"IN GOD WE TRUST": THE CULTURAL AND SOCIAL IMPACT OF AFFINITY FRAUD IN THE AFRICAN AMERICAN CHURCH

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I. INTRODUCTION TO THE PROBLEM

Across the United States, millions of dollars are being stolen from innocent churchgoers by con artists claiming to share in their religious beliefs. Far from a paranoid conspiracy theory, affinity fraud has posed a significant harm to churches and congregations, specifically those with high percentages of minorities, and the dramatic rise in incidents of affinity fraud over the past several years[1] has become a major concern for securities regulators at both federal and state levels. In a typical affinity fraud scheme, perpetrators target other members of the same racial, religious or ethnic group by creating an illusion of a shared allegiance or affinity to a common cause or experience.[2] Because the trust implicit among members of a particular religious or ethnic group can be especially strong if the members of that group consider themselves to be socially marginalized, affinity fraud is a particularly effective scam in minority groups with a documented history of oppression, like the African American community.[3]

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1. The North American Securities Administrators Association (NASAA) has ranked affinity fraud as the fifth most common scam, based on data received from state securities regulators. *See* NASAA, *State Securities Regulators Release Top 10 Scams, Schemes, & Scandals, at* http://www.nasaa.org/nasaa_newsroom/news_releases/392.cfm, (last visited Feb. 10, 2005).

2. *See* W. Mark Sendrow, *Affinity Fraud: The Ultimate Confidence Game*, Arizona Corporation Commission Securities Division, *at* http://64.233.179.104 (last visited July 15, 2004).

3. In one scheme in New Jersey, an African American perpetrator of affinity fraud suggested to his victims that their shared experience as targets of the long history of economic oppression faced by their community mandated they take advantage of certain investments. *See* Lisa M. Fairfax, *"With Friends Like These . . .:" Towards a More Efficacious Response to Affinity-Based Securities and Investment Fraud*, 36 GA. L. REV. 63, 79–80 (2001) [hereinafter Fairfax]. *See generally* Marilynn B. Brewer, *In-Group Bias in the Minimal Intergroup Situation: A Cognitive-Motivational Analysis*, 86 PSYCHOL. BULL. 307 (1979) (finding that

Affinity fraud is different from a garden-variety investment scam because perpetrators base their credibility on intra-racial and intra-religious trust,[4] thus implying to their victims that "you can trust me, because I'm like you."[5] Often focusing on a characteristic both the group and the perpetrator share—such as a common racial background, or religious affiliation—perpetrators claim that their investments will advance the social and economic interests of the group.[6] Scam artists then abuse this trust by using it to convince victims to invest in nonexistent or highly speculative investments.[7]

Affinity fraud is effective for several reasons. First, victims are often financially inexperienced and become embarrassed when they fall prey to a con artist, so are therefore reluctant to report the crime.[8] This reluctance to involve securities regulators also can be attributed to a negative impression of law enforcement,[9] and a desire to resolve the problem within the group rather than through outside help.[10] Second, perpetrators make their financial products more appealing not only by promising that investors will "get rich quick," but also by promising these investments will have a community benefit. However, once money has been given to the perpetrator, victims find that they have been "had" as part of a Ponzi scheme,[11] been given bad financial advice, or simply had their money stolen.[12]

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members within a racial group, specifically those with a history of oppression, share an inherent sense of trust among group members).

4. *See* NASAA, *Affinity Fraud: Beware of Swindlers Who Claim Loyalty to Your Group*, *at* http://www.nasaa.org/Investor_Education/Investor_Alerts___Tips/1679.cfm (last visited January 15, 2001).

5. *See* Mark Griffin, *Remarks by NASAA President Mark J. Griffin, Columbus Club, Union Station Press Conference, November 12, 1997*, North Am, Sec, Administrators Association, *at* http://www.nasaa.org/nasaa/scripts/fu_window_display.asp?usid=0&ref=118 (last visited Aug. 1, 2004).

6. *See id.*

7. *See id.*

8. *See id.*

9. *See* Fairfax, *supra* note 3, at 128. Perpetrators of religious-based affinity fraud often use the argument that the government is persecuting them as a means of gaining loyalty. In addition, perpetrators sometimes convince group members that reporting the scheme will prevent victims from ever seeing return on their investment. *See* Fairfax, *supra* note 3, at 129.

10. *See* Fairfax, *supra* note 3, at 101.

11. As explained in Stuart R. Cohn, *The Impact of Securities Laws on Developing Companies: Would the Wright Brothers Have Gotten Off the Ground?*, 3 J. SMALL & EMERGING BUS. L. 315, 350 n.99 (1999):

> A Ponzi scheme is one that involves using new investor money to pay older investors a promised interest or other economic return. Investors are not aware of this circular use of invested funds and are falsely led to believe that the economic return is being generated by company

The August 2004 Federal Trade Commission report on consumer fraud in the United States indicates that 24% of all African Americans are likely to fall victim to fraud;[13] this makes them almost 2.5 times more likely than non-Hispanic whites[14] to become the target of a scam. In addition, the 2004 report on minority buying power from the Selig Center at the University of Georgia notes that African Americans will see an increase in discretionary income at a compound annual growth rate of 6% annually, the greatest of any ethnic group.[15] With this susceptibility to fraud and an increase in disposable income, African Americans are likely targets for affinity schemes.

This article examines the unique social and legal problems of affinity fraud, specifically among African American church congregations, which are becoming a preferred venue for scam

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operations, which are usually minimal or nonexistent. The term "Ponzi Scheme" is derived from the notorious activities of Charles Ponzi in Boston, beginning in December 1919. Ponzi offered investors a 50% return on short-term notes, claiming that his company would earn huge amounts through the international trading of postal coupons. Interest payments were made on a timely basis, causing others to believe in the merits of the company. In fact, no business operations were ever undertaken. Ponzi collected over $14 million within eight months and made payments of approximately $9 million to his investors. The scheme was finally exposed in 1920 by a Boston newspaper. Ponzi was sentenced to prison, from which he was paroled after three years. Following a second conviction several years later for a real estate fraud, he was deported to Italy and was employed by Mussolini in the Ministry of Finance.

Id. See also In re Ponzi, 268 F. 997 (D. Mass. 1920).

Ponzi schemes, such as the one involved in Financial Warfare, often fall under the purview of Federal Securities laws. The term "security" covers a broad range of investments. *See* 15 U.S.C.A.. § 77(b)(a)(1) (2000) (indicating that the term "securities" covers not only financial instruments commonly considered "securities," like stocks and bonds, but also investment vehicles such as interests in a Ponzi scheme). These interests are often called "investment contracts," which has been defined by the Supreme Court as the investment of money in a common enterprise with profits derived from the efforts of others. *See* SEC v. Howey Co., 328 U.S. 293, 298–99 (1946).

12. *See* SEC, *Affinity Fraud: How to Avoid Investment Scams that Target Groups*, *at* http://www.sec.gov/investor/pubs/affinity.htm (last visited Feb. 10, 2005) (defining affinity fraud).

13. *See* Fed. Trade Comm'n, *Consumer Fraud in the United States: An FTC Survey*, 55–61 (Aug. 2004), *available at* http://www.ftc.gov/reports/consumerfraud/040805confraudrpt.pdf. By comparison, only 6.4% of non-Hispanic whites have a likelihood of falling victim to fraud. *See id.*

14. *See id.* at 62.

15. *See* The Selig Center, Univ. of Ga., *The Multicultural Economy 2004: America's Minority Buying Power*, 3, [hereinafter Selig Center Report], *available at* http://www.selig.uga.edu/forecast/GBEC/GBEC043Q.pdf.

artists,[16] and uses the 2003 case of Financial Warfare[17] to provide a glimpse into the mechanics of how trust and charitable impulses among members in an urban, African American church are exploited. It begins by describing the mechanics of church-based affinity fraud in an African American congregation by using the Financial Warfare scam as an example of the methodologies con artists use to target victims.[18] This article then proposes that punishment for all active participants in church-based affinity fraud can justified based on both traditional securities laws and the current status of the church as a benevolent social organization in African American communities. African American churches not only serve as houses of worship, but as centers for education and self-betterment. This concept of self-betterment, and the church's role as a catalyst for such goals, are at the core of congregants' natural desire to build wealth and improve their lifestyle.

In addition, ministers who perpetrate affinity fraud or assist in these schemes should also be liable for a breach of fiduciary duty. The relationship of special trust, implicit between minister and congregant, is violated when a minister invites or assists scam artists to give financial presentations in his or her church, should warrant increased punishment. This relationship between clergy and church member is not only based on a common faith, but also a common race. Breach of fiduciary duty claims can and should be used by regulatory agencies when prosecuting affinity fraud. Although African American churches have functioned as extra-religious social organizations throughout American history, financial advice cannot be viewed as part of the ecclesiastical message of the church, and therefore is not protected by the First Amendment.

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16. *See* E. Scott Reckard, *Preying Through the Pulpit,* L.A. TIMES, Jan. 13, 2005, at 1A, *available at* 2005 WL 56322960; *see also* Normal Arey, *Guilty Verdict in Church Fraud,* ATLANTA JOURNAL–CONSTITUTION, Feb. 8, 2005, at B5, *available at* 2005 WL 73610487.

17 *See* Complaint, SEC v. Fin. Warfare Club, et al., Civil Action No. 02–7156 (E.D. Pa. filed Sept. 5, 2002) at ¶ 38,
available at http://www.sec.gov/litigation/complaints/complr17714.htm (last visited Dec. 15, 2004); In re: Fin. Warfare Club Inc., et al., No. OAH–SD–51–200100002 (Md. 2002).

18. The information in this section is based on a videotaped presentation delivered at a church in Maryland by Marcus Dukes and Teresa Hodge, the con artists behind the Financial Warfare scheme, and describes remedies currently available to securities regulators in prosecuting affinity fraud. *See* Videotape: Seminar Presented by Financial Warfare, Inc., Baltimore, MD, # CE00001817 [hereinafter Financial Warfare Videotape].

In sum, African American churches have traditionally been involved in re-investing in the communities of which they are a part. Although the goal of returning money to the community is not novel to African Americans, the African American church plays a prominent role in effectuating that goal. Existing securities laws provide an avenue for prosecuting perpetrators, however, securities regulators should seek enhanced civil and criminal penalties based on the status of the African American church as a charitable institution.[19]

II. THE BACKGROUND OF AFFINITY FRAUD IN THE AFRICAN AMERICAN CHURCH COMMUNITY

According to the North American Securities Administrators Association (NASAA) affinity fraud is one of the ten most common financial scams in the United States.[20] Unfortunately, the recent rise in discretionary income[21] among African Americans has been met with little increase in investment education and financial knowledge among African Americans.[22] Coupled with the recent push among African American churches to give other African American businesses "trust and support," African American investors are ripe for defrauding.[23] What could be viewed as a positive growth among African American communities—the ability to invest disposable income—has been transformed into a means through which African American scam artists prey on their own community.[24]

Church-based affinity fraud poses major problems for securities regulators.[25] Victims are reluctant to inform investigators

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19. *See* Fairfax, *supra* note 3. *See generally* Mark Gergen, *The Case for a Charitable Contributions Deduction*, 74 VA. L. REV. 1393, 1395. (1988) (indicating tax deductions serve as reward for selfless behavior); Henry Hansmann, *The Role of Nonprofit Enterprise*, 89 YALE L.J. 835, 843 (1980) (noting the importance of charitable giving to society as a whole).

20. *See* NASAA, *supra* note 2.

21. The Selig Center For Economic Growth at the University of Georgia forecasts that the buying power of African American households in the United States will increase by a compound annual rate of 6.1%. *See* Selig Center Report, *supra* note 15.

22. *See* Jeanne Dugan, *Broken Trust: A Young Man's Talk of Stock Riches Lures Host of 'Regular Folks,'* WALL ST. J., Sept. 12, 2000, at A1, *available at* 2000 WL-WSJ 26609357.

23. *See id.*

24. *See id.*

25. *See* Pennsylvania Sec. Comm'n, *Affinity Fraud, at* http://www.psc.state.pa.us/investor/ibulletin/affinity.html (last visited Jan. 15, 2005). No particular religious group is immune from being targeted. *See id.* (noting "Religious affinity fraud remains a widespread problem, with swindlers found across all denominations").

that they have been scammed out of embarrassment, a belief in "Christian forgiveness,"[26] and, because religious groups tend to be closely-knit, a victim may not want to prosecute someone they know from their own church.[27] If a victim reports the scam in her or his church, she or he often believes government prosecution of the perpetrator is inevitable. Reporting the crime precludes the perpetrator from having a "change of heart" and returning the money to "repent" for stealing from the church.[28] Often times, victims in churches flat-out refuse to believe a member of their own congregation would steal from them.[29]

Moreover, victims are sometimes misled into thinking that the government may be persecuting them for their religious beliefs[30] or their race, and that reporting the fraud to law enforcement will prohibit any possible return on their investment, even after scam artists have already stolen their money.[31] There is a sense of distrust towards a majority government seizing and prosecuting minorities and, in the eyes of some African American congregations, prosecuting a perpetrator of affinity fraud whom they believe is innocent is another example of the United States government controlling the little wealth and power held in African American communities.[32]

In addition, church members frequently reach out to other members of the church to solve the problems within the group, rather than notify outsiders like securities regulators.[33] The end result is that church-based affinity fraud, like other forms of affinity fraud, often goes unreported. This type of intra-group loyalty is especially

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26. Interview with Lucy A. Cardwell, Office of the Attorney General of Maryland, Division of Securities, in Baltimore, Md. (Aug. 1, 2004) [hereinafter Cardwell Interview]. Ms. Cardwell noted that often times ministers themselves are defrauded in these scams, and their desire to forgive the perpetrators often prevents these ministers from testifying against perpetrators.

27. *See* Fairfax, *supra* note 3, at 66.

28. *See* Cardwell Interview, *supra* note 26.

29. *See id.*

30. *See* Michael Fetcher & Morris Kennedy, *Ministries Program Pitched Scripture*, TAMPA TRIB., Mar. 14, 1999, at 1, *available at* 1999 WL 4647199 (noting that an implied government persecution of religious or ethnic groups has been a unifying theme in these scams).

31. *See id.*

32. *See* Cardwell Interview, *supra* note 26. *See also* Fairfax, *supra* note 3.

33. *See* W. Mark Sendrow, *Affinity Fraud: The Ultimate Confidence Game*, Ariz. Corp. Comm'n, Sec. Div., *at* http://64.233.179.104 (last visited July 15, 2004).

prevalent among persons of color, and con artists use this to their advantage.[34]

Defrauding investors in a church-based setting is a particularly effective scheme because con artists tend to reach large groups of people when touting fraudulent investments to an entire congregation; a large number of potential victims leads to the result that more money can be stolen.[35] Networks of church communities are also frequently exploited. In the case of the scheme in Arizona which defrauded Baptists of $530 million,[36] perpetrators individually touted their investment scheme to members of their own churches, and then sent materials to other Baptist churches in the area, exploiting the network of individuals belonging to the Baptist community.[37] In a similar fashion, an investment scheme in Florida[38] was effectuated by utilizing church mailing lists to target other individuals who belonged to other churches of the same denomination.[39] Most recently, in Alabama, Abraham Kennard was convicted of using a network of African American preachers to defraud investors of almost $9 million.[40]

III. THE CASE OF FINANCIAL WARFARE, INC.

The Financial Warfare Club[41] sold securities primarily at African American churches from September 2000 through September 2001, targeting church members "through the exploitation of their religious faith and their ethnic pride." [42] The presentations were frequently advertised during church services on the immediately

34. *See id.*
35. *See* Fairfax, *supra* note 3, at 73.
36. *See id.* at 79.
37. *See id.* at 77.
38. *See id.* at 74.
39. *See id.* at 78.
40. *See Ga. Preacher Found Guilty in Church Scam,* WASH. POST, Feb. 8 2005, at A24, *available at* 2005 WL 56299307.
41. According to the group, the name "Financial Warfare" originates from *Judges* 6–8. In their words "300 people were flooded with the wealth of 135,000—that's what happens when you answer the call" and invest with their group." *Judges* 6 – 8 tells the story of Gideon and his defeat of the Midianites. *See id.*
42. *See* Complaint, SEC v. Fin. Warfare Club, et al., Civil Action No. 02–7156 (E.D. Pa. filed Sept. 5, 2002) at ¶ 38, *available at* http://www.sec.gov/litigation/complaints/complr17714.htm (last visited Dec, 15, 2004). As of the publication of this article, the action filed by the Securities and Exchange Commission in the District Court for the Eastern District of Pennsylvania, is stayed until May 2, 2005.

preceding Sunday.[43] In these presentations, Marcus Dukes and Theresa Hodge, two of the principal players in the Financial Warfare scam, were introduced to the congregation as successful African American businesspeople who had a strong desire to "give something back to the community" through their assistance to African American churches.[44] Their presentations were replete with prayers, scriptural references, and other religious language.[45] At these presentations, Dukes and Hodge informed congregants that, first, the essential element to acquiring wealth was to invest in companies before their initial public offering (I.P.O.) and, second, that African Americans could not take advantage of these investments because the United States Securities and Exchange Commission (SEC)[46] required the purchase of shares before an I.P.O. be made by accredited investors, such as persons who earn in excess of $200,000 a year.[47]

In March of 2001, the Securities Commissioner of the State of Maryland issued a Summary Order to Cease and Desist and later, in May 2002, arranged for a settlement by consent against Dukes and Hodge.[48] The federal case, filed by the SEC, is currently pending before a judge in the District Court of the Eastern District of Pennsylvania.[49] The SEC alleges the total damage incurred by Financial Warfare includes over 1,000 investors in at least eighteen states of more than $1.3 million.[50]

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43. *See id.*

44. *See id.* at ¶ 43.

45. *See id.*

46. The SEC was granted authority by Congress in 1934 to regulate the securities markets through several basic powers: rule-making, adjudication, and investigation, and enforcement. *See generally* THOMAS LEE HAZEN, THE LAW OF SECURITIES REGULATION § 1.4 (4th ed. 2002) [hereinafter HAZEN: SECURITIES REGULATION].

47. *See* Complaint, SEC v. Fin. Warfare Club, et al., Civil Action No. 02–7156 (E.D. Pa. filed Sept. 5, 2002) at ¶ 39, *available at* http://www.sec.gov/litigation/complaints/complr17714.htm (last visited Dec, 15, 2004).

48. *See* Maryland Attorney General, *Church-Based Investment Program and Promoters Permanently Enjoined from Securities and Investment Advisor Activities*, (describing the injunction against Dukes and Hodge), *at* http://www.oag.state.md.us/Press/2002/051502.htm (last visited December 1, 2004). The Maryland Attorney General's complaint notes that Financial Warfare gave presentations in approximately 65 to 80 churches in at least ten states. *See* In re: Fin. Warfare Club Inc., et al., No. OAH–SD–51–200100002 (Md. 2002). However, the SEC has alleged that approximately 1,000 investors in eighteen states had been defrauded of approximately 1.3 million. *See* Complaint, SEC v. Fin. Warfare Club, et al., Civil Action No. 02–7156 (E.D. Pa. filed September 5, 2002) at ¶ 1, *available at* http://www.sec.gov/litigation/complaints/complr17714.htm (last visited December 15, 2004).

49. *See* Complaint, SEC v. Fin. Warfare Club, Inc., et al, No. 02–7156 at ¶ 1. *See also supra* note 42 (indicating the case is currently stayed until May, 2005).

50. *See id.* at ¶ 38.

The source of much of the firsthand knowledge and observation which follows comes from a videotaped presentation given by Dukes and Hodge. The videotape provides a vivid illustration of the means through which Financial Warfare touted fraudulent investments at an African American church in Maryland. It further demonstrates some of the means by which scam artists use race and religion to defraud minority congregants and possibly even church leaders.[51]

A. The Scheme

Dukes and Hodge organized Financial Warfare, Inc. into several corporations in Maryland, the District of Columbia, and Nevada.[52] They found prospective investors through presentations at small churches and through meetings they arranged with pastors at those churches.[53] After establishing a connection with the local pastor, Dukes and Hodge made in-church announcements that they would be presenting an investment program following the next week's service.[54] These presentations were focused around the sale of unregistered securities as I.P.O.s, and were laden with Biblical references and prayers.[55]

The material misrepresentations made by Financial Warfare as alleged by the SEC are staggering. At these presentations, Dukes and Hodge guaranteed Financial Warfare would capture 5% of the minority population in the next five years and create a whopping $1.25 billion for investors over nine months.[56] Financial Warfare offered three levels of participation depending on investment and promised to

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51. *See supra* note 18. The scheme used by Financial Warfare is hardly new. Perpetrators often claim that their funds will be used to help do "God's work" in the community as well as help the church in its various projects and charities. *See* Bill Broadway, *Fraud 'in the Name of God'; Religion-Based Investment Scams Are Increasing, Regulators Warn Scams Luring More Investors*, WASH. POST, Aug. 11, 2001, at B9, *available at* 2001 WL 30328306. Financial Warfare's website also combined biblical references and investment advice. *See In re:* Fin. Warfare Club Inc., et al., No. OAH–SD–51–200100002 (Md. 2002) at 6.

52. *See* Complaint, SEC v. Fin. Warfare Club, et al., Civil Action No. 02–7156 at ¶ 2. These satellite offices allowed them to continue business by offering securities based in their District of Columbia office even after the Maryland Attorney General won an injunction against them.

53. *See id.*

54. *See id.*

55. *See id.* at ¶ 3.

56. *See id.* at ¶ 6.

distribute ownership interests in three infrastructure companies which did not exist except on paper, even though material distributed at the seminars made it seem as if these companies were already operating.[57] The first of these phantom companies was described as a media conglomerate which would acquire media outlets within the top fifty minority markets over the next two years. The second company allegedly would provide access to capital for minorities and operate its own investment bank, commercial bank, and insurance company. The third was a marketing agency, allegedly operating in thirty-five locations with 2,500 affiliated church businesses.[58] Financial Warfare promised their audience that these companies would soon go public.[59]

The tactics used by Hodge and Dukes were extremely effective; as noted earlier, approximately 1,000 investors in eighteen states had been defrauded of more than $1.3 million.[60] Investors' money was not used to purchase stock or benefit members of the Financial Warfare Club in any way. Instead, the SEC alleges, approximately $300,000 went to salary and benefits for Dukes and Hodge, another $300,000 went to "consulting services" they performed, and approximately $600,000 was lost in "intercompany transfers" consisting of about $42,000 in payments to luxury hotels and more than $92,000 in cash withdrawals.[61]

B. The Players

Two of the four individuals who participated in the presentation the church are named in the Maryland Attorney General's complaint against Financial Warfare.[62] Marcus Dukes and Teresa Hodge provided the investment information behind the scam. Although Dukes and Hodge had presented themselves as financially successful, Hodge had a particularly difficult time with her own personal finances; she had filed for bankruptcy four times between 1996 and 1999.[63] Dukes had a background as a registered sales

57. *See* Complaint, SEC v. Fin. Warfare Club, et al., Civil Action No. 02–7156 at ¶ 9.
58. *See id.* at ¶ 7.
59. *See id.*
60. *See id.* at ¶ 1.
61. *See id.* at ¶ 4.
62. *See generally* In re: Fin. Warfare Club Inc., et al., No. OAH–SD–51–200100002 (Md. 2002) (naming Teresa Hodge and Marcus Dukes as defendants).
63. *See* Complaint, SEC v. Fin. Warfare Club, et al., Civil Action No. 02–7156 (E.D. Pa. filed Sept. 5, 2002) at ¶ 4, *available at*

representative for a securities company, but in 1994 was censured, fined $25,000, and permanently barred from working for any broker dealer for engaging in trading in a customer's brokerage account. None of this was disclosed to their potential victims.

The pastor of the church at which Dukes and Hodge gave their presentation was not named in the Maryland Securities Commissioner's complaint or in the SEC complaint, but appears in the videotape of Financial Warfare's presentation. Likewise, a visiting minister also appears on the tape; he arguably played a role in enhancing Financial Warfare's credibility by testifying to the strong spiritual foundation and profound financial knowledge of Dukes and Hodge. [64]

C. The Pitch

1. Appeal to a Higher Authority Through Scripture— or, "God is Sanctioning the Scheme"

At Financial Warfare's pitch to the congregation, the pastor of the church opened the presentation with a prayer. He explained "wealth is not a dirty word" and there is no Biblical foundation for treating wealth as an evil.[65] It was his belief that the world of finance was the "spiritual niche" of the representatives of Financial Warfare, and they were committed to helping bridge the gap between the spiritual and financial world.

The visiting minister then addressed the church leaders. He claimed that when he first met Dukes and Hodge, he was not able to afford to build a church for his congregation, but, after "aligning" with

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http://www.sec.gov/litigation/complaints/complr17714.htm (last visited Dec, 15, 2004). Three petitions were dismissed; a court granted relief to one petition filed in 1997.

64. Neither the church's pastor nor the visiting minister were named in any complaint, either by the Maryland Securities Commissioner or the SEC. However, both appear on the videotape on which I base this summary. *See* Financial Warfare Videotape, *supra* note 18. Therefore, my interpretation of any role they may have played in the scam is purely speculative.

65. *Cf. Luke* 18:22–25.

> "When Jesus heard this, he said to him, "There is still one more thing you need to do. Sell all you have and give the money to the poor, and you will have riches in heaven; then come and follow me." But when the man heard this, he became very sad, because he was very rich. Jesus saw that he was sad and said, "How hard it is for rich people to enter the Kingdom of God! It is much harder for a rich person to enter the Kingdom of God than for a camel to go through the eye of a needle."

Id.

God, the two financial planners, and a series of corporations, he was able to construct his church.[66] His presentation was spun into a masterful web of Bible references and misappropriated financial terminology. For example, he claimed that King Solomon had stated that money solves "everything."[67] He also informed the congregants in attendance for the presentation that the representatives of Financial Warfare will "tear down the old concepts of money in Christ" and will "explain how the Body of Christ" fits into taking advantage of business opportunities.[68]

Theresa Hodge, a well-dressed woman in her mid-thirties, informed those in attendance that she left the business world at the request of God to present Financial Warfare to churches, and was sharing the "good news" as it relates to money. Quoting *Deuteronomy* 8:18,[69] she claimed that, through the Bible, God is giving Christians the power to acquire wealth. Hodge attempted to minimize the possibility of risk in investing with Financial Warfare by asserting it was not a "get rich quick scheme,"[70] but rather a strategy "based on wisdom" and one that was brought by God to the Financial Warfare team.[71] Dukes also used this tactic in his pitch, stating that there was

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66. The pastor quoted *John* 15:1–2: "I am the true vine, and my Father is the gardener. He cuts off every branch in me that bears no fruit, while every branch that does bear fruit he prunes so that it will be even more fruitful." *Id.*

67. I believe he is referring to 2 *Chronicles* 1:11–1:17, in which God grants Solomon riches because he "has not asked riches, wealth or honour." Because of Solomon's humility, God grants him wealth to build his kingdom and reign over Israel. Although he believes the message to be derived from this passage is that "money solves everything," it was the fact that Solomon had the ability to lead Israel because he had asked for "wisdom and knowledge for thyself, that thou mayest judge my people, over whom I have made thee king." *Id.*

68. After scouring the New Testament, I was unable to find a section in which Jesus told his disciples to take advantage of business opportunities. *Cf. Mark* 1:14–1:18, in which Simon Peter and Andrew abandoned their "business opportunity"—fishing—in order to follow Jesus:

> Now after that John was put in prison, Jesus came into Galilee, preaching the gospel of the kingdom of God, And saying, The time is fulfilled, and the kingdom of God is at hand: repent ye, and believe the gospel. Now as he walked by the sea of Galilee, he saw Simon and Andrew his brother casting a net into the sea: for they were fishers. And Jesus said unto them, Come ye after me, and I will make you to become fishers of men. And straightway they forsook their nets, and followed him.

Id.

69. "Remember that it is the Lord your God who gives you the power to become rich. He does this because he is still faithful today to the covenant that he made with your ancestors." *Deuteronomy* 8:18.

70. We will later see that it is, in fact, touted as a "get rich quick scheme."

71. As Dukes later explains, Morgan Stanley had offered to "write them a check for $7 million" which they refused, because they wanted to keep Financial Warfare away from the "majority community." *Cf.*, SEC v. Fin. Warfare Club, Inc., et al, Civil Action No.: 02–7156

"nothing too hard for God," thus implying that God was in control of the market and, consequently, Christians can profit through investing. Investing with Financial Warfare was an "Act of Faith" and Dukes' job on Earth is to act as God's facilitator.

Financial Warfare also used scripture in its marketing materials. The brochure distributed at presentations explains the program as the following:

> Why join Financial Warfare Club? In 1999, the combined value of the New York Stock Exchange and NASDAQ markets were worth over 14.5 trillion dollars. Proverbs 13:22 concludes, ". . . the wealth of the sinner is laid up for the just." It is no secret where the wealth is laid up. *Deuteronomy* 8:18 determines that God has given us the ". . . power to get the wealth. . . ." The prophetic "Wealth Transfer" is how this will occur, but the transfer requires a vehicle to activate this promise. Financial Warfare Club is such a vehicle. The Financial Warfare Club is the way for you to activate your power to get wealth.[72]

This appeal to scripture targeted congregants' sense of Christian charity[73] and, at the same time, gave the impression that God was sanctioning the investment scheme touted by Dukes and Hodge. In supporting financial misrepresentations with scripture, Financial Warfare appealed to congregants in language familiar to the faithful.

The methods used by Financial Warfare are hardly new. The use of scripture in a sales pitch to members of a church is a standard method through which affinity fraud is perpetrated.[74] The presence of both the church's pastor and the visiting minister, as well as their frequent use of scripture in the presentation helped create the illusion

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(E.D. Pa.) at ¶ 46(f) (Oct. 20, 2004) in which the SEC alleges, "Dukes falsely claimed that he had met with a representative of Morgan Stanley about investing in Fin. Warfare Club and that the representative offered Dukes $7 million 'on the spot.' In fact, Dukes never discussed Financial Warfare Club with any representative of Morgan Stanley and the described events never occurred." *Id.*

72. *See* Financial Warfare, *Marketing Materials Distributed to Potential Investors*, [hereinafter Financial Warfare Marketing Materials] (on file with author).

73. *See* Fairfax, *supra* note 3, at 92.

74. *See* Oracle Trust Fund, Lit. Rel. No. 16355, 71 SEC Docket 211 (Nov. 16, 1999), *available at* http://sec.gov.litigation/litlelearses/lr16355.htm (in which perpetrators of this scheme touted investments with biblical names).

that not only the church, but God was sanctioning Financial Warfare's plan.

2. Appeal to Race in a Religious Context

Hodge noted in her presentation that African Americans do not get a chance to participate in Wall Street; at best, they "passively" invest in mutual funds. She stated African Americans are merely "feeding the system"[75] by purchasing products made by companies owned by whites. According to their marketing materials, "The American Black Church membership contributes 3 Trillion Dollars to this system."[76] Hodge contrasted this treatment with the investment strategy of Financial Warfare, which had the potential to fill the pockets of the African American community because their investments were made by other African Americans in African American owned businesses.[77] Although it is true that there are few African American owned businesses on Wall Street,[78] Hodge attributed this to fact that African Americans are not considered "accredited investors."[79] Dukes

75. Although "the system" is never explicitly defined, Financial Warfare's marketing materials claim that "This System Controls the Wealth of the Nations" and, from context, can be explained as commerce created by the New York and NASDAQ stock exchanges. It was Financial Warfare's contention that African Americans do not own stock, but purchase commercial goods which profit majority-owned businesses. *See* Financial Warfare Marketing Materials, *supra* note 72.

76. *See id.* "The system" refers to the number of shares traded on the New York and NASDAQ exchanges. *See id.* Financial Warfare further breaks down African American "contributions" to "the system," claiming that every African American spends an average of $65,000 to benefit majority owned businesses, and a one-hundred member church contributes approximately $6,500,000. *See id.*

77. The materials claim that all investors who participate in the Financial Warfare Club are the "founders" of the Minority Economic Network, and each of the three companies under Financial Warfare's umbrella organization "will be a critical piece to building a strong network of new minority owned public companies." *See id.*

78. There are only three African American CEOs of Fortune 500 companies. *See* FORTUNE, *Most Powerful Black Executives*, *at* http://www.fortune.com/fortune/blackpower .

79. Hodge uses this term to illustrate that the dearth of publicly traded African American-owned businesses to the SEC regulations defining accreditation. These exemptions indicate that under certain circumstances, the cost and burden of registration are not necessary if investors have enough sophistication to make informed investment decisions without the issuing company providing certain information to the SEC or exchanges. This is untrue. Section 4(6) of the Securities Act's registration requirements, allowing sales to accredited investors, is based on the general absence of advertising or public solicitation in the offering process of I.P.O.s. *See* HAZEN: SECURITIES REGULATION, *supra* note 45, at § 4.23. According to 17 CFR § 230.501 (4)–(8), individuals can be accredited investors if they are:

> (4) Any director, executive officer, or general partner of the issuer of the securities being offered or sold, or any director, executive officer, or general partner of a general partner of that issuer; (5) Any natural person whose individual net worth, or joint net worth with that person's spouse, at

later affirmed Hodge's theory, and added that the church community can have access to Wall Street only if it has access to I.P.Os.[80] Dukes told congregants that individuals who purchase stock before an I.P.O. are *guaranteed* to make money, noting that companies who went public in 1999, averaged a 35% return on their investment and a 186% return within the first year.[81] Likewise, Dukes also informed the audience that African Americans generate $1.78 trillion for whites but never reap the benefits of their own purchasing power.[82] Dukes warned against an ominous technology park coming to Baltimore, and predicted that working-class African American families will be driven out of their homes due to the same increase in property values that happened in Silicon Valley[83] if they could not compete on Wall Street.

In his presentation, Dukes appealed to the long history of racism in the United States. He informed the audience that African American investors are always denied loans by "majority banks" and, if African Americans need money to build churches or otherwise invest in their communities, they cannot go to African American owned banks because these banks "have no money." He recommended church leaders must "buy black, own black, and take

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> the time of his purchase exceeds $1,000,000; (6) Any natural person who had an individual income in excess of $200,000 in each of the two most recent years or joint income with that person's spouse in excess of $300,000 in each of those years and has a reasonable expectation of reaching the same income level in the current year; (7) Any trust, with total assets in excess of $5,000,000, not formed for the specific purpose of acquiring the securities offered, whose purchase is directed by a sophisticated person as described in § 230.506(b)(2)(ii); and (8) Any entity in which all of the equity owners are accredited investors.

See id.

Although many Americans, including African Americans, may not meet the requisite income level to be considered "accredited," Hodge implied that this barrier of "accreditation" is what excludes African Americans from investing to build wealth, indicating that accreditation is used to prevent "poor people" from investing in general.

80. *See* SEC v. Fin. Warfare Club, Inc., et al., Civil Action No.: 02–7156 (E.D. Pa.) at ¶ 39 (Oct. 20, 2004); *see also* Fin. Warfare Club Inc., et al., No. OAH–SD–51–200100002 (Md. 2002) at 8.

81. *See* Fin. Warfare Club Inc., et al., No. OAH–SD–51–200100002 (Md. 2002) at 8. Financial Warfare's marketing materials explain that "$1,000 invested in Cisco Systems' Initial Public Offering (IPO) [sic] in 1990 became $1,3000,000 in the year 2000." *See* Financial Warfare Marketing Materials, *supra* note 72.

82. *See* Selig Center Report, *supra* note 18, at 2. The report indicates that African American buying power is currently at $688 billion. *See id.* at 3.

83. Property values in Silicon Valley, California, grew to almost prohibitively expensive levels during the I.P.O. boom in the late 1990s. *See generally What It Takes to Come Top in Technology,* ECONOMIST, April 2, 1997, at S7 (outlining the rapid increase in real estate prices in Silicon Valley, California, during the late 1990s).

black back to Wall Street." All businesses which are part of Financial Warfare's financial strategy, he claimed, will be owned by African Americans and Christian churches. The entire investment would be "deliberately kept within the community."[84]

Dukes' tactic tied a sense of racial allegiance with charitable impulses.[85] Securities regulators have noted that individuals with any income to invest also desire to help others generate such income, as "members of other long-established minority groups who have accumulated savings and achieved a certain standard of living through years of hard work. Often they want to 'give back' to the community in order to help others like themselves."[86] There is also a standing tradition among African Americans to extend financial support to African American charities and business.[87] This appeal to invest in African American-owned businesses targets the charitable impulse to return to the community.

In his presentation, the visiting minister spoke of the paradox that "all churches face" because churches and congregants often struggle to raise enough money to carry their message into the community, they often have to "downsize their [ecclesiastical] vision," thus contradicting the mandate of evangelism. He noted that Christians are perceived as weak because God is unable to supply their need, but asserted that by following the advice of Financial Warfare, God will "demystify Wall Street" and afford Christians what they need.[88] He also indicated that this investment vehicle was offered to "some of the largest black churches," but Financial Warfare felt having a few already wealthy churches participate would be like the rich taking in more wealth. Securities regulators note that this is also a

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84. This part of the scheme refers to the nonexistent investment bank Dukes and Hodge touted, named Integrated Solutions International. *See* Fin. Warfare Club Inc., et al., No. OAH–SD–51–200100002 (Md. 2002) at 7. Dukes and Hodge informed investors they had created two operational infrastructure companies which would drive their business. The first was GlobalCom InterNetworks, a self-described media convergence company which would acquire television and radio stations within the top fifty minority markets over the next two years. The second was Integrated Solutions International, which allegedly provided the access to capital needed for growth through their own investment bank, commercial bank, and an insurance company. Although Dukes and Hodge promised these companies would soon go public, neither of these companies existed. *See id.*

85. *See* Fairfax, *supra* note 3, at 94.

86. *See* Oracle Trust Fund, Lit. Rel. No. 16355, 71 SEC Docket 211 (Nov. 16, 1999), *available at* http://sec.gov.litivation/litlelearses /lr16355.htm.

87. *See* Dugan, *supra* note 22, at A1. (quoting Patricia Turner, Professor of African American Studies at the University of California at Davis).

88. *See* Financial Warfare Videotape, *supra* note 18.

common tactic used by perpetrators of affinity fraud; as mentioned above, African Americans often harbor distrust towards the government, based on the theory that a majority government is intentionally prosecuting the members of the church based on their religious beliefs or ethnic background.[89]

Dukes and Hodge thus employed a two-fold method to abuse racial and religious affinity and defraud attendees at this meeting.[90] First, by appealing to race in a religious context, the representatives of Financial Warfare managed to abuse the charitable impulses of the faithful and struggle of African Americans to gain economic parity with whites. Second, by alleging a conspiracy theory against individuals in the church, the speakers were able to draw a distinct line between those "inside" and "outside" of the group.

IV. SECURITIES LAWS AS APPLIED IN FINANCIAL WARFARE

Current responses to affinity fraud are varied, and include an educational effort by state and federal regulatory agencies to educate potential targets and target perpetrators.[91] Whether perpetrated through the fraudulent purchase and sale of securities, a Ponzi scheme, or garden-variety theft, affinity fraud is actionable though several legal avenues. Although the latter part of this article addresses cultural and social justifications for increased punishment for affinity fraud in African American churches, there are several legal mechanisms available to state and federal prosecutors through which perpetrators of affinity fraud can be prosecuted. In this section, I explain how affinity fraud is punishable under both state and federal securities statutes.

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89. *See* Cardwell Interview, *supra* note 24; *see also* Fairfax, *supra* note 3, at 128 (discussing how perpetrators of religious-based affinity fraud have used the notion that the government is persecuting them as a means of gaining loyalty). Perpetrators sometimes convince group members that reporting the scheme will prevent victims from ever seeing return on their investment. *See id.* at 129.

90. *See supra* note 62 and accompanying text.

91. Numerous state and federal regulatory agencies have undertaken an effort to educate investors about the threat of affinity fraud scams. *See, e.g., supra* note 12 (the SEC's warning about the methods and signs of affinity fraud); Pa. Sec. Commission, *Affinity Fraud, at* http://www.psc.state.pa.us/investor/ibulletin/affinity.html (the Pennsylvania Securities Commission's description and warning about affinity fraud); N.Y. Office of the Att'y Gen., *What is Affinity Fraud, at* http://www.oag.state.ny.us/investors/affinity.html (the New York Attorney General's description and warning about affinity fraud).

A. State Securities Laws

Although criminal prosecution is available to both state[92,93] and federal securities regulators, affinity fraud is typically prosecuted in civil actions.[94] State securities regulators govern the offer and sale of securities in or from the state[95] and also supervise the registration of

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92. In Maryland, criminal prosecution of securities laws is codified at MD. CODE ANN., CORPS. & ASSN'S §11–705.

93. State regulators played an active role in prosecuting Martha Stewart for fraud, which has received a significant amount of public attention. In Maryland, the applicable statute is MD. CODE ANN., CORPS. & ASSN'S § 11–301 (2004). The Maryland statute mandates:

> [it is] unlawful for any person, in connection with the offer or sale of a security (1) to employ any device, scheme or artifice to defraud; (b) to make any untrue statement of material fact or omit to a state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading; or (c) to engage in any act, practice or course of business which operates or would operate as a fraud or deceit on any person.

Id.

In the case of Financial Warfare, the Maryland Attorney General alleged Hodge "misrepresented or omitted to reveal material facts pertaining to the nature of the investment and the risks associated with the investment in Hodge's companies" and "used investor funds without any of the formalities of investment entities, transferring funds from one account to another and from one company to Hodge personally, with the result that they engaged and practices that operated as fraud on the investors. Respondents also used funds from one investor to repay other investors, as in a Ponzi Scheme, and thus employed a device, scheme or artifice to defraud" (citations omitted). *See* Fin. Warfare Club Inc., et al., No. OAH–SD–51–200100002 (Md. 2002) at 8. *See also supra* note 11 (describing Ponzi schemes).

94. *See* MD. CODE ANN., CORPS. & ASSN'S §11–701 (1)(b)(4) (2004) (permitting $5,000 per violation in fines or civil penalties). The 1996 National Securities Markets Improvement Act resulted in the preemption of state securities laws by federal laws in many areas of securities regulation, most notably registration and reporting requirements. *See* National Securities Markets Improvement Act, Pub. L. No. 104–290, 110 Stat. 3416 (104th Cong., 2d Sess., 1996). State securities regulations are called blue-sky laws, which refers to the offer or sale of non-publicly traded securities during the process through which private companies register and are traded on pubic markets. Although the 1998 Securities Litigation Uniform Standards Act requires that most lawsuits against publicly traded securities be traded in federal courts, state agencies still prosecute violations of breach of contract, fraud, and breach of fiduciary duty. In addition, state agencies are active in the essential function of registering broker-dealers and investment advisers licensed to purchase and sell securities. *See* Securities Litigation Uniform Standards Act, Pub. Law. L. No. 105–353, 112 Stat 3227 (105th Cong. 2d Sess., Nov. 3 1998) (S 1260).

95. The Securities and Exchange Acts, as amended, presume that all securities must be registered before their offer and sale. *See* 15 U.S.C.A. § 77e (2004) (detailing the registration provisions of the Securities Act) and 15 U.S.C.A. 78l(g) (2004). Types of securities which generally do *not* require federal registration under these Acts are securities sold intrastate. *See* 15 U.S.C.A. § 77c(a)(11) (2004); for the exemptions listed in Section 3(b) of the Securities Act, such as Regulation A, *see* 15 U.S.C.A. § 77(d)(6) (2004); for Rule 504, *see* 17 C.F.R. §230.504 (2005); for Rule 505, *see* 17 C.F.R. §230.505 (2005). Regulation D refers to 17 C.F.R. 230.501–230.506 (2005), and transactions are made exempt under Section 4(2)'s

broker-dealers[96] and investment advisers.[97] In a civil prosecution, state agencies ordinarily hold perpetrators liable in three ways—by prosecuting them for fraud,[98] failure to register securities,[99] or for acting as a broker-dealer or investment advisor without registration.[100] In sum, state securities regulators ensure that securities offerings are not carried out in a fraudulent manner.

To illustrate, the Maryland Securities Commissioner exercised all three of these available avenues in her complaint against Financial Warfare. First, the Commissioner argued that Dukes and Hodge offered and sold membership interests in phantom corporations through stock grants but failed to register these interests with the state; this constituted a violation of the state law prohibiting the offer and sale of securities without prior registration.[101] Second, Dukes and Hodge failed to register with the state before they provided investment advice and sold securities; this failure to register as investment advisers and broker-dealer agents is actionable under Maryland law.[102] Third, Dukes and Hodge either made untrue statements in their marketing materials and presentations, or omitted material facts necessary to make those statements not misleading under the circumstances they were made.[103] This constitutes securities fraud.

The Maryland Securities Commissioner detailed the fraudulent misrepresentations in her complaint against Financial Warfare. First, she argued the information offered by Financial Warfare contained a laundry list of false and misleading information, omissions of material fact, and material misstatements.[104] For example, the advertising material offered by Financial Warfare made it seem as if these companies were operational, but none of the companies in which Dukes and Hodge promised stock had an operating history, revenues,

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nonpublic offering, *see* 15 U.S.C.A. § 77(d)(6) (2005). The appropriate Maryland statute detailing exemptions is MD. CODE ANN., CORPS. & ASSN'S § 11–401 (2004).

96. Pub. L. No. 104–290, 110 Stat. 3416 (1996), commonly called the National Securities Markets Improvement Act, narrows the authority of regulation of broker-dealers at the state level, giving deference to the Federal Government. *See supra* note 92, and accompanying text. However, state antifraud provisions are preserved. *See id.*

97. In Maryland, the relevant statute is MD. CODE ANN., CORPS. & ASSN'S § 11–402 (2004).

98. *See id.* §§ 11–301, –302.

99. *See id.* § 11–501.

100. *See id.* §§ 11–401, –402.

101. *See id.* § 11–501.

102. *See id.* § 11–401.

103. *See* MD. CODE ANN., CORPS & ASSN'S, §§ 11–301 –302 (2004).

104. *See* Fin. Warfare Club Inc., et al., No. OAH–SD–51–200100002 (Md. 2002) at 8.

contracts or employees. Marcus Dukes' "extensive experience" as a stockbroker was also a lie; he had less than one year's experience as a registered securities agent, and had previously been barred by the National Association of Securities Dealers (NASD)[105] from acting as a securities agent. Likewise, Financial Warfare, Inc. was not registered as a broker-dealer or investment adviser with the state. In addition, Ms. Hodge also failed to disclose that she had filed for personal bankruptcy twice prior, and both Dukes and Hodge told investors they personally contributed $1 million each to Financial Warfare, when neither had contributed any money.[106]

B. Federal Laws

Federal securities law provides several avenues for securities regulators to prosecute affinity fraud. The investments touted in an affinity fraud scheme, such as the pre-I.P.O. interests sold by Dukes and Hodge, often fall under the definition of a "security"[107] and therefore fall within the jurisdiction of federal securities laws. Unlike state securities laws, which are most commonly used to provide civil remedies, federal securities acts[108] frequently seek both civil and criminal penalties for violation of securities laws as defined by several bodies of law.

The most frequently used are the Securities Act of 1933, as amended ("Securities Act") and the Securities Exchange Act of 1934, as amended ("Exchange Act"),[109] which provide civil and criminal

105. The NASD is a self regulatory organization responsible for the oversight of broker-dealer regulation and is monitored by the SEC. *See* 15 U.S.C.A. 78o–3 (2004).

106. *See* MD. CODE ANN., CORPS. & ASSN'S §§ 11–301 –302 (2004), which makes it unlawful to make untrue statements or omit material facts necessary to make a statement.

107. *See supra* note 11.

108. Although this body of law contains the Securities Act of 1933, 15 U.S.C.A. 77(a) *et seq.* (2004) (the "Securities Act"); the Securities Exchange Act of 1934, 15 U.S.C.A. §78(a) *et seq.* (2004), (the "Exchange Act"); The Public Utility Holding Company Act of 1934, 15 USCA §§ 79 *et seq.* (2004); The Trust Indenture Act of 1939, 15 U.S.C.A. §77a *et seq.* (2004); the Investment Company Act of 1940 ("Investment Company Act"), 15 U.S.C.A. §80a *et seq.* (2004), and the Investment Advisers Act of 1940 ("Investment Advisers Act"), 15 U.S.C.A. §80b–1 *et seq.* (2004), for the purposes of this article, I have chosen to limit the term "federal securities statutes" to the securities laws which apply most directly to cases of affinity fraud. These are the Securities and Exchange Acts, the Investment Company Act, and the Investment Advisers Act.

109. Both the Securities and Exchange Acts provide civil remedies for securities violations. *See infra,* notes 107–164 and accompanying text.

liability[110] for the use of fraud or deception in the offer or sale of a security.[111] The Investment Company Act of 1940, as amended ("Investment Company Act") and the Investment Advisers Act of 1940, as amended ("Investment Advisers Act") also prohibit fraudulent conduct by investment companies and advisers, and are further avenues for relief.[112]

As a result, the SEC can pursue various civil remedies. First, it can seek an injunction requiring the perpetrators of fraud to cease and desist,[113] and can also require those perpetrators to disgorge any "ill-gotten gains."[114] The 1990 Securities Enforcement Remedies and Penny Stock Reform Act[115] provide injunctive[116] and disgorgement power[117] during administrative proceedings, as well as monetary penalties.[118] Fines, in each of these circumstances, vary according to the severity of the offense.[119]

Each of these laws contains a provision which allows the federal government to seek criminal prosecution for a willful violation

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110. Although investment fraud results in civil penalties, this article is arguing for increased punishment for scam artists under Federal Securities Laws, other federal criminal statutes, breach of fiduciary duty, and hate crime legislation.

111. *See* 15 U.S.C.A. 77(a) *et seq.* (2004), *see also* 15 U.S.C.A. § 78(a) *et seq.* (2004).

112. *See* 15 U.S.C. § 80(a)–7(a) (1994) (codifying aforementioned sections of the Investment Company Act of 1940); 15 U.S.C. §§ 80b–6(1)–(2) (1994) (codifying relevant sections of the Investment Adviser Act of 1940).

113. *See* Securities Act § 20(b), 15 U.S.C. § 77t(b) (1994); Exchange Act § 21(d), 15 U.S.C. § 78u(d) (1994 & Supp. V 1999); Investment Company Act, § 9(f), 15 U.S.C. § 80a–9(f) (1994); Investment Advisers Act, § 203(k), 15 U.S.C. § 80b–3(k) (1994).

114. *See* ALAN R. PALMITER, SECURITIES REGULATION 367 (1998) ("Disgorgement of defendants' ill-gotten gains to the U.S. Treasury is a frequent, and lucrative, remedy in SEC injunction actions.") (citations omitted).

115. *See* Securities Enforcement Remedies and Penny Stock Reform Act, Pub. L. No. 101–429, 104 Stat. 931 (codified in various sections of 15 U.S.C. (1994)).

116. This injunctive relief is in the form of a cease-and-desist order. This relief is similar to the provisions of the Securities Act, § 8A, 15 U.S.C. §77(j)–1 (1994); the Exchange Act, § 21C, 15 U.S.C. § 78u–3 (1994); the Investment Company Act § 9(f), 15 U.S.C. § 80a–9(d) (1994); and the Investment Advisers Act, §203(I), 15 U.S.C. § 80b–3I (1994 & Supp. V. 1999).

117. The disgorgement relief is similar to the Securities Act § 8A(e), 15 U.S.C. § 77h1–(e) (1994); the Exchange Act § 21C(e), 15 U.S.C. § 78u–3(3) (1994); Investment Company Act § 9(e), 15 U.S.C. § 80a–9(e) (1994); and the Investment Advisers Act § 203(j), 15 U.S.C. § 80b–3(j) (1994).

118. These provisions are similar to those of the Securities Act § 20(d), 15 U.S.C. § 77t(d) (1994); the Exchange Act § 21 C, 15 U.S.C. § 78u–3 (1994); the Investment Company Act § 9(d), 15 U.S.C. § 80a–9(d) (1994); and the Investment Advisers Act § 203(I), 15 U.S.C. 80b–3II) (1994 Supp. V. 1999).

119. Securities Act § 20(d), 15 U.S.C. § 77t(d) (1994); Exchange Act § 21(d)(3), 15 U.S.C. § 78u(d)(3) (1994); Investment Company Act § 9(d), 15 U.S.C. § 80a–9(d) (1994); Investment Advisers Act § 203(I), 15 U.S.C. § 80b–3(I) (1994 & Supp. V. 1999).

of the Act's provisions,[120] the prosecution of which is handled by the United States Department of Justice.[121] The government has looked not only to available provisions under these securities-specific laws, but also to other federal laws to increase the sentencing for criminal violations of affinity fraud.[122] The means through which the fraud is committed—by a group action, by using various means of communication, by committing the act via interstate activities, or by concealing the activity—give rise to a host of crimes beyond the purview of the Securities and Exchange Acts. Charges of conspiracy,[123] the prohibition against making false statements under oath to a government agency (such as the SEC),[124] mail and wire fraud,[125] perjury,[126] obstruction of justice,[127] RICO,[128] and money

120. *See* Securities Act § 24, 15 U.S.C. § 77x (1994); Exchange Act § 32(a), 15 U.S.C. § 78ff(a) (1994).

121. *See* 28 U.S.C. 515(a) (1994) (granting the Justice Department authority to conduct criminal proceedings).

122. Some prosecutors have looked for increased criminal punishments for affinity fraud. *See* United States v. Castellanos, 81 F.3d 108, 112 (9th Cir. 1996) (which did not apply the "vulnerable victim" enhancement to a Hispanic man who lured Hispanic investors to work with him by claiming his company was "proudly Hispanic"). *But see* United States v. Omori, 194 F.3d 18, unpublished table decision, 1996 WL 726647, at **4 (9th Cir. 1996) (upholding the same "vulnerable victim" enhancement for a Japanese-American bank manager who convinced her Japanese customers to purchase fraudulent certificates of deposits). *See generally* United States v. Medrano, 241 F. 3d 740, 741 (9th Cir. 2001) (upholding sentencing enhancements for a Hispanic bank teller found guilty of embezzlement from Spanish-speaking customers). Recently, in *United States v. Booker*, 125 S.Ct. 738 (2005), the Supreme Court determined the elements of the Federal Sentencing guidelines which require a judge to enhance a defendant's sentence based on judicial fact-finding violate the defendant's Sixth Amendment right to a jury trial. The Supreme Court heard Booker's case with that of Douglas Fanfan; this section of the opinion analyzed two sections of the guidelines; one rendered certain sentencing enhancements mandatory, and the second established standards for review for sentences which were appealed. The general effect of these two decisions was that the Federal Sentencing Guidelines were advisory and not mandatory. At the time of press, District courts are still determining the application of these two cases.

123. *See* United States v. Sprecher, 783 F.Supp. 783 F. Supp. 133 (S.D.N.Y. 1992), in which the court noted that the salient characteristic of conspiracy crimes is any agreement to commit an unlawful act; there does not need to be any formalized arrangement to commit a conspiracy. *See* U.S. v. Rubin, 844 F.2d 979 (2d. Cir 1988); U.S. v. Middlebrooks, 618 F.2d 273 (5th Cir. 1980). Two persons are required to carry out a conspiracy. *See* Rogers v. U.S. 340 U.S. 367 (1951). In addition, at least one of the conspirators must take a step in furtherance of the conspiracy. *See* Hyde v. United States, 225 U.S. 347 (1912).

124. *See* 18 U.S.C.A. § 1001 (1994). The "false statements statute" applies to making false statements under oath to a government agency. *See* U.S. v. Bramblett, 348 U.S. 503 (holding that the false statements statute was created to allow government agencies to perform their duties to the best of their ability).

125. *See* 18 U.S.C. § 1341 (1994) (mail fraud); 18 U.S.C. 1343 (1994) (wire fraud). Mail and wire fraud are predicate offenses to establish a RICO count, *see* 18 U.S.C. § 1961 and *infra* note 125, and constitute a "specified unlawful activity" under federal money laundering

laundering[129] often come into play. A criminal prosecution by any of these avenues can result in fines, imprisonment, or both.[130]

1. Prosecution Under the Securities Act

The Securities Act was implemented to promote "full and fair disclosure" of information regarding securities sold to the general public.[131] As mandated by Section 5, no security may be sold without registration unless the security falls under an exemption defined in the Act. Criminal prosecution for securities violations transpire under two

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statutes, *see* 18 U.S.C. §§ 1956, 1957 and *infra* note 126. The activities covered by mail and wire fraud include a plan to intentionally deceive a party in conjunction with the mail or interstate commerce. Unlike Rule 10b–5, which finds liability for "any scheme or artifice to defraud," the crimes of mail and wire fraud do not need to the alleged fraud to have anything to do with the purchase or sale of securities. The purpose of mail and wire fraud statutes is to punish the scheme, rather than whether or not this scheme was carried out. *See generally* U.S. v. Sanders, 893 F. 2d 133 (7th Cir. 1990). Both are "specific intent" crimes, meaning that the government must prove that "the defendant knowingly did and act which the law, forbids...purposely intending to violate the law." *See* DEVITT AND BLACKMAR, FEDERAL JURY PRACTICE & INSTRUCTIONS (3d ed.) § 14.03. Each separate mailing or communication, even if committed with respect to a single scheme to defraud can receive separate and consecutive sentences. *See* Badders v. U.S. 240 U.S. 391 (1916) (holding consecutive sentences for several counts of mail or wire fraud does not violate the double jeopardy clause).

126. In the context of securities and investment fraud, all affidavits and sworn statements made to the SEC or other government agencies are subject to charges of perjury.

127. The United States criminal code contains seventeen sections relating to the obstruction of justice. *See* 18 U.S.C. §§ 1501–1517. The text of the statute forbids anyone who "endeavors to influence, intimidate, or impede any grand or petit jury or officer in or of any court of the United States." *See id.* § 1503. Obstruction of justice can be satisfied almost regardless of whether the defendant is aware he is committing this crime. *See* U.S. v. Jeter, 775 2d. 670 (6th Cir. 1985).

128. Individual RICO violations carry a twenty-year maximum term of imprisonment, plus a fine of not more than the greater of $250,000 for an individual or $500,000 for an organizational defendant. The RICO statute can be found at Pub. L. No. 91–452, tit. IX, §901(a), 84 Stat. 841 (Oct. 15, 1970), as amended 18 U.S.C. §§ 1961–1968. When a defendant when convicted must surrender all property or interest acquired through the RICO violation. RICO violations have frequently been used in securities crimes cases, and has been construed broadly to not only cover traditional "organized crime" but also cases of securities fraud. *See generally* U.S. v. Turkette, 452 U.S. 576 (1981); Russello v. U.S. 464 U.S. 16 (1983). It is important to note that the Private Securities Litigation Reform Act of 1995 amended RICO, thus limiting the extent to which federal law enforcement can rely on conduct that constituted securities fraud as a basis for a civil RICO violation. 18 U.S.C. § 1964 (1994 & Supp. V. 1999).

129. *See* 18 U.S.C. §§ 1956, 1957. Courts have interpreted these statutes as also relating to "financial institutions" as defined in Title 31, U.S.C. § 5312(a)(2). *See* U.S. v. Gollott, 939 F. 2d 255 (5th Cir. 1991) (holding that a group of people who launder money are considered a "financial institution").

130. *See* Securities Act § 24, 15 U.S.C. § 77x (1994); Exchange Act § 32(a), 15 U.S.C. § 78ff(a) (1994).

131. Securities Act, Preamble.

symbiotic provisions of the Act. Section 5's registration provisions[132] mandate that securities must be first registered with the SEC[133] before they are sold to the public, or be otherwise exempt under provisions of the Act.[134] This section also contains a prohibition against acts of fraud in the sale of securities;[135] antifraud provisions are detailed in Sections 11, 12, and 17[136] of the Act. Section 5 works by itself for civil remedies, or in conjunction with Section 24, which allows for the criminal prosecution[137] of any willful violation of the provisions of the Securities Act.

As demonstrated in the case of Financial Warfare, Dukes and Hodge did not file any registration statement with state agencies or the SEC in connection with the offer and sale of the securities they sold in their presentations. Moreover, because these securities were sold in multiple states, the SEC also alleged a violation of Rule 17(a)[138] in

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132. The registration process requires full disclosure of all material facts.

133. Violating the Securities Act § 5, 15 U.S.C. § 77e (1994) involves (1) a person selling a security "through the mails" or by another means of interstate commerce (2) the security is being sold to sell or to be delivered after a sale (3) there is no valid effective registration statement and (4) the seller acted "willfully." The "willfulness" requirement was established in U.S. v. Wiender, 578 F.2d 757 (9th Cir. 1978), and the Supreme Court has defined it as "a word of many meanings, its construction often being influenced by its context," but bears the requirement that there is a "bad faith or evil intent" element to the offense. *See* Spies v. U.S., 317 U.S. 492 (1943), citing U.S. v. Murdock 290 U.S. 389 (1933)).

134. Rule 501 of Regulation D exempts accredited investors, which are statutorily defined by their level of net worth and investment sophistication. *See supra* note 93.

135. 15 U.S.C. § 77e.

136. Section 17 makes it unlawful:

> To obtain money or property by means of an untrue statement of material fact or any omission to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading or
>
> To engage in any transaction, practice or course of business which operates or would operate as a fraud or deceit upon a purchaser.

Securities Act § 17(a)(2–3), 15 U.S.C. § 77q(a)(2–3) (1994). A willful violation of Section 17 is a criminal offense. *See* Aaron v. Securities & Exchange Commission, 446 U.S. 680 (1980), in which the Supreme Court held that scienter is a requirement to find a party liable for a violation of Section 17; the "willful violation" requirement of the antifraud provision contained in 17(a) is frequently litigated. Under this part of the statute, it is illegal to engage in fraud when selling securities, regardless of whether those securities were required to be registered. 15 U.S.C. § 77q(c) includes all securities whether or not those securities were required to be registered. *See* United States v. Wheeler, CR–S–92–228 (LDG RLH), SEC Today 110 (May 21, 1993), in which a defendant was found guilty of a Section 17(a) violation for fabricating information on a Form S–18 with the SEC.

137. Securities Act § 24, 15 U.S.C. § 77x (1994).

138. *See* SEC v. Fin. Warfare Club, Inc., et al., No. 02–7156 ¶¶ 59, 63, 67, 71 (E.D. Pa. Oct. 20, 2004). *See also supra* note 136 (detailing the provisions of Section 17).

their complaint, which forbids the use of fraud in the intrastate offer or sale of securities.

2. Prosecution Under the Exchange Act

Several provisions of the Exchange Act impose prohibitions on fraudulent or deceitful conduct. Sections 9 and 10[139] prohibit several fraudulent activities, whereas Rule 10b–5 provides a general antifraud provision.[140] Rule 10b–5 applies to fraud "in connection with" the purchase or sale of any securities.[141] Like Section 24 of the Securities Act, Section 32(a) provides criminal liability for willful violations of the Exchange Act.[142]

Of all of the provisions of the Exchange Act, Rule 10b–5[143] is arguably the most popular avenue through which securities fraud is prosecuted. Rule 10b–5 imposes a broader standard than the Section

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139. *See* Securities Act of 1934 §§ 9, 10(a–b),15 U.S.C. §§ 78i, 78j(a–b) (1994).

140. Exchange Act § 14(e), 15 U.S.C. § 78n(e) (1994) also prohibits fraudulent conduct in tender offers.

141. 17 C.F.R. § 240.10b–5 (2004) operates in a similar manner as the Securities Act § 17(a), 15 U.S.C. § 77q(a) (1994), but is much broader. The 1933 Act only applies to the sale of Securities, and adds "in connection with" instead of simply "in." *See* Securities and Exchange Commission v. Shattuck Denn Mining Corp, 298 F. Supp 470 (S.D.N.Y. 1968).

142. Section 32(a) provides:

> Any person who willfully violates any provision of this title...or any rule or regulation thereunder the violation of which is made unlawful or the observance of which is required under the terms of this title, or any person who willfully and knowingly makes, or causes to be made, any statement in any application, report, or document required to be filed under this title or any rule or regulation thereunder or any undertaking contained in a registration statement as provided in subsection (d) of section 15 of this title [15 U.S.C. § 78o(d)], or by any self-regulatory organization in connection with an application for membership or participation therein or to become associated with a member thereof, which statement was false or misleading with respect to any material fact, shall be upon conviction be fined not more than $5,000,000 or imprisoned not more than 20 years, or botch, except that when such person is a person other than a natural person, a fine not exceeding $25000,000 may be imposed; but no person shall be subject to imprisonment under this section for the violation of any rule or regulation if he proves that he had no knowledge of such rule or regulation.

Securities Act of 1934 § 32(a), 15 U.S.C. § 78ff(a) (1994).

143. 17 C.F.R. § 240.10b–5 (2004). Rule 10b–5 makes it illegal to

> use or employ in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

See Exchange Act § 10(b), 15 U.S.C. §78j(b) (1994).

17 of the Securities Act[144] by finding liability for any misleading statement made "in connection" with the purchase or sale of securities. In addition, Rule 10b–5 applies to all securities transactions, whereas Rule 17(a) only applies to misrepresentations made in the offer and sale of a security. Rule 10b–5, therefore, can be used to prosecute misrepresentations and omissions and imposes a requirement of scienter.[145]

One critical difference between criminal liability imposed by the two acts is that Section 32(a) of the Exchange Act (unlike Section 24 of the Securities Act) imposes a scienter requirement when charging an individual with making a materially false or misleading statement in a report, document, filing, registration statement, or application;[146] in fact, the final sentence of the regulation allows a defendant to be exonerated if she had no knowledge of the violation.[147] The Exchange Act therefore makes proving fraud more difficult because of this knowledge requirement.

In its complaint against Financial Warfare, the SEC alleged that the securities and promissory notes offered by Dukes, Hodge, and Financial Warfare in Maryland, the District of Columbia, and Nevada were sold in violation of Section 17(a), Section 10(b) and Rule 10b–5 of the Exchange Act.[148] The "securities" offered were interests in

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144. *See supra* note 124.

145. *See* Ernst & Ernst v. Hochfielder, 425 U.S. 185 (1976). *See also* U.S. v. DeSantis, 134 F.3d 760 (6th Cir. 1998) (holding that the government must prove that the defendant first knowingly had a specific intent to defraud, second, that the misrepresentation or omission was made to induce the other party to perform an act they otherwise would not have performed).

146. Some courts have interpreted this literally. For example, in United States v. Dixon, 536 F.2d 1388 (2d Cir. 1976), the Court of Appeals indicated a "willful and knowing" standard was appropriate, and the lower court had erred in merging the "willful" standard into a "willful and knowing" standard. The *Dixon* court articulated that the trial judge erred when giving the jury instructions to apply the "willful" and not the "willful and knowing" standard. *Id.* at 1396. In contrast, the Court in U.S. v. Natelli, 527 F.2d 311 (2d Cir. 1975), *cert. denied*, 425 U.S. 934 (1976), held that the defendant acted with deliberate and reckless indifference to the truth or falsity and, therefore, although he lacked the requisite "knowledge" under Section 32, was still liable.

147. The last sentence of Rule 32(a) provides "no person shall be subject to imprisonment under this section for the violation of any of the rule or regulation if he proves that he has no knowledge of such rule or regulation." Securities Act § 32(a), 15 U.S.C. § 78ff(a) (1994).

148. SEC v. Fin. Warfare Club, Inc., et al., No. 02–7156 ¶¶ 60–77 (E.D. Pa. Oct. 20, 2004) states:

> From at least September 2000 and continuing at least through March 2001, defendants Dukes, Hodge, and FWC (MD) knowingly or recklessly, in connection with the offer, purchase or sale of securities, directly and indirectly, by the use of the means or instruments of transportation or

phantom corporations to be sold pre-I.P.O.; according to Dukes and Hodge, these corporations were solely owned and operated by African Americans. The SEC also alleged that Dukes and Hodge sold these securities to investors by telling them they would provide free shares of these companies, or the chance to buy shares at a small cost, to members of the Financial Warfare Club.[149] They promised that these nonexistent companies would go public within five to eleven months.[150] The reality is that no member of the club was ever given the chance to buy stock, and there were no steps taken to take these companies public. In addition, none of the financial literacy courses offered by Dukes and Hodge were ever given, nor was money set aside for their actualization.[151]

3. Prosecution Under the Investment Company and Investment Advisers Acts

The Investment Company Act requires that all investment companies with assets over $100,000 who use the mails or interstate commerce or who purport to be investment companies must register with the SEC.[152] Although there are numerous provisions similar to the Securities and Exchange Acts, the Investment Company Act imposes additional disclosure requirements,[153] and protects against any money managers' conflicts of interest.[154] The 1970 Amendments to this Act also prohibit fraudulent acts and practices in connection with an investment company's portfolio securities.[155] Moreover, Section 49

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communication in interstate commerce, or the means or instrumentalities of interstate commerce, or of the mails, or of the facilities of a national securities exchange: (a) employed devices, schemes or artifices to defraud; (b) obtained money or property by means of, or made, untrue statements of material facts, or omitted to state material facts necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading; and (c) engaged in acts, transactions, practices, or courses of business which operated as a fraud or deceit upon offerees, purchasers and prospective purchasers of securities.

Id.

149. *See id.* at ¶ 42.

150. *See id.*

151. *See id.*

152. *See* Investment Company Act § 13, 15 U.S.C. § 80a–13 (1994).

153. *See* Investment Company Act § 8(b)(5), 15 U.S.C. § 80a–8(b)(5) (1994).

154. *See* HAZEN: SECURITIES REGULATION, *supra* note 45 at § 20.1.

155. *See* the Investment Company Act § 17(c), 15 U.S.C. § 80a–17(c) (1994); *see also* Investment Company Act, Lit. Rel. No. 19224 (stating the advisor and portfolio manager of a tax-exempt money market fund violated the 1940 act when purchasing over $170 million of securities unrelated to the financial mission of the money market fund).

provides criminal liability for any violation of the Investment Company Act.[156] The Investment Company Act also specifically states that larceny and embezzlement of a registered company's assets is a federal crime,[157] as is the falsification of records, to file a false or misleading statement of material facts, or to omit any information which would render any report misleading as required under the Act.[158]

The Investment Advisers Act extends liability to non-broker dealers who are in the business of giving investment advice.[159] The Act requires registration[160] of all non-exempt investment advisers, and prohibits material misrepresentations made in connection with rendering investment advice.[161] Violations of the Act can result in an adviser's registration being suspended or revoked, and, as is the case with the above mentioned securities laws, criminal penalties.[162]

Although civil violations are brought more frequently, criminal violations of the Investment Company and Investment Advisers Acts have been infrequent, perhaps due to the strong antifraud provisions of the Securities and Exchange Acts.[163] The Acts, taken together, may provide an alternative venue for the prosecution of affinity fraud as the

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156. Section 49 states:

> Any person who willfully violates any provision of this title or of any rule, regulation, or order hereunder, or any person who skillfully in any registration statement, application, report, account, record or other document filed or transmitted pursuant to this title or the keeping of which is required pursuant to section 31(a) makes any untrue statement of a material fact or omits to state any material fact necessary in order to present the statements made therein from being materially misleading in the light of the circumstances under which they were made, shall upon conviction be fined not more than $10,000 or imprisoned not more than five years, or both; but no person shall be convicted under this section for the violation of any rule, regulation, or order if he proves that he had no actual knowledge of such rule, regulation or order.

Investment Company Act § 49, 15 U.S.C. § 80a–48 (1994).

157. Investment Company Act § 37, 15 U.S.C. § 80a–36 (1994).

158. Investment Company Act § 34, 15 U.S.C. § 80a–33 (1994).

159. Investment Company Act § 201, 15 U.S.C. § 80b–1 (1994) *et seq.*

160. Investment Company Act § 203(c), 15 U.S.C. § 80b–3(c) (1994).

161. Investment Company Act § 204, 15 U.S.C. 80b–4 (1994).

162. *See* United States v. Elliott, 62 F.3d 1304 (11th Cir. 1995) (determining an adviser-client relationship is not a prerequisite for determining investment adviser fraud).

163. *See* Matthews, *Criminal Prosecutions Under the Investment Company Act of 1940 and the Investment Advisers Act,* 13 B.C. INDUS. & COMM. L. REV. 1257, 1262 (1972).

few cases finding violations of the Acts have shown broad construction of the statutes.[164]

V. FURTHER JUSTIFICATIONS FOR INCREASED PUNISHMENT OF AFFINITY FRAUD

Although these traditional securities laws provide an important vehicle through which victims of affinity fraud may be able to find a resolution, they do not take into account the vital role the church has played in promoting the extra-religious interests of the African American community since the time of slavery. In the section below, I argue that the history of African American churches can provide a further understanding of the role churches play in community development and minority wealth-building, and thus provide further justification for strict sentencing for perpetrators of affinity fraud. The history of African American churches also provides insight into why African American churches have proven to be such fertile ground for affinity fraud scams.[165] Second, I argue that the sense of trust between minister and congregant is effectuated in a fiduciary duty, which is breached when ministers introduce con artists into their church, or participate in the fraud themselves. Third, I briefly explain the argument advanced by scholars like Lisa Fairfax, who argues that affinity fraud constitutes a hate crime. Although there are many avenues for prosecutors to take in punishing perpetrators of affinity fraud, the sections below explain that affinity fraud in the African American church is not only a crime, but reflects many complex social issues not addressed by lawmakers.

A. Historical and Social Justifications for Increased Punishment

Historically, the church has functioned as an integral social nexus in African American communities. As an organized reaction to chattel slavery in the United States, African American churches operated as not only houses of worship, but also provided social

164. *See* United States v. Deutsch, 451 F.2d 98, 112–13 (2d Cir. 1971) (holding that a general intent for liability and proof an illegal transaction has occurred are enough to find liability); *see also* United States v. Brashier, 548 F.2d 1315 (9th Cir. 1976), (in which a defendant was found guilty of embezzlement as a specific intent crime).

165. *See supra* notes 13–14 and accompanying text (describing why African Americans are particularly vulnerable to affinity fraud).

organizations designed for the betterment of the communities in which they existed both before and after emancipation.

Racial segregation was a driving force in the development of African American churches as social service organizations; from the institution of slavery arose a sense of unity among congregations[166] and a political base for African Americans.[167] This "nation within a nation" integrated community life with religious life, and led to the "dichotomy between church and religion" central to the organization and community-based activities of African American churches.[168] Church was both a forum in which to worship and to "learn about one's world."[169] During the years before emancipation, the church served as a massive social support network, assisting in family life and social control;[170] during the civil rights movement, the church played a crucial role in the struggle for political equality.[171]

Scholars C. Eric Lincoln and Lawrence H. Mamiya note that kinship relations traditionally have provided "the only real safety net" for African Americans, by providing a source of child care and the possibility of borrowing or lending money in times of financial crisis.[172] Lincoln and Mamiya note that these resources are indicative of a "survival strategy" among African Americans.[173] A second strategy, the "liberation perspective," emphasizes self-determination, dignity of life, and a sense of pride in African American culture and tradition.[174] The church, they argue, operates between these two strategies in both the political and economic realm.[175] They note that the African American church is the most economically independent entity in the economic sector of African American America because it

166. *See* PETER J. PARIS, THE SOCIAL TEACHING OF THE BLACK CHURCHES 17–19 (Fortress Press 1985).

167. *See* Michele M. SimmsParris, *What Does it Mean to See a Black Church Burning? Understanding the Significance of Constitutionalizing Hate Speech*, 1 U. PA. J. CONST. L. 127, 133 (1998). *See also* PARIS, *supra* note 166, at 8.

168. *See id.*

169. *See id.*

170. *See id. See also* E. FRANKLIN FRAZIER, THE NEGRO CHURCH IN AMERICA 39–40 (Schocken Books 1963).

171. *See generally* C. ERIC LINCOLN & LAWRENCE H. MAMIYA, THE BLACK CHURCH IN THE AFRICAN AMERICAN EXPERIENCE (1990).

172. *See id.* at 241.

173. *See id.*

174. *See id.*

175. *See id.*

does not depend on white America to pay its pastors, build its churches, or depend on white trustees to raise funds.[176]

The foundations of the African American self-help tradition go back to attempts by slaves to help each other survive the "traumas and terrors of the plantation system."[177] These traditions of caring for one another's children and the communal housing in which slaves lived fostered a tradition of mutual aid in the African American community from early America onward. These traditions of mutual aid were formalized when slaves were converted to Christianity and congregated in churches during the eighteenth and nineteenth centuries.[178] The African American church as an economic nexus has its inception in the African American church as a "mutual aid society,"[179] which existed in the antebellum south to aid slaves escape to the north. These societies eventually founded African American churches and became banks and savings and loans for African Americans.[180]

African American churches have a history of contributing to the economic well being of the communities they serve. During the years immediately following the Civil War, African American leaders urged African Americans to mimic the economic advancement of Jews in Europe, and stressed the importance for economic and moral development of the African American people.[181] The Freedman's Savings and Trust Company, chartered in 1864, provided the first major bank that held the savings of most of the new emancipated African Americans. Its collapse in 1874 following a long economic recession and poorly trained leadership, laid a historical foundation for distrust of banks.[182] By 1908, fifty-five African American-owned banks had been established[183] and clergy played a prominent role in their establishment.[184] Prominent African American church leaders at the turn of the twentieth century, such as Daddy Grace and Father

176. *See id.* The authors note that this differs from African American universities, which do, in fact, rely on the fundraising efforts of whites. *Id.*

177. *See id.* at 242.

178. *See id.*

179. *See* Robert L. Woodson, *Race and Economic Opportunity*, 42 VAND. L. REV. 1017, 1031 (1989).

180. *See id.*

181. *See* LINCOLN & MAMIYA, *supra* note 169, at 243; *see generally* W.E.B. DU BOIS, THE SOULS OF BLACK FOLK 1–9 (Bantam Classic 1989) (1903).

182. *See* LINCOLN & MAMIYA, *supra* note 169, at 245.

183. *See id.*

184. *See id.* at 246.

Divine,[185] initiated massive economic development in African American communities, and neighborhood ventures such as adoption agencies and credit unions have endured to this day, each with business models that reflect the unique needs of the African American community which they serve.[186] Such credit unions are modeled after Baltimore's African Methodist Episcopal (A.M.E.) Church Credit Union in that they are capitalized by the congregation and serving investors with typically little capital to save. The A.M.E.'s Credit Union currently serves the community by providing investment education on financial planning and budgeting, and offers mutual funds.[187]

African American churches are also important cogs in the economic machinery of their communities. Groups such as the Congress of National Black Churches (CNBC) have established community-based economic development programs to train African American businessmen to run their own businesses, and provide funding through grants for their operations.[188] In fact, a South Carolina pastor routinely invites local African American businessmen to the lectern each Sunday to discuss their businesses.[189] In addition, Leaders Energizing Community Development, founded by members of the AME Church, has established church-based credit unions across America. The United House of Prayer for All People routinely purchases inner city property adjacent to better neighborhoods to foster community development. In Maryland, Baltimore United in Leadership Development (BUILD) is an interdenominational group of thirty two churches which operates as a consumer advocacy group for the African American congregations they serve.

African American churches are still involved in the economic development of their communities on a massive scale. For example, the Concord Baptist Church, the largest African American church in the United States, operated a nursing home, private school, clothing

185. *See* University of Virginia, Religious Movements Homepage Project, *"Sweet Daddy Grace and the United House of Prayer for All People, at* http://religiousmovements.lib.virginia.edu/nrms/daddy_grace.html (last visited Oct. 12, 2004). Daddy Grace and Father Divine were prominent African American ministers at the turn of the century who acquired tremendous personal wealth. *Id.*

186. *See* Woodson, *supra* note 179, at 1031.

187. *See id.*

188. *See* Laurie Goodstein, *From Pulpit, Pitches for the Material World: Some Black Congregations are Using Church to Push Entrepreneurship*, WASH. POST, December 26, 1996, at A1.

189. *See id.*

bank, credit union, and employed two full-time social workers. The Bethany Baptist Church in Brooklyn raised $1 million to open a soup kitchen that employs 44 people and serves lunch and dinner every day. The A.M.E. Church in Jamaica, Queens, has established a housing corporation responsible for rehabilitating ten stores in the neighborhood, a home care agency, a 300-unit $11 million facility for housing 300 senior citizens, and a 480-student elementary school.[190]

Bringing economic vitality to urban African American populations has a vital role in achieving racial parity with whites in the United States.[191] A salient aspect of church-based enterprise in African American communities is an element of working together to share resources for a charitable purpose: the betterment of the community in which they operate.[192] Today, African Americans constitute over twenty million people and a current value of $10.2 billion.[193]

The importance of the church in African American economic development provides a social and historical basis for the profound financial incentive for scam artists such as Financial Warfare to defraud congregants in African American churches. Although one may assume that individual churches will not see the effects of fraud as greatly because of their tremendous wealth and presence in the community, this does not take into account the majority of small churches which do not have these tremendous assets[194] but have large congregations. The massive scale of the churches discussed above serves to illustrate the tremendous role churches play in community development in African American communities. The charity of these institutions plays a central role in helping these communities survive and exist, and fills in the gaps where government-assisted social programs cannot.

The role of the African American church in American society, as evidenced by its history, mandates increased punishment for perpetrators of affinity fraud because it serves as evidence of the essential secular role the church plays in African American communities. African American churches have played and continue to play an integral role in community development. Increasing

190. *See* LINCOLN & MAMIYA, *supra* note 169, at 257.

191. *See* Timothy Sandfleur, *Can You Get There Here? How the Law Still Threatens King's Dream*, 22 L. & INEQ. 1, 29 (2004).

192. *See* Woodson, *supra* note 179, at 1031.

193. *See id.*

194. LINCOLN & MAMIYA, *supra* note 169, at 262.

punishment for affinity fraud committed in African American churches will protect the essential role undertaken by African American churches in urban development. Moreover, African American churches have historically been involved with developing the wealth of their individual congregants; securities regulators have a distinct interest in protecting these potential victim-investors from further fraud given the increase in disposable income among African Americans in recent years.[195]

B. Ministers' Liability for Breach of Fiduciary Duty and Constitutional Protections of Freedom of Religion

Churches have become big businesses in the United States.[196] Although churches have owned property and generated wealth since the middle ages, the complexity of doing business in the modern world and the need for capital to achieve church goals has affected the role of the church as a business in our society. Poorer, smaller churches see the extensive wealth of larger churches and the tremendous flexibility that wealth brings to their ministry[197] and, naturally, want a piece of the pie.

Generating such enormous wealth arises from institutional investing, complex real estate transactions, and other activities for which securities laws were designed to regulate.[198] In these

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195. *See* Selig Center Report, *supra* note 15.

196. *See* Betsy Schiffman, *Holy · Real Estate*, Forbes.com, *available at* http://www.forbes.com/2002/12/06/cx_bs_1206home.html (last visited Aug. 15, 2004). This article claims that the Boston Archdiocese of the Catholic Church will have no problems paying out the $100 million sex abuse settlement resulting from the charges brought against it. "According to a report in *The Boston Herald* last August, it has about $160 million worth of income-producing commercial real estate and total property worth between $1.3 billion and $1.4 billion. As of 2001 the diocese boasted 2.069 million members. According to the Center for Applied Research in the Apostle (a national Catholic research center), each household puts an average $438 every year into the collection plate, which could generate hundreds of millions a year in total donations." *Id.*

197. *See* Financial Warfare Videotape, *supra* note 18, in which members of Financial Warfare repeatedly indicated the benefits churches would incur by having wealthy congregants who tithed. For example, they explained the amount of annual tithes one parishioner would bring if she became a multi-millionaire by investing with Financial Warfare.

198.

> Congress . . . eschewed the idea of a merit approach, opting instead for a system of full disclosure. The theory behind the federal regulatory frameworks is that investors are adequately protected if all relevant aspects of the securities being marketed are fully and fairly disclosed. The reasoning is that full disclosure providers investors with sufficient

circumstances, the church ceases to administer pastoral guidance and assumes the role of financial adviser, corporation, and venture capitalist.[199] With this complex role of clergy comes a need for education and guidance for ministers of smaller churches who may not have resources such as financial advisers to guide them in their decisions. An education initiative may also help alleviate the threat of affinity fraud. This section details the need for heightened punishment specifically for pastors who commit fraud knowingly,[200] given the heightened trust between minister and congregant and the non-ecclesiastical roles and responsibilities some ministers assume.

1. Liability of Clergy for Breach of Fiduciary Duty

To date, clergy cannot be held liable for malpractice,[201] but claims for breach of fiduciary duty have survived summary judgment, and courts have made certain to differentiate the two claims.[202] Claims

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opportunity to evaluate the merits of an investment and fend for it themselves.

See HAZEN: SECURITIES REGULATION, *supra* note 45, at § 1.2[3][A].

199. *Cf.* Ryan G. Lee, *Employing the Section 5 Enforcement Power to Guarantee Religious Freedom in the State Courts*, 85 MARQ. L. REV. 1025, 1027 (2002). In his article, Lee criticizes "an increasingly secular society inclined to render all things relative no longer recognizes a meaningful distinction between the affairs of the church and the affairs of other civilly liable organizations," and believes this demonstrates a "disturbing erosion" of tenets of the First Amendment. *Id.* The author proposes that the federal judiciary enjoin state courts from allowing churches to be sued in tort through Section Five of the First Amendment. *See id.* at 1029.

200. *See* Fairfax, *supra* note 3, at 67–68 (2001). *See also* Mark Gergen, *The Case For a Charitable Contributions Deduction*, 74 VA. L. REV. 1393, 1395 (1988); Henry Hansmann, *The Role of Nonprofit Enterprise*, 89 YALE L.J. 835, 843 (1980).

201. To date, no court has recognized clergy malpractice as a cognizable cause of action. *See* Nally v. Grace Community Church, 763 P.2d 948 (Cal. 1988), in which the parents of a congregation member brought an action against the church after their son had been counseled by a minister and later committed suicide. Courts have either found the tort does not exist, *see, e.g.*, Moses v. Diocese of Colorado, 863 P.2d 310 (Colo. 1993), or that even if the tort existed, there was insufficient evidence to show that it had been committed, *see, e.g.*, Hester v. Barnett, 723 S.W.2d 544 (Mo. Ct. App. 1987). Clergy malpractice is not recognized in Maryland. *See* Borchers v. Hrychuk, 126 Md. App. 10, 727 A.2d 388 (1999).

202. *See* Destefano v. Grabrian, 763 P.2d 275, 287 (Colo. 1988), in which the court articulated the difference between clergy malpractice and breach of fiduciary duty is that "the former is a breach of trust and does not require a professional relationship or professional standard of care, while the latter is an action of negligence based upon a professional relationship and a professional standard of care." *See* Teadt v. Lutheran Church Missouri Synod, 602 N.W.2d 816 (1999), which distinguishes between clergy malpractice and breach of fiduciary duty. In *Teadt*, a minister made sexual advances to a parishioner in the context of pastoral counseling. The court held the claim was based on clergy malpractice, and a breach of fiduciary duty in this context would be impossible to define because it is impossible to prove that a minister violated a fiduciary duty by failing to provide for the congregant

of clergy malpractice have generally failed on the grounds that malpractice assumes a professional relationship between clergy and congregant, and imposes a professional standard of care on clergy, which is an impermissible violation of the First Amendment.[203] Therefore, a breach of fiduciary duty claim would be the appropriate means to prosecute a minister who leads congregants into an affinity fraud scheme.

State involvement in clergy misconduct is permissible under the Constitution.[204] Courts have held that purely secular conduct can give rise to a clergy members' liability on third parties,[205] but state courts have split on the extent to which clergy can be liable for breach of fiduciary duty.[206] Such an analysis relies on a relationship of

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emotionally and spiritually by following his advice. In addition, claiming negligence against a member of the clergy is not actionable if the court must inquire into religious doctrine to arrive at a conclusion, *see* Sanders v. Casa View Baptist Church, 134 F.3d 331 (5th Cir. 1998). First Amendment protections are limited, however, if a minister holds himself out to be a professional marriage counselor, notwithstanding his use of scripture to counsel, and is therefore held to a professional, not religious, standard of care. *See id.* Most of the cases involving breach of fiduciary duty to-date occur in the context of sexual misconduct between clergy and congregants during pastoral counseling.

203. *See generally* Eric C. Funston, *Made Out of White Cloth: A Constitutional Analysis of the Clergy Malpractice Concept*, 19 CAL. W. L. REV. 507 (1983).

204. *See* United States v. Ballard, 322 U.S. 78 (1944). Courts have held that where the activities of a clergy member are religious in nature, the prohibition against state interference is absolute. *See* Molko v Holy Spirit Ass'n. for the Unification of World Christianity, 762 P.2d 46 (Cal. 1988), in which the court was not permitted to interfere with the church's belief system or analyze its merits. Conversely, if those activities are non-ecclesiastical in nature, the state may become involved. *See* Van Schaick v Church of Scientology, Inc. 535 F.Supp. 1125, 1135, 1139 (D. Mass. 1982) (finding a church liable for fraudulent misrepresentations entirely secular in nature).

205. For example, the Supreme Court of Colorado has allowed claims for breach of fiduciary duty when those claims were non-ecclesiastical in nature. *See* Moses v. Diocese of Colorado, 863 P.2d 310 (Colo. 1993). An Oregon Court has also determined that claims of breach of fiduciary duty and intentional infliction of emotional distress were not barred by the First Amendment. *See* Erickson v. Christenson, 781 P.2d 383, 386 (Or. Ct. App. 1989). Courts have also recognized claims for intentional torts by clergy, such as the circumstances in Ballard, in which a minister was found guilty of receiving obtaining gifts or donations of money by fraud, 322 U.S. 78 (1944); sexual assault, Mutual Service Cas. Ins. Co. v. Puhl, 354 N.W.2d 900, 901 (Minn. Ct. App. 1984); unlawful imprisonment, Whitaker v. Sandford, 85 A. 399, 399 (Me. 1912); alienation of affections, Hester v. Barnett, 723 S.W.2d 544, 555 (Mo. Ct. App. 1987); and for sexual harassment, intentional infliction of emotional distress, and defamation, Guinn v. Church of Christ, 775 P.2d 766, 785–86 (Okla. 1989). *See* Zanita E. Fenton, *Faith in Justice: Fiduciaries, Malpractice, & Sexual Abuse by Clergy*, 8 MICH. J. GENDER & L. 45 n.47 and accompanying text.

206. *Cf.* Lee, *supra* note 199. Lee asserts that this is an impermissible encroachment on religious freedom. *But see* F.G. v. MacDonnell, 696 A.2d 697 (holding that a parishioner had a supportable claim against rector for breach of fiduciary duty based on an inappropriate sexual relationship administered during pastoral counseling).

special confidence between minister and congregant, which is a necessary precondition to finding a breach of fiduciary duty.[207] Some courts have allowed the state to find clergy negligent when counseling members of churches because they owe those members a fiduciary duty.[208] In such circumstances, a secular standard—the same "relationship of special trust" that is articulated in a corporations context—is applied to clergy when assessing whether a fiduciary duty has been breached.[209] The plaintiff must show that she was in a situation of dependence and reposed trust or confidence in the member of the clergy.[210] In such cases, the ecclesiastical component of the communication is ignored. In addition, courts have held that a blanket legal duty cannot be imposed on individuals based on their title as an ordained member of a religious body.[211] Whether a duty of special trust has been established between clergy and congregant must be determined on a case-by-case basis.[212]

State courts have held religious leaders liable for affinity fraud and enhanced their punishment because of the fiduciary duty imposed

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207. *See* Mac Donnell, 696 A.2d 697, 703–04. "The essence of a fiduciary relationship is that one party places trust and confidence in another who is in a dominant or superior position."

208. *See* Moses v. Diocese of Colo., 863 P.2d 310.

209. *See* F.G. v. MacDonnell, 696 A.2d 697, 702 (N.J. 1997) (holding that the First Amendment does not protect a minister from being held liable for sexual advances made during marital counseling). The primary concern is whether there is a duty of special trust or confidence, and that relationship has been breached. *See* Mabus v. St. James Episcopal Church, 2004 WL 2249405, at *8. This standard applies in all cases of breach of fiduciary duty, including the law of corporations.

210. *See* Mabus, 2004 WL 2249405, at *8. The Mississippi Supreme Court examined whether the plaintiff was either dependent or instilled a special trust or confidence in the minister. This was determinative of whether there was a fiduciary duty between congregant and minister, and whether the plaintiff was put in a "vulnerable position."

211. *See* Doe v. Dunbar, 718 So.2d 286 (Fla. Dist. Ct. App. 1998). *See also* Dausch v. Ryske, 52 F3d. 1425 (7th Cir. 1994); Lee, *supra* note 196. Both cases find it impermissible for a member of the clergy to have given negligent pastoral advice and therefore liable for breach of fiduciary duty in a counseling setting, because the relationship between clergy and church member had a solely an ecclesiastical basis and was therefore barred by the First Amendment. *See also* Mabus, 2004 WL 2249405, at *10, holding "a priest may not be held to be in a fiduciary relationship merely based on his status as a priest." In other words, there must be a relationship of special trust.

212. *See* Alexander v. Culp, 705 N.E.2d. 378, 382 (Ohio App. 8th Dist. 1997), in which a woman sought counseling from a priest, who subsequently divulged to her husband the information during the counseling session. The court found the woman had a claim for breach of confidentiality. *See also* Sanders v. Casa View Baptist Church, 898 F. Supp. 1169, 1179 (N.D. Tex. 1995), in which the court held whether there was a fiduciary relationship between a minister and a congregant was a fact determinable by a jury.

on them as members of the clergy. In *United States v. Lily*[213] a minister's punishment was enhanced because of his role as both the head of a spiritual institution and also its financial adviser.[214] Second, the minister's role as financial manager allowed him to defraud parishioners out of $1.6 million; his role as the church's minister heightened the trust inherent between himself and his congregation.[215] The circumstances in *United States v. Luca*[216] were very similar. Because the minister used religious-based language when committing the fraud, a member of the congregation indicated that he allowed his guard to be let down when the minister solicited money from the congregation.[217]

In the case of Financial Warfare, the pastor of the Maryland church may have fallen victim to a natural and arguably "Christian" trust of the outside minister. The presence of such an outside minister creates an illusion of legitimacy with the pastor of the church and with the congregation. For a victim-pastor whose flock is about to be misled, the testimony of a fellow clergy member suggests that the scam artist lives up to the promises he or she makes. The pastor of the target church may have believed that Dukes and Hodge's plan was legitimate, and the presence of the perpetrator-pastor allows the victim-pastor to feel confident in giving financial advice to congregants. However, because neither the visiting minister nor the pastor of the church named by the Maryland Securities Commissioner or SEC in any legal action, their actual role in perpetrating the fraud is purely speculative.[218]

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213. 37 F.3d 1222 (7th Cir. 1994). *See also* HAZEN: SECURITIES REGULATION, *supra* note 47, at § 4.6 n.312 (summarizing the case as one in which "A church pastor selling certificates of deposit to finance church expansion could not hide behind the First Amendment right to free exercise of religion").

214. *Id.* at 1226–27.

215. *Id.* at 1227.

216. 183 F.3d 1018 (9th Cir. 1999).

217. *Id.* at 1027. *See also* U.S. SENTENCING GUIDELINES MANUAL § 3B1.3. The sentencing guidelines detail that an "abuse of trust" provision applies to individuals who abuse their position of trust, and the "charitable impulse" provision applies to individuals who misrepresent they hold position in connection with charitable organization. The "abuse of trust" provision could easily apply to the visiting minister, *see supra* note 62, who used his position to convince his congregants of the authenticity and veracity of Dukes and Hodge. The "charitable impulse" provision could apply to Dukes and Hodge, who claimed to be placing investors' funds in companies which would return charitably to the African American community. *See supra* note 120 (discussing recent changes to the guidelines).

218. *See supra* note 64.

Often times, if the victim-pastor is "paid out" first, this provides congregants with tangible evidence—especially if the proceeds are used by the minister or pastor for consumer goods, like a new automobile—that the pastor or minister is somehow getting rich.[219] Because scam artists often come from outside a congregation,[220] their affinity with targeted congregants needs to established. During Financial Warfare's presentation, the outside minister's presence may have served to manipulate the church's own pastor and to increase the credibility of Dukes and Hodge. The pitch would have been easier to make had they been congregants; they would have been seen in church and fellow church members would have known their parents, siblings, and children.[221] Scammers outside the congregation have to work harder and typically utilize church leaders, usually the minister or pastor, to create a sense of trust within the church community in order to entice congregants to invest with them.

2. Hiding Behind the Constitutional Protection of Freedom of Religion

As noted above,[222] Financial Warfare frequently used scriptural references to target victims of their investment scam. As explained below, courts probably would not recognize a cause of action based on whether those scriptural references actually supported the financial assertions made in the presentation. However, material misstatements about the credibility of Dukes and Hodge as investment advisers, or the financial "soundness" of Financial Warfare's investments, if made by clergy members, would not be protected by the fact they were made by a member of the clergy. Thus, the First Amendment would not bar individuals for being liable for fraud, even if that fraud was conducted in the context of a religious meeting or service, and involved references to religious texts designed to create an affinity between scam artist and congregant.

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219. *See supra* note 11 (describing Ponzi schemes).

220. For example, the recent case of affinity fraud at the United Christian Church in Palmdale, CA, involved an individual who came to the church from outside the congregation. Likewise, the pastor of a church can be convinced by a scam artist-minister that he is trustworthy. *See* Reckard, *supra* note 16. *See also supra* note 64.

221. *See supra* note 64.

222. *See supra* notes 63–71 and accompanying text.

United States v. Ballard is the only Supreme Court opinion addressing criminal prosecution for fraud in a church setting.[223] The defendants claimed to have supernatural healing powers[224] which, the indictment charged, were made knowing they were false.[225] The District Judge instructed the jury that, although the statements were probably untrue as facts[226] and the healing performed by the defendants unlikely,[227] they were not permitted to consider them in their verdict.[228] Rather, they must determine whether the defendants "honestly and in good faith" believed these statements.[229] If the defendants believed them, the judge reasoned, the defendants should be given an acquittal, and, if not, they should be found guilty.[230] The sole criterion on which the defendants could be found guilty, the judge explained, was whether they used the mail to defraud others,.[231] and the jury found them guilty.[232] Reversing the Court of Appeals' decision[233] that the jury should have considered the truth or falsity of the statements, the Supreme Court agreed with the district court.

Writing for the court, Justice Douglas asserted that assessing the probability of the statements made by the group amounted to a trial for heresy.[234] Douglas noted that the question was whether the district court had correctly suppressed the question of validity of the defendants' beliefs, and reiterated that the appropriate test—commonly called the "sincerity of belief test"—was whether the defendants "honestly and sincerely believed" that they were telling the truth.[235] This has been applied in subsequent cases with limited success both by the Supreme Court[236] and lower courts.[237]

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223. 322 U.S. 78 (1944). The religious movement in *Ballard* was called "I Am" and leaders were selected by divine will by the 'ascertained masters' to bring the words of the "divine entity" to residents of California. *Id.* at 79–80.

224. *See id.* at 81. For example, Guy Ballard, one of the defendants, claimed to be 'Saint Germain, Jesus, George Washington, and Godfre Ray King." *Id.* at 79.

225. *See id.* at 80.

226. *See id.* at 80.

227. *Id.* at 80.

228. *Id.* at 81.

229. 322 U.S. 78, 81.

230. *Id.*

231. *Id.* at 81–82.

232. *Id.* at 81.

233. *See* United States v. Ballard, 35 F. Supp. 105 (D.C. Cal 1940).

234. 322 U.S. 78, 86–87 (1944).

235. *Id.* at 83.

236. *See* 289 U.S. 829.

237. *See, e.g.*, Mejia-Paiz v. I.N.S., F.3d 720 (9th Cir. 1996).

The "sincere belief" test was further clarified in *Tilton v. Marshall*[238] in which a Texas Court found that a televangelist could be liable for fraud that could be proven through concrete acts—for example, whether a minister actually prayed over someone to cure her ailment[239]—but not for claims based on a "statement of religious doctrine or belief."[240] Had Tilton promised to read scripture and pray for the wheelchair-bound individual and congregants, based on this fact, donated money, a jury could only determine if the minister prayed over the individual and base liability for fraud on the act of praying. [241] Congregants could not recover if the minister failed to heal the individual.

The second category distinguished in *Tilton*—representations based on "religious doctrine or belief"—includes lobbying congregants to give money to the church, or, by extension, invest money with the church, and basing those donations on scripture. These are representations originating in religious doctrine, and a claim of fraud will fail based on this theory.[242] This rule, when applied to Financial Warfare, would lead to the conclusion that the defendants' claims that they had sat together and found "unity scriptures" and "wealth gospels" before the presentation at the Maryland church could be proved or disproved, but whether God instructed them that a Bible passage justified their financial scheme could not be a basis for a fraud claim.

Perpetrators of affinity fraud often seamlessly blend scripture into their sales pitch,[243] as a means of convincing victims that "God is sanctioning the scheme." Yet, as *Ballard* and *Tilton* indicate, regardless of whether that scripture is part and parcel of the scam, perpetrators of affinity fraud cannot hide behind the Constitution. Moreover, mixing financial rhetoric and scripture cannot allow a minister to escape liability for breach of fiduciary duty. Not only can they not hide, but their punishments should be increased because of the breach of special trust.

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238. 925 S.W.2d 672 (Tex. 1996).
239. *Id.* at 679.
240. *Id.*
241. *Id.* at 695–96.
242. *See* Employment Div., Dep't of Human Resources of Oregon v. Smith, 494 U.S. 872 (1990).
243. *See supra* notes 63–71 and accompanying text.

C. Affinity Fraud as a "Hate" Crime

State legislatures provide varying definitions of the term "hate crime."[244] Examining state law leads to the conclusion that hate crimes are broadly defined and include general criteria such as "ethnic intimidation,"[245] "intimidation based on bias or bigotry,"[246] "malicious harassment,"[247] a "bias crime,"[248] simple "intimidation,"[249] or various permutations of these terms.[250] Some states require violence as part of their definition.[251] The federal guidelines,[252] as well as half of the states,[253] call for increased punishment if a defendant is found guilty of a hate crime.

Economic offenses can also be prosecuted under hate crimes statutes. Certainly, because the hate crimes statute applies to all federal crimes, and because violations of securities laws and other federal statutes can be the legal bases for causes of action, hate crimes statutes can apply on their face.[254] Although the term "hate crime"

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244. *See* John S. Baker, Jr., U.S. v. Morrison *and Other Arguments Against Federal "Hate Crime" Legislation*, 80 B.U. L. REV. 1191, 1201 (2000). Examples of "hate crime" statutes can be found in 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 n.129.

245. *See generally* COLO. REV. STAT. ANN. § 18–9–121 (West 2004).

246. *See generally* CONN. GEN. STAT. ANN §§ 53a–181j, 53a–181k, 53a–1811 (West 2004).

247. *See generally* IDAHO CODE § 18–7092 (Michie 2000).

248. *See generally* IND. CODE ANN. § 5–2–5–1 (West 2004).

249. *See generally* N.D. CENT. CODE § 12.1–14–04 (2001).

250. For example, the New Jersey Statute uses "bias intimidation" as a criterion; N.J. STAT. ANN § 2C:16–1 (West 2004), Oklahoma defines hate crime as "malicious intimidation or harassment" (OKLA. STAT. ANN. TIT. 21 § 850 (West 2001).

251. The Arkansas code adds "violence" as an option ("intimidation, harassment or violence") ARK. CODE ANN. § 16–123–106 (Michie 2001); the Virginia Code requires "assault and battery," VA. CODE ANN. § 18.2–57 (Michie 2001).

252. The UNITED STATES SENTENCING GUIDELINES MANUAL § 3A1.1(a) requires that "if the defendant intentionally selected any victim or any property as the object of an offense of conviction because of the actual or perceived race, color, religion, national origin, ethnicity, gender, disability, or sexual orientation" his punishment should be increased by three levels. Moreover, (b)(1) mandates "If the defendant knew or should have known that a victim of the offense was a vulnerable victim, increase by 2 levels." If "the offense involved a large number of vulnerable victims, increase the offense level determined under subdivision (1) by 2 additional levels." *See* UNITED STATES SENTENCING GUIDELINES MANUAL § 3A1.1(a). *See also supra* note 120.

253. *See* Fairfax, *The Thin Line, supra* note 244, at 1079.

254. *See* H.R. REP. No. 103–244 (1993) (stating that "any federal offense can constitute a hate crime").

conjures up images of physical violence,[255] Congress has noted that the hate crime sentencing enhancements specifically cover crimes like money laundering and embezzlement, thus endorsing the use of hate crime legislation for non-violent crime.[256]

The logical question is whether a member of a discernible racial or religious group can target someone within that group and still have their act constitute a hate crime.[257] At least one court has held that intra-group crime does, in fact, fall under the statutes.[258] Inherent in an intra-group crime is a disassociation from the group. For example, in the case of *In re Vladimir P.*, the defendant was found liable for targeting a member of his own group because he failed to disassociate himself from the others who were verbally assaulting their victim with racial slurs.[259] This dissociation from the group may be tied to the plaintiff-assailant's internalization of their own feelings of racial inferiority.[260] Therefore, intra-racial animosity can, in fact, constitute a hate crime because victims are targeted because of their race, regardless of whether that race is shared with their assailants.

Although economic crimes are non-violent, they have significant financial consequences for many individuals who lose significant amounts of money. When individuals are targeted because of their race or religious beliefs, even though they are not physically injured, they may lose money which is necessary for retirement or their daily existence. Moreover, minorities should be encouraged to invest in the market. Capital markets give investors a chance to participate in a color-blind society; African American dollars are the same as white dollars in the market. If African Americans are more reluctant to invest because of affinity fraud, or have actually lost

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255. *See* Lu-in Wang, *The Complexities of Hate*, 60 OHIO ST. L.J. 799, 801–02 (noting that the public perception of a hate crime is largely shaped by the way in which these crimes are publicized).

256. *See* H.R. REP. No. 103–244 (1993).

257. *See* Fairfax, *The Thin Line,* supra note 244 at 1109. Fairfax notes that hate crime statutes do not address whether intra-group crimes fall under the hate crime statute.

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

259. *See id.*

260. *See* Kenneth B. Clark & Mannie P. Clark, *Racial Identification and Preference in Negro Children*, in READINGS IN SOCIAL PSYCHOLOGY 602 (Eleanor E. Maccoby et al., eds, 3d ed. 1958). This is the classic study in which African American children were given dolls of varying skin tone and were asked to select which were the "prettiest" and the "smartest." The children selected the lighter skinned dolls. This study was followed up in 1988 in an experiment which gave similar results. *See* Darlene Powell-Hopson & Derek S. Hopsin, *Implications of Doll Color Preferences Among Black Preschool Children and White Preschool Children*, 14 J. OF BLACK PSYCHOLOGY, 57, 57–63 (1988).

money, they are victims of a racism perpetuated from within their own group.

VI. CONCLUSION

The complex cultural and societal elements present among African American church populations illustrate the need for an increased punishment for race-based affinity fraud. Enhanced punishment for church leaders can be justified on several bases. What makes affinity fraud such a strange phenomenon is its inherently cannibalistic nature. Worse, it is perpetrated by self-declared Christians professing the "Word of God" in churches to others of faith.

This alone should warrant an increased punishment on the basis that perpetrators of affinity fraud should not be forgiven either because they are also African American (the logical extension of which is that affinity fraud is not a racial-bias motivated crime) nor should they be held to a regular level of culpability out of any notion of Christian forgiveness. Affinity fraud in African American churches is a blatantly discriminatory practice. What makes it particularly despicable is the effect it has had on the Herculean efforts of African American churches to build wealth in communities. In addition, the relationship of special trust which exists between a minister and his congregation warrants increased incentive for African American church members to invest through their minister and others who the minister has pre-screened and invited to speak at their church. When these church members fall victim to con artists, they naturally will be more reluctant to invest. Moreover, if African American church members are consistently the victims of affinity fraud scams, the increase in African American affluence will not lead to an increase in investment and savings. Affinity fraud also stymies any progress that is being made by African American churches investing charitably in their communities. Lastly, churches need to make money and increase wealth to help community organizations. This is especially prevalent in African American churches reinvesting in communities where poverty is a central link to so many social problems and reinvesting capital back into the community is central to keeping the community together.

A key justification for increasing punishment for perpetrators of affinity fraud involves the history of the African American churches, their unique role in the development of the African

American economy, and the social reality they now occupy in community development and charitable giving in the United States. Knowing this history as part of an African American church or simply by being African American and understanding the problem of the "White Man's Wall Street," perpetrators of affinity fraud engage in the most egregious form of racism. Rather than promote the wealth of institutions which have served as a dominant force in charitable giving to African American communities throughout American history, perpetrators victimize the very organizations which have served their own community. By preying on the fears of congregants, they aid in keeping members of their own racial group who have struggled for economic parity for centuries, fettered to "second class" status.

As noted above, pastors have a fiduciary duty to their congregants to perform due diligence and research any individuals who are coming to their parish to give financial presentations. When these pastors are accessories in the scam, their position as pastor should play a role in increased punishment as, by extending themselves as a trustworthy source, they are preying on the relationship of heightened trust recognized by society and by the law between congregant and minister.