatred of gays, and thus fell outside the statute.”¹⁰⁵ The trial judge, Hon. Jill Konviser, rejected the claim.¹⁰⁶ The Honorable Konviser noted that “[n]either the legislative findings nor any other portion of the legislative history alter the definition of a hate crime as set forth in Penal Law § 485.05(1)(a).”¹⁰⁷ She added that “[t]he Legislature . . . made an assessment that the intentional selection of a victim based on a protected characteristic is tantamount to a crime motivated by bias, prejudice, or hatred, thereby justifying enhanced punishment.”¹⁰⁸ The Honorable Konviser’s opinion is especially important because she served as Governor Pataki’s Senior Assistant Counsel from 1997 to 2002, during the time in which the Hate Crime Act was enacted.¹⁰⁹ Unfortunately, the judge did not explain her ruling, but suggested “that opportunistic bias crimes were of equivalent odiousness to crimes of pure hate and thus could be subsumed under a statute that mainly criminalized the latter.”¹¹⁰

While an analysis of cases and legislative history demonstrates the difficulty of applying the statute to opportunity crimes, the Queens’ District Attorney’s office pursues hate crime charges “that show[] just how far the envelope might be pushed in construing ‘hate.’”¹¹¹ In a 2006 press release, District Attorney Brown stated, “[u]nder . . . New York State’s Hate Crime Act of 2000, enhanced charges can be filed when a defendant commits a larceny and selects his or her victims because of their age, which is defined as being sixty years of age or older.”¹¹²

For example, “Shirley Miller [was] an alleged scam artist accused of fleecing four older, lonely men out of hundreds of thousands of

¹⁰³ *Id.* at 1620.

¹⁰⁴ *People v. Fox*, 844 N.Y.S.2d 627 (N.Y. Sup. Ct. 2007).

¹⁰⁵ Ginsberg, *supra* note 50, at 1621.

¹⁰⁶ *See Fox*, 844 N.Y.S. 2d at 630, 632 (citation omitted).

¹⁰⁷ *Id.* at 633 (citing N.Y. PENAL LAW § 485.05(1)(a) (McKinney 2018)).

¹⁰⁸ *Fox*, 844 N.Y.S. 2d at 633 (citation omitted).

¹⁰⁹ *See Jill Konviser*, BALLOTPEDIA, http://ballotpedia.org/Jill_Konviser (last visited Apr. 17, 2018).

¹¹⁰ Ginsberg, *supra* note 50, at 1621.

¹¹¹ *Id.* at 1626.

¹¹² Press Release, Dist. Attorney Brown, Queens Cty. Dist. Attorney, Florida Woman Pleads Guilty to Hate Crime in Predatory Scheme to Defraud Elderly Men (Mar. 1, 2006), <http://www.queensda.org/pressreleases/2006/march/03-01-2006.pdf>.

dollars by pretending to be their sweetheart.”¹¹³ She was charged not only with grand larceny, “but [also] grand larceny as a hate crime” pursuant to New York Penal Law § 485.¹¹⁴ “While Grand Larceny is a C Felony, hate crime charges elevate the charge to a B Felony, which is the next highest level.”¹¹⁵ Therefore, she could have faced a maximum sentence of up to twenty-five years in prison, but plead guilty in exchange for a short four-month sentence.¹¹⁶ Other recent cases follow the similar pattern of choosing elderly people as victims of financial exploitation.¹¹⁷

The practice of charging larceny as a hate crime is not limited to the Queens District Attorney’s Office.¹¹⁸ This practice “shows signs of becoming more widespread [in New York] in the near future.”¹¹⁹ In Brooklyn, for example, “Sal Lauria and an accomplice were charged with grand larceny in the second degree as a hate crime for allegedly obtaining a reverse mortgage in the victim’s name and then stealing \$350,000 in proceeds from a joint account they

¹¹³ Ginsberg, *supra* note 50, at 1626.

¹¹⁴ *Id.*; see N.Y. PENAL LAW §§ 485.05(1)(a), (3) (McKinney 2018). The N.Y. Daily news called the tactic “a novel strategy” and quoted the Queens District Attorney Richard Brown as saying, “[s]uch crimes of financial exploitation are commonly known as ‘sweetheart scams’ and are among the most devastating forms of elder abuse.” See Scott Shifrel, *Call Elderly Scam a Qns. Hate Crime*, N.Y. DAILY NEWS (Oct. 9, 2004), <http://www.nydailynews.com/archives/news/call-elderly-scam-qns-hate-crime-article-1.611388>.

¹¹⁵ Eisenberg, *supra* note 13, at 896.

¹¹⁶ See Press Release, Dist. Attorney Brown, Queens Cty. Dist. Attorney, Bayside Woman Halts Trial to Plead Guilty to Defrauding Four Elderly Men in “Sweetheart” Scam (Oct. 14, 2005), <http://queensda.org/Press%20Releases/2005%20Press%20Releases/10-October/10-14-2005.htm>.

¹¹⁷ See, e.g., Anne Barnard, *A Novel Twist for Prosecution of Hate Crimes*, N.Y. TIMES (June 22, 2010), <http://www.nytimes.com/2010/06/23/nyregion/23hate.html>. In Queens, the District Attorney prosecuted several more criminals like Miller, each time charging larceny as a hate crime. *Id.* For example, two women, “Gina L. Miller, 39, and Sylvia Johns, 23, of Flushing, were charged with grand larceny as a hate crime” for “stealing more than \$31,000 from three elderly men they had befriended separately.” *Id.* Nancy Jace, 37, “bilked five elderly men out of \$250,000, pretending to romance them and persuading them to pay for fictitious family emergencies,” later pleading guilty and serving a six-month sentence. *Id.* A thirty-year-old woman, Sherry Kaslov, “pleaded guilty to similar charges; she served four months and was hit with [ten] years of probation.” *Id.* In an even larger take, twenty-year-old Natasha Marks “swindl[ed] more than \$1 million from an 86-year-old man as a hate crime, including taking out a \$550,000 mortgage on his house; a fugitive, she faces two to six years.” *Id.* Finally, “Wando Delmaro was sentenced to [ten] years after pleading guilty to a hate crime: posing as a water-company employee and distracting elderly people while accomplices burglarized them.” *Id.*

¹¹⁸ See, e.g., Meredith Hoffman, *Accused Mortgage Scammer Charged with Hate Crime for Stealing \$350K*, DNA INFO., (Mar. 7, 2012), <https://www.dnainfo.com/new-york/20120307/prospect-heights-bed-stuy-crown-heights/accused-mortgage-scammer-charged-with-hate-crime-for-stealing-350k>.

¹¹⁹ Eisenberg, *supra* note 13, at 897. King’s County has charged Grand Larceny as a Hate Crime, and other jurisdictions in New York State have considered bringing similar charges. See Hoffman, *supra* note 118.

established.”¹²⁰ The victim of the reverse mortgage¹²¹ fraud scheme was an eighty-one year-old man.¹²²

Similarly, in September of 2015, Brooklyn District Attorney Ken Thompson charged a licensed insurance agent and financial planner, who “held himself out as a savvy investor and trusted advisor,”¹²³ with a “64-count indictment in which he [was] charged with grand larceny as a hate crime and other charges for allegedly targeting vulnerable, elderly victims and scamming them out of more than \$2.5 million in hard-earned savings.”¹²⁴ Just like Sherry Kastov, who “admitted that she preyed upon elderly men because their age made them ‘susceptible’ and an ‘easy target for theft,’”¹²⁵ “[t]his defendant allegedly took advantage of some of society’s most vulnerable victims, whom he targeted because of their age.”¹²⁶

These cases show that the elderly are particularly susceptible to being victims of opportunistic crimes, and how the “age” category applies in the prosecution of opportunistic hate crimes. All of the defendants took advantage of the vulnerability of the elderly. An explanation for targeting elders, and the consequent necessity of protecting them under the hate statute, is that older people are defenseless and “hold most of the household wealth in this country.”¹²⁷

“While exact statistics on how often financial crimes against the elderly occur are not available, it is widely believed to be underreported by the victims”¹²⁸ due to their medical and mental

¹²⁰ Elizabeth Ecker, *New York Reverse Mortgage Scam Charged as Hate Crime*, REVERSE MORTGAGE DAILY, (Mar. 7, 2012), <https://reversmortgagedaily.com/2012/03/07/new-york-reverse-mortgage-scam-charged-as-hate-crime/>.

¹²¹ “A ‘reverse mortgage’ is a financial instrument available only to adults over age 62 that allows a person to take equity out of a home she owns, which is repaid by the estate upon her death.” Guelda Voien, *Man Charged with Hate Crime in Reverse Mortgage Scam: Brooklyn DA*, REAL DEAL, (Mar. 7, 2012), <https://therealdeal.com/2012/03/07/man-charged-with-hate-crime-in-brooklyn-reverse-mortgage-scam/>; see Ecker *supra* note 120.

¹²² Ecker, *supra* note 120.

¹²³ Christina Carrega-Woodby, *Brooklyn Insurance Broker Cheated Elderly Residents Out of \$2.5M: District Attorney*, N.Y. DAILY NEWS (Sept. 9, 2015), <http://www.nydailynews.com/new-york/nyc-crime/brooklyn-insurance-broker-scammed-residents-2-5m-da-article-1.2354503>.

¹²⁴ Press Release, Brooklyn Dist. Attorney Ken Thompson, Bay Ridge Insurance Agent Indicted on Hate Crime Charges for Allegedly Targeting Elderly Victims in Financial Fraud, (Sept. 9, 2015), <http://brooklynda.org/2015/09/09/bay-ridge-insurance-agent-indicted-on-hate-crime-charges-for-allegedly-targeting-elderly-victims-in-financial-fraud/>.

¹²⁵ Press Release, Dist. Attorney Brown, *supra* note 116.

¹²⁶ Press Release, Brooklyn Dist. Attorney Ken Thompson, *supra* note 124.

¹²⁷ McClurg, *supra* note 76, at 1108.

¹²⁸ *Financial Crimes Against the Elderly 2013 Legislation*, NAT’L CONF. ST. LEGISLATURES (Jan. 10, 2014), <http://www.ncsl.org/research/financial-services-and-commerce/financial-crimes-against-the-elderly-2013-legis.aspx>.

conditions.¹²⁹ For all these reasons, it is essential that this growing class of vulnerable citizens be protected.

VII. LEGISLATIVE PROPOSAL

According to the 2011 MetLife Mature Market Institute study, financial exploitation of older Americans is a growing epidemic that cost seniors an estimated \$2.9 billion in 2010.¹³⁰ “In Maine alone, there are 14,000 new reports each year of senior abuse, which includes financial abuse.”¹³¹ The scope of the problem is hard to estimate because of the limited data on that topic.¹³² Few cases are reported—“According to the New York State Elder Abuse Prevalence Study, only one in 44 cases is reported.”¹³³ Shame plays a role in failure to report “financial exploitation.”¹³⁴ “Perpetrators are constantly developing new ways to gain access to our seniors’ life savings and have focused upon a generation that typically has been more trusting and less able or willing to self-report.”¹³⁵ These crimes are more difficult to report when the victim is a family member, because “often a family member is legally appointed as the guardian of assets.”¹³⁶ “A victim or those around them may suspect what is happening, but feel even more powerless or ashamed to report. Often, a victim will struggle with filing criminal charges against a child or other family member.”¹³⁷

Andrew Jay McClurg, the Herbert Herff Chair of Excellence in Law at University of Memphis Cecil C. Humphreys School of Law, in his article *Preying on the Graying: A Statutory Presumption to Prosecute Elder Financial Exploitation*, proposed a number of solutions to

¹²⁹ See, e.g., Eisenberg, *supra* note 67 (stating some elders do not report financial abuse due to cognitive deficiencies such as dementia).

¹³⁰ See METLIFE MATURE MKT. INST., THE METLIFE STUDY OF ELDER FINANCIAL ABUSE: CRIMES OF OCCASION, DESPERATION, AND PREDATION AGAINST AMERICA’S ELDERS 7 (June 2011), <http://ltombudsman.org/uploads/files/issues/mmi-elder-financial-abuse.pdf>; see also *Broken Trust: Combating Financial Exploitation of Vulnerable Seniors: Hearing Before the S. Special Comm. on Aging*, 114th Cong. (2015) (statement of Senator Susan M. Collins (2015), <https://www.aging.senate.gov/imo/media/doc/SMC%20opening%20%20FINAL%20for%20press%20table.pdf>) [hereinafter Senator Susan M. Collins Statement] (addressing those same statistics and also exploring the reasons why victims fail to report).

¹³¹ Senator Susan M. Collins Statement, *supra* note 130.

¹³² See Eisenberg, *supra* note 67.

¹³³ *Id.*

¹³⁴ Senator Susan M. Collins Statement, *supra* note 130.

¹³⁵ *Broken Trust: Combating Financial Exploitation of Vulnerable Seniors: Hearing Before the S. Special Comm. on Aging*, 114th Cong. (2015) (statement of Ranking Member Senator Claire McCaskill) (2015), https://www.aging.senate.gov/imo/media/doc/SCA_CMC_2_4_15.pdf.

¹³⁶ *Id.*

¹³⁷ *Id.*

prevent and/or eliminate financial exploitation of the elderly.¹³⁸ I strongly support his idea of enacting a local law requiring financial institutions to report reasonable suspicion of elder fraud to law enforcement.¹³⁹ In many states, the law already requires mandatory reporting of financial exploitation cases, but only to Adult Protective Services (“APS”), not to law enforcement.¹⁴⁰ APS often lacks the resources to properly investigate these cases.¹⁴¹ As a result, financial exploitation is rarely investigated.¹⁴²

According to Professor McClurg,

[f]inancial institutions are often in the best, most efficient position to detect and disrupt elder financial abuse because of their existing duties and safeguards to protect customers’ assets, sophisticated technology for identifying patterns of fraud, and ability to train employees to spot exploitation. Ideally, all fifty states would require mandatory reporting by financial institutions and, importantly, back up the duty with meaningful sanctions for failure to comply.¹⁴³

I believe that these preventative measures would significantly increase the investigation of financial crimes against the elderly, and consequently would protect the most precious and vulnerable citizens. Every such victim could be someone’s parent or grandparent, who supported and raised them. It is our duty to protect the elderly. Enacting a law requiring financial institutions to report suspicious activity, such as unusual transferring or wiring large amounts of money by the elderly, will not eliminate the problem, but it can be a significant step in preventing the financial crimes against the elderly.

CONCLUSION

Generally,

a hate crime is defined as “a crime in which the defendant intentionally selects a victim, or in the case of a property crime, the property that is the object of the crime, because of the actual or perceived race, color, religion, national origin,

¹³⁸ See McClurg, *supra* note 76, at 1099, 1142–43.

¹³⁹ See *id.* at 1142.

¹⁴⁰ *Broken Trust: Combating Financial Exploitation of Vulnerable Seniors: Hearing Before the S. Special Comm. on Aging*, 114th Cong. (2015) (written testimony of Page Ulrey, Senior Deputy Prosecuting Attorney, King County Prosecutor’s Office, Seattle, Washington), https://www.aging.senate.gov/imo/media/doc/SCA_Ulrey_2_4_15.pdf.

¹⁴¹ See *id.*

¹⁴² See *id.*

¹⁴³ McClurg, *supra* note 76, at 1142.

ethnicity, [age,] gender, disability, or sexual orientation of any person.”¹⁴⁴

Age is a category that is covered by the New York Hate Crime Act, and therefore, the elderly are a protected class. Elders are more vulnerable to financial crimes, or in other words, crimes of opportunity. Although the statute does not expressly cover crimes of opportunity, courts may consider such crimes as if they were expressly covered by the statute.

Hate crimes do more than just inflict on victims incalculable physical and emotional damage. Hate crimes also threaten the safety and *welfare of all citizens*, tearing at the very fabric of our society. These despicable act[s] intimidate and disrupt *entire communities*, and do damage to the civility that is crucial in a democracy.”¹⁴⁵

In this regard, protection of the elderly is essential. “While not everyone falls into the category of being female, African American, Jewish, gay, transgendered or disabled, anyone fortunate to live long enough will eventually fall into the category of being elderly.”¹⁴⁶ To protect this growing class of vulnerable citizens, courts in New York should freely apply the Hate Crime statute to financial crimes against the elderly, and the legislature should take a “concrete step toward both providing justice for individual victims and deterring exploitation before it happens.”¹⁴⁷

¹⁴⁴ Hull, *supra* note 1, at 398.

¹⁴⁵ GOVERNOR’S PROGRAM BILL MEMORANDUM #1RR, *supra* note 86, at 81 (emphasis added).

¹⁴⁶ See Hull, *supra* note 1, at 416.

¹⁴⁷ McClurg, *supra* note 76, at 1143.