




Exploring Alternative Approaches to Hate Crimes

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ABOUT THE STANFORD LAW SCHOOL POLICY LAB

Engagement in public policy is a core mission of teaching and research at Stanford Law School. The Law and Policy Lab (The Policy Lab) offers students an immersive experience in finding solutions to some of the world's most pressing issues. Directed by former SLS Dean Paul Brest, the Policy Lab reflects the school's belief that systematic examination of societal problems, informed by rigorous data analysis, can generate solutions to society's most challenging public problems. Policy Lab students, closely guided by seasoned faculty advisers, counsel real-world clients in an array of areas, including environmental, trade, education, intellectual property, public enterprises in developing countries, policing, technology, and energy policy. The Policy Lab on Assessing Alternative Responses to Hate Crimes was taught by Professor Shirin Sinnar in 2019-2020.

ABOUT THE ABOUT THE BRENNAN CENTER FOR JUSTICE AT NYU LAW SCHOOL

The Brennan Center for Justice is an independent, nonpartisan law and policy organization that works to reform, revitalize, and when necessary, defend our country's systems of democracy and justice.

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Executive Summary

Even before racist political rhetoric around the coronavirus triggered a wave of hate crimes against Asian Americans, white supremacist incidents around the country had fueled a vigorous public debate about the proper responses to hate violence. **In March 2020, Stanford Law School and the Brennan Center for Justice at NYU Law School hosted a convening of experts in the fields of criminal law, civil rights, community advocacy, and restorative justice to assess the current hate crime enforcement model and explore alternative approaches that could more effectively redress the harm resulting from hate crimes.** The Proteus Fund, the Stanford Center for Comparative Studies in Race and Ethnicity, and the Stanford Clayman Institute for Gender Research provided additional support for the convening.

This report, written by Stanford Law School Policy Lab students¹ under the guidance of Professor Shirin Sinnar and Brennan Center Fellow Michael German, assesses several critiques of hate crimes laws articulated *within* communities of color and other targeted communities and evaluates potential alternative approaches to responding to hate crimes. The report draws on the March 2020 discussion, as well as research within law, criminology, and other fields, to inform policymakers and community advocates seeking improved responses to hate crimes.

A “hate crime” is a criminal offense motivated by animus against certain actual or perceived characteristics of a victim’s identity. Most states and the federal government have laws that create “stand-alone” offenses or impose sentence enhancements for crimes with a bias motive. Under these laws, defendants found to have committed a crime motivated by someone’s actual or perceived characteristics

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may be subject to increased punishment. The enactment of hate crime laws resulted from an unlikely convergence of civil rights advocacy on behalf of frequently targeted communities and a more conservative victims’ rights movement, beginning in the 1980s.² Civil rights groups were responding to the impunity that often surrounded hate violence against members of their communities, such as the murder of

Chinese American Vincent Chin by two white men who received only probation and a \$3,000 fine for the crime.³ In subsequent decades, many civil rights groups have supported the vigorous implementation of hate crime laws with the hope of expressing strong societal condemnation for hate crimes and deterring further incidents.

But in recent years, some community groups and racial justice advocates have questioned both whether the traditional hate crimes legal approach relies too heavily on carceral solutions, especially through sentence enhancements, and whether it sufficiently responds to the unique individual and community harms of hate crimes. They have also emphasized the importance of confronting state violence, not just interpersonal violence. Calls to defund or abolish police and prisons, which have gained steam in the wake of George Floyd's killing, reflect growing skepticism in many communities of color about the primary reliance on police, prosecution, and imprisonment to address social problems. Faced with heightened fear for their safety in the wake of hate violence, but concerned about the traditional response that links recognition of hate crimes to increased imprisonment, many within targeted communities are reevaluating that approach and considering potential alternatives. This report responds to the growing interest among community members, civil rights groups, and policymakers, in exploring a wider range of responses to hate crimes.

No single report could provide a comprehensive assessment of the existing hate crime legal approach or its alternatives. Nor could a report of this kind substitute for processes of consultation and deliberation within the many communities affected by hate crimes, which will no doubt reflect a variety of perspectives. This report aims to provide research to assist those deliberations, rather than settle the difficult

empirical and normative questions that arise in this context. Some important questions are outside the scope of this examination. The report does not address, for instance, the potential dangers of prosecuting hate crimes under an expanded "domestic terrorism" statutory framework.⁴ It likewise does not address the full range of social, economic, or educational interventions possible to prevent hate crimes. Nor does it assess mechanisms to strengthen the reporting of hate crimes at the federal level. These important issues deserve additional attention. Here, the focus is on evaluating the traditional hate crime legal model and assessing alternative approaches that are designed to empower individuals and communities to counteract the injuries hate crimes inflict.

With those limitations acknowledged, this report suggests the following about the traditional hate crime legal approach:

- Existing hate crime laws do not address a large number of hate crimes because community distrust of law enforcement prevents many people from reporting hate crimes to law enforcement in the first instance;
- There are substantial questions about whether the traditional approach to hate crime is serving its goals. Specifically, impediments to investigating, charging, and proving hate crimes, including apathy within some law enforcement agencies, undermine the laws' intended expressive function, and penalty enhancements have an at best inconclusive deterrent effect; and
- Increasing the enforcement of hate crimes laws could exacerbate existing pathologies of the carceral state, including mass incarceration and discrimination faced by individuals of color within the criminal legal system.

With respect to potential alternative responses, this report assesses: (1) restorative justice programs that respond to hate crimes and (2) social services programs for individuals and communities targeted by hate crimes. These broad categories include programs that could replace aspects of the traditional approach and others that could exist alongside it. The report finds the following:

- Restorative justice programs may offer a way to identify and mend the unique individual and community harms caused by hate crimes, while demanding meaningful accountability for those who cause harm.
- A number of existing restorative justice programs in the United States have addressed hate crime cases within the larger scope of their work diverting selected cases from traditional prosecution or sentencing. These programs vary considerably as to their scope and eligibility requirements, including whether they focus on juveniles or adult defendants and whether they include serious felonies.
- Restorative justice processes have demonstrated promise as a way of increasing satisfaction for those who experience harm and in decreasing recidivism. The research on restorative justice *in the hate crimes context* is miniscule, however, so more resources should be directed to experimentation with, and rigorous study of, such programs.
- Potential issues that might complicate the implementation of restorative approaches in the hate crimes context include concerns that victims or offenders may feel coerced into participating, that offender participation could be insincere or retraumatizing for victims, or that the scaling up of existing programs will prove challenging. Further research is necessary

to determine whether program design, including screening criteria and facilitator training, can mitigate these concerns.

- Support for social services and grant programs can be established, retooled, and better staffed and funded to ensure that individuals and communities affected by hate crimes receive adequate, culturally competent resources.
- Governments can invest in programs that provide compensation, professional support, and mental health services for survivors and others affected by hate crimes, including programs run by community groups serving particular racial, religious, or LGBTQ communities.
- Grant programs can enhance security at frequently targeted gathering places and institutions, if designed carefully to avoid the unintended consequences of private and governmental surveillance.
- To avoid reproducing or exacerbating shortcomings of the current hate crime approach, policymakers and others must pay close attention to issues that frequently arise in this space—such as program eligibility requirements, law-enforcement involvement, and other policy features identified in this report.

Chapter I of this report defines and describes the hate crime problem, including the harms that hate crimes inflict and limitations in existing data on hate crimes. Chapter II examines several critiques of the traditional hate crime legal model raised within targeted communities. Chapter III assesses alternative responses centered on restorative justice and the provision of social services.

Chapter I: The Hate Crime Problem

Hate crimes encompass a wide range of criminal offenses committed by individuals with diverse motivations and personal characteristics. **The range of underlying conduct that qualifies as hate crimes should caution against a singular policy response that treats these crimes as all alike.** At the same time, the significant harms that hate crimes inflict on direct victims and the communities that share a victim's identity suggests the urgency of developing effective responses.

WHAT IS A HATE CRIME?

While the precise definition varies across jurisdictions, a “hate crime” generally means a criminal offense motivated by actual or perceived characteristics of a victim's identity. The Federal Bureau of Investigation (FBI), charged with compiling hate crime statistics and investigating violations of federal hate crime statutes, defines hate crime as a “criminal offense against a person or property motivated in whole or in part by an offender's bias against a race, religion, disability, sexual orientation, ethnicity, gender, or gender identity.”⁵ Most U.S. states and the District of Columbia have hate crimes laws, though not all extend protections to the full set of characteristics recognized in federal law. Many states exclude sexual orientation or gender identity from their hate crime laws, while others include status as a police officer within their list of protected characteristics.⁶ For clarity, this report will use the FBI's definition of hate crime, since its protected categories encompass traditionally persecuted and marginalized groups, without taking a position on the appropriateness of including other groups like those experiencing homelessness.⁷

Hate crime laws apply to a vast range of offenses and motivations. While news coverage often focuses on spectacular acts of violence, such as mass shootings, hate crimes more often involve property crimes, intimidation, or simple assault.⁸ Less than

Note on Hate Crime Statistics

As discussed in more detail below, it is important to recognize that official hate crime statistics, which are based on data collected from the nation's law enforcement agencies, are notoriously unreliable. Victims often are reluctant to report hate crimes to law enforcement, and the vast majority of law enforcement agencies, which lack either the ability or the will to identify and investigate these crimes, consistently report that no hate crimes occur within their jurisdictions.

1% of hate crimes reported in the 2019 Uniform Crime Reports involved a murder.⁹

Moreover, many incidents in which people use racial slurs or otherwise target people because of their identity do not constitute criminal violations, in part because of First Amendment constraints on the prohibition of speech that does not rise to the level of a threat or assault.¹⁰ These acts are often classified as hate *incidents*, but not hate crimes.

In addition, research suggests a greater variety of motivations behind hate crimes than might be assumed. Most people who commit hate crimes are not members of organized hate groups, though some studies have linked the presence of hate groups in a locality with a greater incidence of hate crimes.¹¹ Nor do all act out of a clearly defined

belief system. One influential study creates a typology of motivations, distinguishing, for instance, between “thrill-motivated” offenders driven by peer pressure and bragging rights and “mission-offenders” motivated by a supremacist belief system.¹² Another study identifies the most common hate crimes as (1) incidents that occur during an ongoing local conflict that has escalated over time, such as a dispute between neighbors; (2) incidents that form part of a targeted campaign of abuse directed against certain individuals; or (3) incidents that occur in public spaces committed by individuals who somehow feel aggrieved by the victim.¹³

Researchers have also documented the diversity of hate crimes offenders along demographic lines. For instance, the data suggests that people of varying ages commit hate crimes.¹⁴ While most people who commit reported hate crimes are adults, many are children.¹⁵ Some who have committed hate crimes suffer from substance addiction or mental health problems.¹⁶ The reported perpetrators in hate crimes datasets also belong to a variety of racial and ethnic groups.¹⁷

In sum, the research demonstrates that hate crimes involve a wide range of conduct, offenders, and bias motivations. This suggests that prioritizing one type of response at the expense of others may not be sufficient to address the complex and diverse nature of the problem.

THE INDIVIDUAL AND COMMUNITY HARMS OF HATE CRIMES

Hate crimes inflict serious physical and psychological injuries that not only harm direct victims but send shockwaves through communities. Such widespread and diverse impacts require a holistic response.

Because hate crimes can involve many types of criminal offenses, the direct harm on victims varies—from intimidation and property damage to physical injury and death.¹⁸ Beyond direct physical

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harm to people and property, hate crimes can have distinct, long-lasting psychological effects on victims, leading to depression, post-traumatic stress, anxiety, and other conditions.¹⁹ Hate crimes appear to have a particularly acute psychological impact. For example, studies on the effects of hate crimes motivated by sexual orientation have found that “hate-crime victimization appears to be associated with greater psychological distress for gay men and lesbians,” in addition to longer recovery times, than other types of crime targeting the same communities.²⁰ The American Psychological Association (APA) recognizes the links between hate crime and individual victims’ self-esteem and identity. In the aftermath of the Pittsburgh synagogue shooting, the APA’s president noted that “hate crimes have a more destructive impact . . . because they target core aspects of our identity as human beings.”²¹

Hate crimes can also affect members of the victim’s community and reverberate across society. According to the APA, hate crimes breed fear in communities by “send[ing] messages to members of the victim’s group that they are unwelcome and unsafe in the community, victimizing the entire group and decreasing feelings of safety and security.”²² In addition, research on group identification suggests that “perceiving prejudice” against a group to which an individual belongs is “psychologically painful” for individuals who identify strongly with their group.²³ Members of the broader community to which a victim belongs may also experience various feelings related to the crime, including shock, anger, fear and vulnerability, and a sense of inferiority.²⁴ These feelings can lead members of the community to

change their behavior, including taking steps to make their group identity less visible²⁵ or refraining from federally protected activities like voting and other types of civic engagement.²⁶

PROBLEMS WITH HATE CRIME DATA

In recent years, from Charleston to Pittsburgh, Charlottesville to El Paso, and communities in between, the United States has experienced a surge of heinous, widely publicized acts of hate violence.²⁷ This coincides with a period of heightened division, where public officials have advanced policies and political rhetoric that marginalize the very communities this violence has targeted.²⁸ Based on these trends, recently reported increases in hate crimes reflected in official data are unsurprising.²⁹ Because of systemic underreporting, however, it is impossible to know the true nature and extent of hate crimes in U.S. communities.³⁰

The federal government maintains two distinct sources of hate crime data, both of which are managed by the U.S. Department of Justice. First, under the Hate Crime Statistics Act of 1990 the FBI publishes annual statistics on hate crime data submitted through the Uniform Crime Reporting (UCR) program, which is a voluntary data collection effort consisting of federal, state, local, tribal, and territorial law enforcement agencies.³¹ The second source of federal data on hate crimes is the Bureau of Justice Statistics' National Crime Victimization Survey (NCVS). Each year, and at the direction of BJS, the U.S. Census Bureau collects interview-based data from a nationally representative sample of individuals and households about the nature and characteristics of crimes experienced during a specific period, including whether the crime was reported to the police and the victim's experience within the criminal justice system.³² Since 2003, the NCVS has collected data on victims' perceptions of whether a particular crime was bias motivated.³³

The UCR and NCVS produce widely divergent figures on the extent of hate crime in the United States. Between 2004 and 2015, for example, law enforcement agencies participating in the UCR program reported an average of 6,739 hate crimes per year,³⁴ while the NCVS estimated an average of 250,000 hate crimes per year during the same period.³⁵ Because the NCVS does not include data on vandalism or intimidation, which account for about 60 percent of the hate crimes reported in UCR statistics, the potential disparity is even more stark than these totals suggest.³⁶

Additional methodological distinctions between the UCR and NCVS shed light on these divergent figures. Most significantly, the UCR relies on reports from law enforcement officials, while the NCVS provides a countrywide estimate based on interviews with a nationally representative sample of victims. Officials reporting hate crimes through the UCR must adhere to various procedures that, while designed to ensure data quality, might lead to the exclusion of certain incidents from the record.³⁷ And in some jurisdictions, responding officers might erroneously abstain from reporting hate crimes that meet the federal definition but do not match the specific offenses and protections covered in the hate crimes laws of their respective states.³⁸ The NCVS, which draws from victims' perceptions as to whether an incident was bias motivated, is not subject to the same constraints.³⁹

Thus, the UCR does not capture hate crimes that are not brought to the attention of law enforcement. That may omit a significant number of hate crimes. According to NCVS data for 2011-2015, most hate crimes were not reported to police during that period, and about a quarter of nonreporting victims "believed that police would not want to be bothered or to get involved, would be inefficient or ineffective, or would cause trouble for the victim."⁴⁰ This statistic aligns with reports suggesting that fear or distrust of law enforcement contributes to underreporting.⁴¹

But even when victims report hate crimes to law enforcement, the incidents might not show up in official data. In 2018, and in keeping with historical trends, just over 12 percent of U.S. law enforcement agencies “participating” in the UCR hate crime statistics program reported at least one hate crime within their jurisdiction.⁴² In other words, the vast majority of agencies report *zero* incidents to the federal government. This includes municipal police departments representing some of the nation’s largest cities.⁴³

Several factors could be to blame. According to the Brennan Center for Justice, just 13 states have laws that require some form of training on identifying, reporting, or responding to hate crime, while 28 states and the District of Columbia have laws requiring state or local agencies to collect hate crime data.⁴⁴ Researchers have found that undercounts in UCR data appear to stem from responding officers’ failure to recognize indicators of hate crimes,⁴⁵ while journalists and civil rights advocates have highlighted the role of insufficient training and procedural error in underreporting and other data collection irregularities.⁴⁶

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In conclusion, both the UCR and the NCVS are subject to limitations, and neither provides a definitive account of hate crime in the United States. That said, an elevated rate of hate crimes reported through the UCR, in addition to an apparent increase of high-profile acts of hate violence, has paralleled heightened concern about hate crime within various impacted communities. In 2019, for example, a coalition of advocacy organizations published results from a poll of “800 adults, with oversamples of 200 African Americans, 200 Hispanic Americans, and 200 Arab American/Middle Eastern Americans,” which found that 84 percent of those surveyed felt that hate incidents, defined as criminal or noncriminal acts in whole or in part motivated by actual or perceived race, color, religion, national origin, gender, sexual orientation, gender identity, disability, or ethnicity, were very or somewhat prevalent in the United States.⁴⁷ The report also found that 66 percent of those surveyed felt the problem was getting worse.⁴⁸ Additionally, several groups, including South Asian Americans Leading Together (SAALT) and the Anti-Defamation League, a Jewish nongovernmental organization, reported spikes in hate incidents targeting their communities the year following the 2016 presidential election.⁴⁹

Despite the limitations of existing data, it is clear that the individual and community harms that hate crimes inflict, the reported increase of hate crimes, and heightened fears about the problem among impacted communities warrant an examination of current responses to hate crimes and an assessment of potential alternatives.⁵⁰

Chapter II: The Traditional Hate Crime Legal Model

The traditional legal approach to hate crime enforcement, adopted by most states and the federal government over many decades, involves either the establishment of separate hate crime offenses for crimes of bias or sentencing enhancements where prosecutors can show that bias motivated the commission of a traditional crime. **This Part briefly describes existing laws and their objectives before identifying and assessing five shortcomings of the traditional model.**

CORE FEATURES AND OBJECTIVES

Forty-five states and the District of Columbia authorize law enforcement to investigate and prosecute hate crimes.⁵¹ While the range of covered offenses and protected characteristics in state statutes varies by jurisdiction,⁵² the general model is largely consistent. If a crime fits within a pattern of conduct proscribed in the statute and was directed against one of the protected characteristics enumerated in the statute, then, depending on the type of statute, prosecutors can either charge a defendant with a standalone criminal offense or seek a penalty enhancement, which authorizes the court to increase the punishment associated with an underlying offense.⁵³ For the purposes of this report, we refer to the “traditional” hate crimes model as encompassing both the standalone and penalty enhancement approach.

Some scholars have attributed the emergence of hate crimes laws to the unique convergence between civil rights advocates seeking to address the targeting of minority groups and a more conservative victims rights movement.⁵⁴ Proponents of hate crimes laws employed criminal law theories of punishment to justify penalty enhancement for individuals who commit crimes because of a demonstrable bias motive. First, they argued that

people should be punished in proportion to the harms they commit.⁵⁵ Because hate crimes inflict harms that reach beyond the immediate victim, the punishment should be more severe. Second, they contended that hate crime enhancements deter would-be perpetrators from targeting others out of bias because they do not want to face more time in prison.⁵⁶ A third—and perhaps the most common—justification is that hate crime laws send a message to people at large, including victims, their communities, and would-be perpetrators, that society does not tolerate bias-motivated crimes.⁵⁷

SHORTCOMINGS OF THE TRADITIONAL MODEL

This Part assesses how the traditional hate crimes model fails to address the needs and concerns of communities frequently targeted by hate crimes. Much of the historical opposition to hate crimes laws stemmed from a different set of critiques: some questioned whether hate crimes actually resulted in greater harm than other kinds of crimes, or objected to hate crimes laws on the basis that they criminalized ideas or speech or unfairly created “protected classes” of people.⁵⁸ This Part focuses instead on a set of concerns voiced within subordinated communities that neither question

the degree of harm from hate crimes nor the urgency of a state response. For such communities, the question is not whether hate crimes inflict greater harms on victims and their communities, but whether the traditional model is responsive to those harms.

Community distrust of law enforcement is a structural barrier to reporting hate crimes, such that the current system does not address a large number of hate crimes.

Many victims of hate crimes choose not to report incidents to law enforcement. As noted above, NCVS data suggests that over half of hate crime victims between 2011 and 2015 did not report incidents to police, with nearly a quarter of those victims explaining they chose not to report because of a belief that the “police would not want to be bothered or to get involved, would be inefficient or ineffective, or would cause trouble for the victim.”⁵⁹ If most hate crimes victims do not go to authorities in the first place, then the traditional legal model does not provide a mechanism for addressing the needs of most victims.

Many hate crimes survivors do not report due to fear of systematic mistreatment from law enforcement.⁶⁰ Tensions between police and marginalized communities stem from past and present abuses that have led to death, unlawful imprisonment, and public outcries for reform.⁶¹ While perhaps most prevalent among Black Americans, this mistrust can be seen across a number of marginalized communities. For example, in a 2015 survey of 27,715 transgender people living in the United States, the National Center for Transgender Equality found that 57 percent of respondents said they would feel uncomfortable calling the police for assistance, and of those who, in the previous year, had interacted with a law enforcement officer who thought or knew they were transgender, 58 percent experienced verbal harassment, physical or sexual assault, or other forms of police mistreatment.⁶²

In addition to a distrust of law enforcement stemming from prior experiences of mistreatment, some victims may fear exposure and other consequences of coming forward to police or the public, including revictimization,⁶³ disclosure of sexual orientation⁶⁴ or immigration status,⁶⁵ other privacy concerns,⁶⁶ or fear of retaliation from those who committed the offense.⁶⁷ The legal system also presents additional practical and procedural barriers to reporting. At the outset, police might paint the legal process as burdensome and time consuming, which discourages victims from moving forward.⁶⁸ Cultural and language barriers may impede reporting.⁶⁹ And victims could be unaware of existing hate crimes laws or enforcement practices. They might not know what constitutes a hate crime or understand that the crime committed against them was bias motivated.⁷⁰

The underreporting of hate crimes does not simply affect the ability of the government or public to obtain a comprehensive understanding of the hate crimes problem; more fundamentally, it means that the primary legal avenue in place for responding to hate crimes fails to address most incidents.

Impediments to investigating, charging, and proving hate crimes undermine the laws’ intended expressive function.

A central justification of hate crime laws is that they send a message that society does not tolerate attacks motivated by bias. But challenges in investigating, charging, and proving hate crimes undermine this expressive function. Failures within the legal system to investigate and adjudicate hate crimes might communicate a quite different message: that protecting people from hate crimes is not a priority. As Professor Avlana Eisenberg observes, while theorists often focus on the expressive value of *enacting* a law, the law’s *enforcement* has “an expressive dimension that can either further the message of a statute’s enactment or contradict it.”⁷¹

The problem begins at the investigative phase, where police may be ill-equipped to identify conduct as a hate crime, preventing the crime from being investigated as such.⁷² Challenges to both the identification and investigation of hate crimes may include inadequate training, personal opposition to hate crimes laws, a lack of supervisory commitment, the difficulty of identifying a bias motivation, and political incentives to report low hate crimes statistics in a jurisdiction.⁷³

Even when prosecutors are alerted to the possibility of a bias motive in a case, they face disincentives to bringing hate crime charges. Some prosecutors see little to gain in prosecuting a crime as a hate crime when courts already impose such high sentences for the underlying criminal offense.⁷⁴ Prosecutors also fear that introducing a hate crime charge could distract a jury, increase the state's burden of proof, or otherwise compromise a guilty verdict.⁷⁵ In other cases, prosecutors might add hate crimes charges to increase leverage over defendants during the plea-bargaining stage in crimes that are not hate motivated.⁷⁶ Finally, establishing evidence to meet the high standard of proof necessary to prove a bias motive can be challenging, particularly in jurisdictions that require showing that the crime would not have occurred "but for" the victim's identity.⁷⁷

The 2015 execution-style murder of three American Muslim students in Chapel Hill, North Carolina, is a tragic example of how decisions not to bring hate crime charges can send an expressive message to families of the victims and their communities, creating additional pain.⁷⁸ In that incident, the police initially cited a parking dispute as the reason a middle-aged white man killed the three young people.⁷⁹ But the victims' family members repeatedly pressed for a hate crimes charge, as the victims were visibly Muslim, the defendant had made anti-religion social media posts and harassed other Black and Brown neighbors, and the parking issue appeared to be pretextual.⁸⁰

Nonetheless, federal prosecutors did not bring hate crime charges, pointing to the difficulty of proving motivation, especially under the federal "but for" causation standard.⁸¹

Multiple studies conclude that, compared to the "certainty of apprehension," longer sentences do not have a significant effect on general deterrence.

Thus, barriers to investigating and prosecuting hate crimes often prevent the use of hate crimes charges. The result is that, rather than convey the particular stigma of hate crimes, the implementation of hate crimes laws often leads victims to perceive a *lack* of governmental prioritization.

Penalty enhancement has, at best, an inconclusive deterrent effect.

Limited research addresses the deterrent effects of hate crimes laws or penalty enhancements in particular, although legal scholars, nonprofits, and government agencies have studied the relationship between criminal sentences and deterrence in general. Much of this more general research finds that increasing sentence length may not, in fact, generate the deterrence that many intuitively believe would result.

Legal scholars typically differentiate between two forms of deterrence from criminal sanctions: general deterrence (the deterrent effect on the public at large) and specific deterrence (the deterrent effect on the individual prosecuted).⁸² Multiple studies conclude that, compared to the "certainty of apprehension," longer sentences do not have a significant effect on general deterrence.⁸³ This is especially true where defendants already face lengthy punishment; the prospect of an additional

five years on top of a twenty-year sentence, for instance, is unlikely to dissuade a person from committing a crime.⁸⁴ In addition, expectations of deterrence often rely on a set of questionable assumptions about human behavior, including the assumption that people contemplating criminal acts are aware of sentencing policies and that they rationally calculate the consequences of their actions.⁸⁵ In the hate crimes context, one criminologist argues that the deterrence rationale for hate crimes enhancements lies on several “probably faulty” assumptions: that potential perpetrators know of hate crimes laws, that they believe there is a reasonable chance they will be caught, that the addition of a hate crime enhancement will deter those who would not be deterred by the otherwise applicable punishment, and that the risk of offending outweighs benefits in the mind of people contemplating an offense.⁸⁶

Some proponents of traditional sentencing contend that longer prison times may be warranted to incapacitate the particular individuals sentenced so that they are not able to re-enter society and commit additional crimes, or to aid specific deterrence.⁸⁷ But findings supporting specific deterrence have been questioned for reasons including the fact that, given heightened sentences, lower recidivism rates may reflect offenders “aging out” of criminality rather than deterrence or rehabilitation.⁸⁸ In addition, the experience of incarceration could exacerbate recidivism.⁸⁹ Moreover, imprisonment creates its own costs, both in terms of financing prisons and in the human and economic costs of excluding individuals from society.⁹⁰

While existing research casts doubt on the deterrent effect of increased punishment, there is evidence to suggest that increased police presence could deter crime because it heightens the perceived risk of apprehension.⁹¹ It is not clear how this evidence translates to the hate crimes context, where crimes are more rare and perhaps less likely to be identified through standard policing measures. Moreover, increasing police presence may

disproportionately affect the very individuals whom hate crimes laws set out to protect—a point that the next section addresses further.⁹²

The enforcement of hate crime laws could exacerbate discrimination within the criminal legal system against defendants of color.

Hate crime laws are designed in part to prevent and punish bias-motivated violence, but that does not mean they are immune from bias-motivated enforcement and structural discrimination that have created disparities in the criminal legal system. Anti-Black hate crime consistently accounts for about 50 percent of hate crimes motivated by race or ethnicity and a plurality of all hate crimes reported in the UCR each year.⁹³ Thus, that data suggests that hate crimes affect Black victims more so than those of any other group. Still, hate crimes data also represent people of color as defendants or suspects to a surprising extent.

In 1993, when the Supreme Court upheld the constitutionality of hate crime penalty enhancements, it did so in a case involving the doubling of the prison sentence of a young Black man.⁹⁴ In several recent cases involving low-level offenses, state and federal authorities brought hate crime charges against Black defendants, each of whom suffered from mental illness.⁹⁵ Apart from these high-profile incidents, government hate crime statistics provide some insight, with the caveat that available data sources suffer from underreporting and are limited to reported incidents, not prosecutions. Several sources of hate crime offender data show a statistical overrepresentation of Black people. Accounting for about 13 percent of the U.S. population,⁹⁶ Black people represent 24 percent of reported hate crime offenders in 2018 UCR data,⁹⁷ and 34 percent of “violent” hate crime offenders in 2004-2015 NCVS data.⁹⁸ Additionally, the New York City Police Department reported that, in 2018, most reported hate crime suspects and about 45 percent of those arrested for hate crimes were Black.⁹⁹

This data should be treated with caution for several important reasons. For one, none of the sources discussed above are based on prosecutions, convictions, or sentencing, and so provide scant information about how hate crime laws are actually used.¹⁰⁰ Moreover, the source of the statistical overrepresentation is not clear. The UCR in particular represents a subset of crimes that victims *choose* to report to law enforcement, that law enforcement officers *categorize* as hate crimes, and that law enforcement agencies *report* to the FBI. Thus, racial disparities at any of these stages can contribute to racial disparities in the UCR numbers.¹⁰¹ Both implicit and explicit racial bias within the criminal legal system may shape judgments with respect to identifying, investigating, and classifying hate crimes.¹⁰² To cite a prominent example of disparate enforcement in a different context, white and Black people use drugs at similar rates, but while white people are more likely to sell drugs, Black people are significantly more likely to be incarcerated for drug-related crimes.¹⁰³

The identification of people of color as suspects in hate crimes cases may also reflect ongoing competition across minority groups for power or resources in contexts of deprivation. For example, inter-group conflicts between Black and Latinx communities have been well-documented in Los Angeles.¹⁰⁴ The Los Angeles County Human Rights Commission reported that, in 2018, as in previous years, a majority of the county's anti-Black hate crimes were committed by Latinx individuals, and vice versa.¹⁰⁵ Hate crime scholars have described other examples of “intercultural violence among and between oppressed groups”¹⁰⁶ or theorized that minority groups may compete “for the second-lowest rung on the social and economic ladder.”¹⁰⁷ The application of hate crimes charges to individuals caught up in such conflicts does not address the larger circumstances that pit disempowered communities against one another.

Whatever the source for the statistical overrepresentation of people of color among those classified as hate crimes suspects, the implication is concerning. Supporters of hate crimes laws generally advocated for them believing they would help address bias and violence against traditionally subordinated groups. If hate crimes laws are being used, instead, to enhance the sentences of defendants from subordinated communities already subject to over-policing and mass incarceration, that result would frustrate those objectives.

Traditional hate crimes laws focus on prosecuting and punishing perpetrators rather than repairing the harm to victims or the communities that share the victims' identities.

Hate crimes laws are premised on the recognition that hate crimes inflict especially serious harm on direct victims and groups that share the victim's identity, including trauma.¹⁰⁸ But these laws aim principally to prosecute and punish perpetrators rather than heal or support survivors. To be sure, some survivors may view the prosecution and punishment of those responsible as contributing to their sense of safety, especially where other alternatives do not exist to hold perpetrators accountable. Given available options, some survivors welcome incarceration or enhanced penalties as a means to incapacitate offenders¹⁰⁹ or send a “very strong message of deterrence”¹¹⁰—some of the traditional justifications for these laws.

But hate crimes laws do not focus on repairing the harm to victims, in any direct fashion, and do not respond fully to their needs. Hate crimes legal scholar Jeannine Bell observes that, “Even when such acts are prosecuted, civil rights law, irrespective of the statute used, may not be a magic bullet for victims. It does not make them whole, even when they ‘win.’”¹¹¹

Some survivors, activists, and community leaders, especially those subscribing to an abolitionist ethic, object to the focus on prosecution and punishment as opposed to the direct needs of victims. For instance, Black and Pink, an Oakland, CA-based organization advocating for LGBTQ people, argues:

Hate crimes laws focus on punishing the “perpetrator” and [have] no emphasis on providing support for the survivor or families and friends of those killed during an act of interpersonal hate violence. ...We must focus on building our capacity to respond and support survivors and create transformative justice practices that can also heal the perpetrator (though focusing first and foremost on survivors).¹¹²

Moreover, such advocates express concern that hate crimes prosecutions vest power in the state, rather than in communities that bear the brunt of the state’s criminal legal processes. Thus, Black and Pink contends: “Hate crime law sets up the State as protector, intending to deflect our attention from the violence it perpetrates, deploys, and sanctions.”¹¹³ In a similar vein, Rinku Sen, President of the Applied Research Center, writes, “[b]y relying on criminal justice as our only recourse, we ask the system that puts our very humanity in question to reverse the consequences of such dehumanization.”¹¹⁴ Thus, some advocates advise working on “breakthrough agendas that uphold the dignity and safety of all our people, in all our institutions”¹¹⁵ and building support mechanisms for survivors separate from the state as the “pathway to collective liberation.”¹¹⁶

CONCLUSION

The traditional hate crimes legal model often falls short in achieving its goals of expressing condemnation for hate crimes and deterring future hate crimes. Significant community mistrust of police contributes to the underreporting of hate crimes to law enforcement, while additional challenges limit the investigation and charging of hate crimes that are reported. Further, while one would assume that hate crimes enforcement would protect people of color and other marginalized groups—as many advocates for hate crimes laws envisioned—hate crimes charges also penalize members of these marginalized communities as defendants. Community organizers also express concern that the current approach fails to restore or heal victims and affected communities, or shift power back to communities rather than the state.

A variety of potential solutions could address these critiques. Reformers concerned primarily with the limited charging of hate crimes have focused on building trust between communities and law enforcement, training police on responding to hate crimes, and establishing specialized hate crimes units within police departments. A very different approach would be to imagine alternative frameworks that rely *less* on traditional prosecution and punishment and more on restorative justice and direct support for victims and communities—the subject of the next Part.

Chapter III: Envisioning Alternative Approaches to Hate Crimes

This Part considers two types of responses to hate crimes that rely less heavily on law enforcement and incarceration than the traditional legal model: restorative justice programs and the direction of support to affected victims and communities. The particular approaches discussed under these broad categories vary in the extent to which they replace that model or exist alongside it. Both sets of responses aim to retain the “expressive” function of hate crimes laws in communicating society’s strong disapproval of bias crimes. Restorative justice approaches seek to reduce the role of incarceration as a punishment, while repairing the harm of hate crimes and holding perpetrators accountable. Social service strategies aim primarily at redressing the harm to hate crimes victims and affected communities.

RESTORATIVE JUSTICE

“Restorative justice” has gained attention as a possible alternative to the traditional criminal legal process in healing the harm to crime victims while demanding accountability from the person(s) who caused harm. This section discusses the philosophy and principles of restorative justice, describes examples of restorative processes used in response to hate crimes, and then presents a tentative assessment of the benefits and challenges with restorative processes used in this context.

What is Restorative Justice?

Restorative justice is an umbrella concept, incorporating a wide range of theories, processes, and outcomes. A prominent theorist of restorative justice describes it as “a process to involve, to the extent possible, those who have a stake in a specific offense and to collectively identify and address harms, needs, and obligations, in order to heal and put things as right as possible.”¹¹⁷ It begins with the premise that the individual(s) harmed by an offense should be the focus (and a primary stakeholder in developing a response), not just the state.

Restorative justice approaches seek to reduce the role of incarceration as a punishment, while repairing the harm of hate crimes and holding perpetrators accountable.

It thus involves fundamentally different questions than the traditional criminal legal approach:

FUNDAMENTAL QUESTIONS OF TRADITIONAL & RESTORATIVE JUSTICE	
Traditional	Restorative
1. What laws have been broken?	1. Who has been hurt?
2. Who did it?	2. What are their needs?
3. What do(es) the offender(s) deserve?	3. Whose obligations are these?
	4. What are the causes?
	5. Who has a stake in the situation?
	6. What is the appropriate process to involve stakeholders in an effort to address causes and put things right?

Source: Howard Zehr, *The Little Book of Restorative Justice* (2002)

Restorative justice in the U.S. context emerged in large part as a response to problems with the traditional criminal legal system, such as mass incarceration and the excessive criminalization of communities of color and the poor, as well as questions about the effectiveness of punitive models in deterring crime and rehabilitating those who commit harm.¹¹⁸ While restorative justice emerged in response to modern phenomena, the concept has a long history, and its philosophy is rooted in the traditional justice practices of indigenous communities.¹¹⁹ Today, there are over 300 restorative justice programs throughout the U.S., operating in forty-five states.¹²⁰ While it is impossible to draw firm conclusions on the efficacy of restorative justice, studies suggest that certain restorative justice programs promote increased satisfaction among victims and a greater sense of accountability among offenders, decrease recidivism, and reduce costs.¹²¹

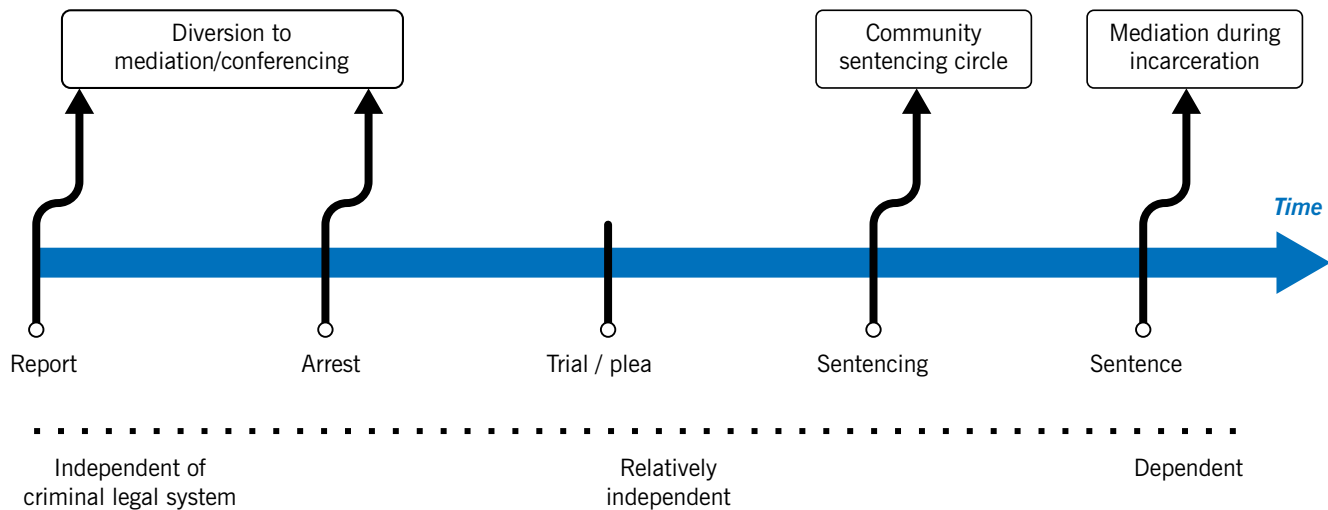
While models differ, a common model of restorative dialogue involves three phases: 1) a preparation phase in which facilitators meet with victims, offenders, and other possible participants to discuss expectations and concerns, and assess readiness to

participate; 2) a dialogue meeting in which victims share the impact of the crime and ask questions of the person who harmed them, offenders have an opportunity to express remorse, and the participants agree on a set of reparative obligations; and 3) a follow-up phase to support and monitor compliance with the agreement.¹²² Reparative agreements may include requirements such as monetary restitution, community service, apologies, the completion of an educational or counseling program, the repair of physical damage, or other creative interventions tailored to the nature of the crime.¹²³

Restorative Justice Practices in the Hate Crimes Context

Restorative justice programs vary in their relationship to the existing criminal legal system.¹²⁴ As one scholar puts it, practices are “independent” when they divert cases out of the traditional criminal process at an early stage, “relatively independent” when instituted as a part of the criminal process (often to reduce a sentence), and “dependent” when they exist adjacent to the standard process (usually post-conviction).¹²⁵

A CONTINUUM OF INDEPENDENCE



This diagram was created based on the description in Gavrielides, *Contextualizing Restorative Justice for Hate Crime* (2012)

The section below presents examples of restorative justice processes in the hate crimes context based on the independent/relatively independent/dependent framework. The discussion focuses on programs at the more independent end of that continuum, rather than those that operate only after a conviction and in addition to traditional sentences.¹²⁶ Note that, even in the more independent examples, restorative justice practices often take place after some involvement with the criminal legal system, such as an arrest, and with prosecution (and often potential imprisonment) available as a backstop should the alternative process fail.

INDEPENDENT PRACTICES: DIVERSIONARY MEDIATION/CONFERENCING MODELS

Independent restorative justice practices generally seek to divert or keep cases out of traditional processes. Some independent practices involve community-based programs that do not involve law enforcement at all. For instance, many restorative justice organizations engage in community conferencing practices, which allow discrete groups of people—like those from a neighborhood,

school, or workplace—to “conference”¹²⁷ about a conflict or crime in order to create “the potential for constructive engagement.”¹²⁸ Restorative Justice for Oakland Youth, for example, conducts “conflict circles” where those who were harmed by an incident, those responsible for the harm, and other community members can come together to address the harm, support those responsible to change, and respond to impact on the broader community.¹²⁹ Circles and other restorative practices are also gaining prominence in U.S. schools.¹³⁰

Other independent programs divert cases that would otherwise go through a traditional legal process to restorative processes operated by nonprofit organizations or separate government bodies. A typical diversion process begins with a referral from an agency (usually a school, police department, probation officer, or district attorney) to a professional restorative justice nonprofit or community organization.¹³¹ Prosecutors may place the case in a “holding pattern,” with charges neither brought nor abandoned.¹³² In some programs, prosecutors never even learn of the alleged crime from the police department, which partners directly with the program.¹³³ To encourage

honesty and ensure confidentiality, providers and law enforcement often agree to memoranda of understanding (MOUs) that guarantee that information obtained during the process will not be used against the accused in later proceedings, should the process fail.¹³⁴ The restorative justice facilitator then meets with each party separately to assess whether they are ready and willing to participate.¹³⁵ If not, the case may be remanded to court.¹³⁶ Restorative justice experts have emphasized the necessity of the process being fully voluntary.¹³⁷

If the parties are deemed fit for the restorative justice program, facilitators will then prepare each party to participate in dialogue, often including “homework” assignments and additional meetings.¹³⁸ The dialogue process itself initially involves a narrative phase, where those affected by a crime “are given the rare opportunity to express their feelings directly to the person(s) who violated them” and the latter are “put in the uncomfortable position of having to face those whom they violated.”¹³⁹ After discussion and agreement on reparative measures, the final step is the monitoring of the parties’ relationship and the offender’s compliance with the agreement.¹⁴⁰ If major problems arise, such as a breakdown in process or a failure to come to an agreement, the case can be remanded to a traditional criminal prosecution.¹⁴¹ Successful restorative justice diversion plans are generally completed within months, after which the referring agency is notified, usually resulting in the case being closed without formal charges.¹⁴²

Several U.S. programs have included hate crimes among the cases they divert from prosecution:

Hate Crime Example 1: Community Works West, a nonprofit based in Oakland, California, partners with Alameda and San Francisco counties to divert youth arrested for low-level felonies and high-level misdemeanors to a restorative process, the completion of which results in the non-filing of charges.¹⁴³ In 2012, Community Works

West in Oakland, CA, handled a case involving several youths who were accused of vandalizing a mosque and stealing the shoes of people praying inside.¹⁴⁴ After an intensive preparation process, the parties conferenced, and the youth were asked to help build the new mosque, attend services at the mosque with their families, write an apology letter to be read during the service, and complete community service hours.¹⁴⁵

Hate Crime Example 2: Common Justice, a nonprofit organization, diverts cases from incarceration in Brooklyn and the Bronx, including violent felonies, after those responsible for harm participate in a conference with survivors or “surrogates who take their place,” complete the terms of a reparative agreement, and conclude a 12-15 month violence intervention program.¹⁴⁶ One case referred to the program involved an anti-Semitic hate crime on the New York subway in which a young woman was badly beaten.¹⁴⁷ After a lengthy discussion, the woman responsible agreed to a range of commitments, including “work, education, apologies, reading assignments, and community service,” as well as a requirement that she stay off the trains for a year and keep a daily reflection journal to understand the trauma and insecurity that the victim had experienced.¹⁴⁸

Hate Crime Example 3: In 2016, the Office of the Attorney General for Washington, D.C., launched the nation’s first restorative justice program housed within a prosecutor’s office.¹⁴⁹ The program’s restorative justice facilitators work alongside prosecutors to develop alternatives to pressing charges in select cases, most involving juveniles, based on a restorative conferencing model.¹⁵⁰ According to the program’s founder, Seema Gajwani, “[r]estorative conferences allow prosecutors to better meet the needs of victims, witness accountability in action from the person who committed the crime, and learn about the human realities and underlying causes of crime.”¹⁵¹ To prevent “net widening,” the program only

accepts cases in which prosecutors would otherwise bring charges,¹⁵² and prosecutors who participate in a conference are also barred from any future action on that case.¹⁵³

With the exception of “[s]ex crimes, gun offenses, homicides, and (intimate partner) domestic violence cases,” the Restorative Justice Program accepts most cases, including hate crimes.¹⁵⁴ In 2019, the program handled the case of a 16-year-old involved in the group assault of a transgender woman.¹⁵⁵ At one point during the conference, the teenager asked everyone except for the woman to leave, at which point he apologized to her and she accepted.¹⁵⁶ They agreed that he would attend school more frequently and that she would recommend possible clients for his up-and-coming barbering business.¹⁵⁷ The case would be dismissed when the teenager had followed through on his agreements.¹⁵⁸

Hate Crime Example 4: The Dane County Community Restorative Court (CRC) in Madison, Wisconsin melds victim-offender mediation and peace circles.¹⁵⁹ The CRC has entered memoranda of understanding (MOUs) with several law enforcement agencies in the county, which, along with the District Attorney’s office, refer select cases for CRC-led Restorative Justice Circles.¹⁶⁰ While most referred cases proceed through the CRC, “[n]ot all offenders who are referred to the court are accepted or agree to participate, resulting in their cases going through the normal court system.”¹⁶¹ If victims choose not to participate, or if there is no clear victim, “a Repairing Harm circle, made up of various members of the community as well as two facilitators, [acts] as a ‘surrogate’ victim to explain the impact of the offender’s crime on the community.”¹⁶² If the victim objects to the offender’s participation, “the CRC may refer the offender to the District Attorney or may still pursue the repairing harm circle.”¹⁶³ The District Attorney is the final decision-maker as to the use of traditional criminal charges or the CRC alternative system.¹⁶⁴

The CRC handled a case involving an inebriated white man who taunted a Black man with racial slurs while his companion attempted to attack him.¹⁶⁵ The case would otherwise have been chargeable with disorderly conduct and a hate crime enhancement.¹⁶⁶ The perpetrator apologized and agreed to complete 40 hours of community service at an organization serving people of color and write five essays on his “upbringing and his relationship with alcohol.”¹⁶⁷

Stakeholders are offered an opportunity to speak about the case, including its impact on the community, and they then attempt to form a reparative agreement.

RELATIVELY INDEPENDENT PRACTICES

Sometimes, restorative programs supplement, rather than replace, criminal prosecution. Such “relatively independent programs” replace a portion of the traditional process, usually at the sentencing phase.

Community Sentencing Circles

Community sentencing models involve a group of stakeholders sentencing an offender, usually after the person pleads guilty in court.¹⁶⁸ Stakeholders may include the offender, victim, family members, community leaders and members, and in some cases, the judge, prosecutor and defense counsel.¹⁶⁹ These stakeholders are offered an opportunity to speak about the case, including its impact on the community, and they then attempt to form a reparative agreement.¹⁷⁰ The ultimate agreement is either presented to the judge as a recommendation, or in cases where the judge, district attorney, and defense attorney participate in the circle, “the agreement becomes the final sentence.”¹⁷¹ The circle members monitor

compliance with the agreement and may remand the case to the traditional court system in case of non-compliance.¹⁷²

Alternative Sentencing

Alternative sentencing, which involves identifying and imposing a sentence other than incarceration, is a well-established model for many courts seeking to decrease jail and prison populations.¹⁷³ Alternative sentencing also offers an opportunity for sentencing to be more attentive to the harms caused to an individual and their community. As in the restorative processes described above, sentences imposed often involve community service, education, or participation in rehabilitation programs. The difference in this model is that the sentencing follows an otherwise traditional criminal prosecution.

Some communities affected by hate crimes have advocated for offenders to serve their sentences in the form of community service or education programming, and also taken on the burden of teaching the offender about them, their history, or the impact of hate acts.¹⁷⁴ For instance, in 2014, the Sikh Coalition and the victim of an anti-Sikh hate crime asked that the offender serve out a 72-hour community service sentence with the group—an experience that the offender credited with leading him to stop drinking, hold a steady job, and spend additional volunteer hours with the Sikh community.¹⁷⁵

Introduced in both chambers of Congress in 2019, the Khalid Jabara and Heather Heyer NO HATE Act would authorize federal courts to require defendants convicted under 18 U.S.C. § 249, a federal hate crimes statute, to participate in educational programs or community service as a condition of supervised release.¹⁷⁶ In 2021, Congress passed the bill as part of the Covid-19 Hate Crimes Act.¹⁷⁷

ANALYSIS OF RESTORATIVE JUSTICE IN THE HATE CRIMES CONTEXT

Many restorative justice programs are relatively new, small in size and scope, and varied in methods and application, which makes it difficult for researchers to evaluate them systematically or compare them experimentally against outcomes in the traditional criminal justice system. Moreover, U.S. programs typically do not focus on hate crimes, but address hate crimes among many other types of crimes. Despite these methodological difficulties, some research indicates that restorative justice can be effective. Georgetown University Professor Carrie Menkel-Meadow identified several studies from North America, New Zealand, Australia, and Europe that validated claims that restorative justice “creates greater compliance with agreements or judgments, reduces imprisonment (and therefore costs to the system), provides greater satisfaction for both victims and offenders, and reduces recidivism rates.”¹⁷⁸ And criminologist Mark Walter’s study of community-led mediation programs developed specifically for hate crimes offenses in the U.K. found that a majority of victims reported that the process “*directly* improved their emotional well-being.”¹⁷⁹ While the study had a small sample size, it provides encouragement for U.S. restorative justice practitioners considering applying these practices to hate crimes.

One set of claims made for restorative justice programs is that they better support victims by allowing them to articulate the harm they experienced, receive an acknowledgment of that harm, and ask for commitments to repair that harm from the person responsible. Many victims benefit from sharing their story in an environment that affirms the significance of the harm.¹⁸⁰ Further, unlike traditional prosecution, restorative mediations also enable victims to ask for commitments for repair that are tailored to addressing the particular trauma or sense of insecurity that those victims experienced.¹⁸¹ In

the Walters study, hate crimes victims cited feeling empowered by playing a direct role in resolving the conflict, supported by mediators, and comforted by the perpetrator's written commitment to abstain from further hate crimes.¹⁸² In the Washington, D.C., hate crime case described above, the very process of meeting with restorative justice facilitators empowered the hate crime victim to be more open about the incident she experienced within her own community networks, providing her greater support.¹⁸³

Of course, not all victims will feel satisfied with a restorative justice approach. The Black victim in the hate crime handled through the Wisconsin program described above reported that he felt better after going through the process, but ultimately concluded that the men who assaulted him should have faced more severe punishment.¹⁸⁴

Centering the victim's interests and giving them full control over whether to participate are essential elements to restorative justice programming. Some have raised concerns that survivors participating in mediation sessions might feel intimidated and retraumatized by discussing the crime, particularly if the survivor belongs to a group with traditionally lower social status than that of the offender.¹⁸⁵ Restorative justice programs typically address this concern through a combination of training mediators to support victims and screening mechanisms to ensure that offenders will not blame the victims or excuse their conduct. The Walters study credited careful preparation of hate crime victims and effective facilitation of conferences as key to preventing revictimization.¹⁸⁶ In the D.C. restorative justice program, the willingness of offenders to accept responsibility for the harm they caused is considered one of the most important screening criteria.¹⁸⁷

In addition, concerns over revictimization should be assessed in comparison to the current criminal justice system. In the traditional model, crime victims must tell their story to a law enforcement

Centering the victim's interests and giving them full control over whether to participate are essential elements to restorative justice programming.

officer, often repeat it to a prosecutor, and sometimes restate it to a grand jury before a case even gets to trial. Crime victims often find the experience of cross-examination during criminal trials to be extremely painful.¹⁸⁸ Restorative justice processes can avoid some of these difficult components of a traditional prosecution.

A second set of questions regarding restorative justice focuses on the impact on offenders. One concern is that restorative justice is too lenient an approach to serious crime.¹⁸⁹ Professor Lawrence Sherman and research fellow Heather Strang, who studied restorative justice programs in Australia, argued that judging whether alternative justice measures "are 'hard' or 'soft' is not nearly as important as whether they prevent repeat offending better than prosecution in court."¹⁹⁰ An evaluation of a Washington, D.C. restorative program for youthful offenders found that the participating prosecutors "believe that the program frequently does more to hold respondents accountable than the traditional court process by requiring them to participate in the process, face their victims, be a part of the outcome agreement, and complete commitments made in that agreement."¹⁹¹ While not hate-crime specific, restorative justice programs have shown promise in reducing recidivism rates in multiple studies.¹⁹² In addition, proponents of restorative responses to hate crime often believe that the experience of meeting a victim directly may also provide an opportunity for offenders to confront their prejudices.¹⁹³

Still, the idea that restorative justice is too lenient can be more problematic in a hate crime context, both because hate crimes are often serious crimes and because the victims typically

represent communities frequently targeted with discrimination and police abuse. Asking survivors from communities that are disproportionately punished in the current justice system to give their attackers the benefit of a restorative process may inadvertently send the message that society views racist crimes against them as less serious than other crimes for which these same communities are disproportionately punished.¹⁹⁴ Therefore, the application of restorative justice to hate crime cases would benefit from a broader commitment to restorative justice, not limited to hate crimes, to avoid “sending the message that those who commit hate crimes deserve opportunities to avoid prison that are not available to others who commit harm.”¹⁹⁵

As previously discussed, the traditional legislative response to hate crime has been to increase penalties, which some may see as an attempt to correct the racial and ethnic disparities that exist in the current criminal justice system. Of course, these concerns imagine a stereotypical hate crime in which a white racist attacks a person of color, which is not always the case.

Another set of concerns relates to the rights of alleged offenders. An alternative to a likely prison sentence can be a serious inducement for an accused person to opt into a restorative program, but it typically requires admission of the crime. Defendants charged with hate crimes are often at risk of a substantial prison sentence, and may feel coerced into confessing to crimes they did not commit, or that they committed but without a bias motivation.¹⁹⁶ Legal counsel must be available to provide appropriate guidance. There should also be legal protections barring the use of statements made during mediation sessions in a later prosecution if the mediation fails and the defendant is returned to the criminal justice system. Defendants entering into a restorative justice program should not be required to sacrifice their constitutional rights. One broader concern about restorative justice impacts on the rights of

the accused is that mediated settlements may result in drastically different outcomes for people who committed similar crimes.¹⁹⁷ Even where offenders voluntarily agree to accept the restorative measures, a grave disparity in outcomes could undermine public perceptions of equal justice.

A third set of questions on restorative justice for hate crime relates to the impact on communities who share a victim’s identity and on society at large. One question is how restorative justice can adequately address communal injuries related to hate crime cases. If the direct victim of a hate crime opts into a restorative justice solution but members of the community want to see a traditional criminal punishment, how can these communal interests be addressed? Who decides who speaks for the community? Several restorative justice practices contemplate community participation in mediation or sentencing circles. How are these participants selected?¹⁹⁸ These are difficult questions, so at a minimum, restorative justice practitioners should conduct outreach with groups representing the affected community before reaching these decisions, at least in cases that have attracted significant interest beyond the immediate victims.

An important societal question relates to the impact of restorative justice programs on general deterrence—whether the establishment and publicization of such programs will affect the likelihood of *other* individuals committing hate crimes. While research discussed earlier indicates that increasing already long criminal sentences does not improve deterrence, a crucial but unanswered question is whether greater public knowledge that some hate crime offenders may avoid imprisonment altogether, as a result of restorative justice diversions, will embolden others to commit them. Even if individual offenders who go through restorative justice processes experience them as rigorous and transformative—making those individuals less likely to reoffend—it is not clear that the public at large, including other potential offenders, will understand them as such. Restorative

justice programs must clearly communicate that such programs do not allow offenders to “get off easy,” especially when these programs are applied to hate crimes.¹⁹⁹

Restorative justice programs must clearly communicate that such programs do not allow offenders to “get off easy,” especially when these programs are applied to hate crimes.

Finally, the scaling up and expansion of restorative justice programs will present questions of cost. Restorative justice programs require a commitment of time and resources by all participants, particularly victims. On the other hand, it is clear that the costs of today’s mass incarceration system are enormous. The Bureau of Justice Statistics calculated the cost of the criminal justice system to be \$295 billion in fiscal year 2016, which included federal, state, and local expenditures for police protection, prosecution, courts, public defense, and corrections.²⁰⁰ The estimated economic burden of incarceration is more than three times higher, however. A study by Institute for Advancing Justice Research and Innovation measured the economic impacts on incarcerated people, their families, and communities, which included costs for productivity loss, visitation, evictions, divorce, adverse health consequences, and child welfare, among other factors, to estimate an “aggregate burden” \$1.014 trillion per year. Most of these expenses fall on innocent families and communities.²⁰¹ The promise of restorative justice in relieving some of these economic losses must be factored into any cost-benefit analysis.

PATH FORWARD

Restorative justice in the hate crime context shows promise as a means of helping victims heal, providing accountability for offenders, and

allaying the broader impact of hate crimes on communities—while reducing the reliance on criminal punishment and imprisonment as a solution. Still, difficult questions remain, and the current application of restorative justice to hate crimes is too limited—and too understudied—to permit broad conclusions. Answers to these questions will require greater experimentation by local governments, nonprofits, and local communities—perhaps with the support of federal funding—as well as rigorous assessment of these programs. The models, examples, and analysis provided here provide a starting point for those seeking to redress the distinct harms associated with hate crime in a manner that addresses some of the traditional model’s shortcomings.

SOCIAL SERVICES FOR TARGETED COMMUNITIES

Hate crimes cause distinct harms to survivors and their communities, which may warrant special social services to respond to such harms. The traditional hate crime model, as discussed in Part II, does not focus on “making victims whole,” while enforcement challenges undercut the intended expressive message. This section discusses five types of programs that may help support hate crime survivors while expressing societal recognition of the distinct harm of hate crimes: (1) victim compensation programs; (2) victim advocate programs; (3) culturally competent mental health services; (4) security improvements for targeted institutions; and (5) solidarity initiatives spanning affected communities.

GOVERNMENT-FUNDED VICTIM COMPENSATION PROGRAMS

One way to support hate crime victims and their communities would be to expand existing compensation programs for crime victims. Every state in the U.S. runs programs to compensate victims of certain crimes.²⁰² According to the U.S. Department of Justice’s Office for Victims of Crime, compensation “may include fees for medical

and dental care, counseling, funeral and burial expenses, and lost wages and income.”²⁰³ Victims can apply for compensation if their economic loss is not already covered by their insurance or by another government program.²⁰⁴ While these programs can provide critical support for victims, some challenges arise in the hate crime context. Advocates must therefore explore avenues to expand and change these programs to better serve hate crime victims.

The Challenges of Victim Compensation Programs

Legal scholars Shirin Sinnar and Beth Colgan have discussed several limitations of applying victim compensation funds in the hate crime context.²⁰⁵ First, eligibility requirements for victim compensation do not cover the breadth of hate crimes because victim compensation programs are generally limited to violent crimes.²⁰⁶ Some programs explicitly cover hate crime, but are unclear as to whether *all* types of hate offenses are covered.²⁰⁷

Second, eligibility requirements that force victims to cooperate with police and report crimes—often within strict time windows—fail to recognize many hate crime victims’ mistrust of authorities. States generally require that a victim report a crime in order to be eligible for compensation.²⁰⁸ Many states also impose strict time limits for reporting. In New York, victims seeking compensation have one week from the time of the crime to report it to law enforcement authorities.²⁰⁹ In Florida, victims have just 120 hours to report.²¹⁰ In addition to reporting requirements, states generally also require victims seeking compensation to cooperate with the police and prosecutors.²¹¹ These requirements fail to recognize that hate crimes are vastly underreported in part because of the deep mistrust of police by communities traditionally victimized by hate crime.²¹²

Third, compensation is usually limited to victims and their dependents.²¹³ This means that broader community members affected by hate crime are

ineligible for compensation.²¹⁴ As Part II outlines, hate crimes not only affect direct victims, but can also have deep psychological effects on members of the community to which the victim belongs.

Fourth, victim compensation programs are largely funded through state and federal fines and fees paid by individuals convicted of crimes.²¹⁵ According to the White House Council of Economic Advisers, such fines and fees can force “the indigent formerly incarcerated to make difficult trade-offs between paying court debt and other necessary purchases,” and may also increase recidivism by compelling individuals to return to crime to pay their debts, among other issues.²¹⁶ The increased use of fines and fees more generally has been a response to higher criminal justice spending in the context of mass incarceration,²¹⁷ a phenomenon that disproportionately affects people of color.²¹⁸ Victim compensation funds thus hide a sad and alarming irony: they aim to increase justice for victims, yet they draw revenue from serious injustices against the poor and individuals of color.

Expanding Victim Compensation to Address Hate Crime Victims’ Needs

Several changes to victim compensation programs would make these programs more just and better suited to the needs of hate crime victims. First, states should explicitly add hate crimes to the categories of offenses eligible for compensation. For instance, New York makes eligible victims of “hate crime charges who have not been physically injured.”²¹⁹ This serves an expressive function regarding the significance of hate crime and acknowledges the psychological harms that hate crime victims endure. States should also explicitly compensate property crimes in the hate crime context.

Second, states should also ease restrictions on reporting crimes and on cooperating with police. At a minimum, states should eliminate strict time limits, thus allowing time for reticent and traumatized victims to report a crime. Ohio, for example, recently removed the 72-hour time

limitation from its reporting requirement.²²⁰ Beyond eliminating time limits, compensation programs should also consider alternatives to police reporting requirements. For example, state compensation programs could fund community programs to collect data about hate crime and to provide victim compensation to individuals directly. In the aftermath of a deadly hate attack in Portland, Oregon, the city announced a \$350,000 grant for community groups “to act as a point of contact for those who have experienced hate crimes, to train individuals or groups [on] how to resist hate crime, or to gather, analyze and publicize data about such crimes.”²²¹ With the city’s support and engagement, community groups created Portland United Against Hate (PUAH), which includes a community-run reporting system for hate crimes.²²² Victim compensation programs can fund such initiatives both to collect data on hate crime and to provide compensation to individuals reluctant to report through law enforcement channels.²²³

Third, states should consider expanding eligibility for compensation beyond immediate victims and their dependents, to provide support for others who share a victim’s identity who can demonstrate an impact from the hate crime.

Finally, states should decrease reliance on fines and fees as revenue for victim compensation programs and undo the disproportionate impact on the poor and communities of color. States could work with non-profit organizations to find alternatives to traditional fines and fees. In New York, for example, the Fines and Fees Justice Center has advocated to end tax caps that increase reliance on fines and fees and to encourage the use of means-adjusted fines.²²⁴ The American Bar Association (ABA) has also developed a set of guidelines to ensure “that fines and fees are fairly imposed and administered and that the justice system does not punish people for the ‘crime’ of being poor.”²²⁵

Thus, state victim compensation programs can better address the harm from hate crime by adding hate crimes to categories of offenses eligible for compensation, broadening the definition of eligible victims, removing requirements that victims report offenses to law enforcement, and ensuring that funding for such programs does not rely on unjust fines and fees levied on convicted individuals.

VICTIM ADVOCATE PROGRAMS TO SUPPORT HATE CRIME SURVIVORS

Victim advocates can help hate crime survivors heal in the aftermath of incidents, addressing a shortcoming with the traditional hate crime legal model, which focuses on punishing the offender rather than helping targets overcome the harm they experienced. In addition, for survivors who pursue a criminal legal process, the support of victim advocates can help them navigate that process, including the challenges that often prevent the successful identification and prosecution of a crime as a hate crime.

Victim advocate programs offer various types of resources and assistance, such as providing emotional support, helping with victim compensation applications, and sharing information about a victim’s legal rights and options within the criminal legal system.²²⁶ There are generally three ways that victim advocate services are offered. First, many states and local governments make advocates available through police departments or prosecutors’ offices.²²⁷ Second, some governments provide these services through independent government agencies.²²⁸ And finally, national and local nonprofit community organizations also provide advocate services to individuals who are harmed by crime.²²⁹

Victim advocate programs within community organizations may offer some distinct advantages over programs located within law enforcement or other government offices. First, community organizations are positioned to develop expertise

and sensitivity in working with their respective constituencies. Dozens of community organizations provide victim advocate services to victims of bias- or hate-motivated crime.²³⁰ Most of these organizations serve survivors based on shared identities, which fosters greater trust and comfort among survivors. By contrast, few government offices appear to distinguish between general victim advocate services and services specific to survivors of hate crime, although some do exist. Chicago, for example, provides support specific to hate crime through its Commission on Human Relations, which makes available staff and volunteers to “accompany victims to court hearings, visit hate crime victims, and provide referrals for support services.”²³¹ A 2003 analysis by the Urban Institute noted that one approach to better serve “underserved” victim groups—including hate crime victims—would be to “develop victim service programs within other types of organizations that currently work with underserved populations.”²³²

Second, given that many survivors of hate crimes are hesitant to work with law enforcement, community organizations may be able to offer a welcoming environment to a wider array of survivors.²³³ Local community organizations are also able to support those who suffer from hate incidents that do not constitute crimes, such as hate speech that does not rise to the level of a criminal threat or assault. As one victim advocate organization in San Francisco notes, survivors of such non-criminal hate incidents “may not receive much affirmation of their experience from the wider community. This lack of affirmation or acknowledgment may increase isolation, lower self-esteem, and can leave someone vulnerable to further violence.”²³⁴

Moreover, the 2003 Urban Institute report suggests that the isolation of victim advocates in government offices may diminish their effectiveness. That is, victim advocates in law enforcement or prosecutors’ offices often “work alone and are the only person in the office focused on the victim.”²³⁵ Some offices even use their victim-assistance staff members

for “clerical functions rather than true victims services.”²³⁶ Moreover, government offices providing support to crime survivors have historically failed to be adequately sensitive to the particularized needs of survivors—often due to cultural barriers or outright bias.²³⁷ Relatedly, advocates within nonprofits may be better able to protect the confidentiality of information shared by survivors, as compared to government advocates. Indeed, the Urban Institute report notes that “collaboration between public-based advocates and non-profit advocates is difficult because public-based advocates may not be able to protect the confidentiality of the victim’s disclosures.”²³⁸

That said, local community organizations are also limited in some substantial ways. Similar to victim compensation programs, the source of funding for these programs can present difficult questions. Some nonprofit organizations that provide victim advocate services to hate crime survivors receive funding from the Victims of Crime Act (VOCA) Victim Assistance Formula Grant Program, which comes with restrictions.²³⁹ And grants supporting victim advocate programs may come from the Crime Victims’ Fund (CVF), which draws on fines and fees assessed against convicted individuals.²⁴⁰

On top of the specific concern around criminal fines and fees as a funding source, victim advocate programs struggle to receive adequate support in general. The Urban Institute report identified the dependence of community organizations on interns to meet staffing needs and the limited number of staff fluent in foreign languages as specific concerns.²⁴¹ Funding restrictions also prevent groups from successfully reaching survivors.²⁴² In addition, organizations serving particular racial, religious, or LGBTQ communities may be established in larger cities, but in smaller cities or rural communities, such groups may not exist at all.

Thus, victim advocacy in the hate crime context would benefit from greater public funding of community organizations to provide sensitive and

identity-specific support. Increased advocacy around divesting from police may provide an opportunity to direct funds to community groups. Policymakers should also ensure that cooperation with law enforcement or prosecution does not serve as a barrier to victim advocacy services, that advocates are trained to handle cases with sensitivity to the particular needs and cultural contexts of victims, and that availability of funding does not depend on the collection of fines, fees, or other costs assessed by the criminal legal system without a meaningful determination of ability to pay.²⁴³

Barriers to accessing mental health care for racial and ethnic minorities include lack of insurance, language issues, unavailability of culturally competent mental health care providers, and other issues.

CULTURALLY COMPETENT MENTAL HEALTH SUPPORT

Culturally sensitive and tailored mental health care is essential to adequately respond to the harms of hate crime and to address the particular health needs of hate crime victims and affected community members. As Part I explains, hate crimes frequently inflict psychological harm on both direct victims and community members who identify with the victim. According to a 2019 report, hate crime victims may suffer from post-traumatic stress, a diminished “sense of belonging,” and a lack of “trust in relationships and social institutions.”²⁴⁴ Community members also experience psychological harm if they “perceive prejudice” against a member of their group, particularly depending on how strongly they identify with the shared group identity.²⁴⁵ Compounding the psychological

consequences of hate crime, minority groups traditionally victimized by hate crime already face particular challenges in terms of mental health.²⁴⁶

Both racial minorities and LGBTQ people face serious barriers to receiving care. Barriers to accessing mental health care for racial and ethnic minorities include lack of insurance, language issues, unavailability of culturally competent mental health care providers, and other issues.²⁴⁷ The American Psychiatric Association underscores the problems that lack of culturally competent mental health care can cause, including underdiagnosis and misdiagnosis of conditions in racial and ethnic minority groups.²⁴⁸ Many members of the LGBTQ community have also faced stigma when seeking care, leading them to postpone or abandon care altogether.²⁴⁹

The psychological challenges already facing the populations affected by hate crime and the barriers to care underscore the need for culturally competent mental health care in the hate crime context. The Council of National Psychological Associations for the Advancement of Ethnic Minority Interests highlights the characteristics of a culturally informed mental health practice: professionals’ awareness of their own bias, their knowledge of clients’ differing worldviews, and their flexibility in incorporating culturally informed therapeutic practices and approaches in their treatment.²⁵⁰ Mental health scholars also outline the importance of “structural competency” to addressing discrimination and hate crime in mental health treatment.²⁵¹ This approach involves not only creating a safe environment for individual clients and ensuring that care does not re-traumatize patients, but also fostering partnerships with community organizations to refer patients for legal or other services and encouraging broader community actions to combat hate or discrimination.²⁵²

Many organizations are working to increase access to culturally competent mental health care for hate crime victims. For example, some organizations are offering trainings for mental health professionals on caring for victims of hate crime and hate incidents. Portland United Against Hate (PUAH) trains mental health providers on how to address clients' experiences of hate, "[i]ncorporate a multicultural and social justice orientation to the work," and "[a]dapt trauma-informed care within the context of hate incidents."²⁵³ These trainings were developed in conjunction with a university and include a 54-page guide for mental health professionals on how to respond to hate.²⁵⁴ PUAH also offers a shorter training for community members seeking guidance on how to respond to hate incidents through a trauma-informed lens.²⁵⁵ In 2019, 89 community leaders, mental health professionals, and others attending these trainings, with over 80% of attendees rating the trainings as "excellent" or "very good" and over 80% expressing interest in follow-up programming.²⁵⁶

Other organizations are modeling culturally competent mental health care through peer-led programs catering to specific communities. Community United Against Violence (CUAV), a San Francisco organization dedicated to supporting and empowering LGBTQ individuals,²⁵⁷ provides peer counseling for members of the LGBTQ community experiencing violence, whether in the form of domestic violence, hate violence, or state violence.²⁵⁸ CUAV also provides group programs specifically for survivors of anti-LGBTQ hate violence, including a 10-week workshop "using creativity as a tool for both healing and celebrating [participants'] unique identities."²⁵⁹ The Bay Area Khalil Center, which combines "the application of traditional Islamic spiritual healing methods [with] modern clinical psychology,"²⁶⁰ offers therapy sessions with Muslim practitioners familiar with religious concepts or contexts relevant to their clients.²⁶¹ Therapists with a shared identity and understanding of their clients' realities may be better equipped to address the needs of some clients.²⁶²

Other organizations are working to support not only individuals directly affected by hate crime, but also community members.²⁶³ For example, the YWCA of Kalamazoo—an organization dedicated to "eliminating racism and empowering women"²⁶⁴—offers both individual and group therapy to support "anyone who has directly or indirectly been impacted by a hate crime."²⁶⁵ Other organizations have worked in more creative ways to address the collective fear and distress that hate crimes breed. The Maryland chapter of the Council on American-Islamic Relations, for example, co-sponsored a self-defense workshop for Muslim women and girls in response to a "post-election spike in hate incidents targeting Muslim women."²⁶⁶ The workshop aimed to ease the feelings of fear and anxiety that hate incidents cause in the broader community.²⁶⁷

Confidential telephone support may be another way to support victims of hate crime who are wary of seeking in-person care or those who live in geographical areas where culturally competent mental health services do not exist. Hesitation to seek care is an ongoing barrier for hate crime victims, many of whom face the social and cultural stigma of mental health conditions.²⁶⁸ Even for those who desire in-person mental health care, culturally competent services may be too distant or too expensive. Becky Monroe described how the Lawyers' Committee for Civil Rights' Stop Hate project tried to secure an African American therapist for an African American woman in Mississippi in need of assistance, but could locate no one affordable within four hours of her home—suggesting the potential value of a telemedicine alternative.²⁶⁹

An example in the sexual assault context could serve as a model for establishing a hate crime hotline. The National Sexual Assault Telephone Hotline provides survivors of sexual assault with confidential support from a trained staff member, including referrals for mental health support.²⁷⁰ Calls are routed to different affiliates depending on the caller's location; the affiliates "are organizations

or agencies dedicated to supporting survivors of sexual assault.²⁷¹ If a single nationwide hotline would not be feasible in the hate crime context, given the multiplicity of cultural competencies service providers would need to address hate crime victims, national hotlines run by organizations serving particular populations—such as LGBTQ or Latinx people—might provide more tailored support. Such telephonic support could reach individuals hesitant to seek in-person support as well as those in areas where in-person support is not available.

Mental health practitioners, non-profit organizations, and local and state governments all have a role in ensuring the mental welfare of both direct and indirect hate crime victims. By practicing cultural competence, mental health professionals can better support hate crime victims and avoid misdiagnosis and underdiagnosis of conditions. Practitioners can also partner with local advocacy organizations to better address the structural discrimination and obstacles their clients face. Organizations can support hate crime victims through training programs for mental health professionals and programs to provide culturally competent mental health care for both hate crime victims and members of the broader community suffering the effects of hate crime. Local and state governments can support victims by funding such initiatives.

SECURITY IMPROVEMENTS AND RESOURCES FOR TARGETED INSTITUTIONS

The federal government and several states have responded to hate violence by allocating public funds to enhance the security of frequently targeted

establishments. Many high-profile hate crimes in recent years have occurred in places of worship.²⁷² Mosques and Jewish institutions, for example, have been frequent targets of bias-motivated violence.²⁷³ A new California law aims to “improve the physical security of nonprofit organizations, including schools, clinics, community centers, churches, synagogues, mosques, temples, and similar locations that are at a high risk for violent attacks or hate crimes due to ideology, beliefs, or mission.”²⁷⁴ Other states have used similar language in establishing their programs.²⁷⁵ These programs seek to prevent hate crimes, allay community anxieties, and express public condemnation of bias-motivated violence.

At the federal level, the Department of Homeland Security’s Federal Emergency Management Agency (FEMA) operates the Nonprofits Security Grant Program (NSGP), which funds security enhancements at nonprofits that are “at high risk of a terrorist attack.”²⁷⁶ While this program is not explicitly tied to hate crime, there is substantial overlap in the organizations that would qualify.²⁷⁷ In 2020, the program was slated to provide up to \$90 million in grants to eligible organizations—\$50 million for nonprofits in urban areas and \$40 million for organizations outside of urban areas.²⁷⁸ Organizations apply through state agencies that administer the NSGP grant program, which are also responsible for informing eligible nonprofits of the availability of the funds.²⁷⁹

In addition to California, at least four other states have established security grant programs for organizations that are targeted by hate crime.²⁸⁰ Each of these states ties eligibility for funding to the likelihood that the organization could be targeted

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for hate crime and requires that the organization make some showing of how or why they are at risk. New York, for example, requests a “vulnerability assessment.”²⁸¹ State grant programs determine eligibility based on the protected categories in the state’s hate crime legislation²⁸² or federally protected categories.²⁸³

Most programs, including the federal NSGP program, do not require recipient organizations to spend their own money in implementing security enhancements funded by the grants, but some programs have a cost-sharing requirement.²⁸⁴ Programs generally allow for grant funds to go toward technology, equipment, personnel, and other resources to further safeguard the recipient from acts of violence. Some states administer these programs through the same office that administers NSGP funding—an arrangement that takes advantage of the fact that every state already has an agency designated to administer federal NSGP funding.²⁸⁵ Some states, however, choose to administer the programs separately.²⁸⁶

Benefits of Security Improvement Grant Programs

By alleviating anxieties and fears about violence, security enhancements for frequently targeted institutions directly address the community harm caused by hate crime. Broad community coalitions have supported legislation establishing security grant programs.²⁸⁷

While there appears to be little empirical research on the effectiveness of security enhancements for hate crime in particular, general studies of the effects of private security personnel and surveillance technology on crime rates are mixed.²⁸⁸ Community leaders have indicated that security improvements create peace of mind for community members in the wake of hate incidents, however. Cindy Watson, the executive director of the Jacksonville Area Sexual Minority Youth Network, after announcing bolstered security measures at the organization’s youth center following the Pulse Nightclub massacre, said, “What I want to do is encourage

people to have courage, to have a strong heart and to not be controlled by fear because the purpose of a hate crime is to incite fear in the hearts and minds of a large community.”²⁸⁹

In addition, by channeling public resources to affected institutions, these programs also emphasize the collective responsibility for hate crimes in society. Following Massachusetts Governor Charlie Baker’s signing of a state budget that included \$1.5 million for nonprofit security grants, one Jewish community leader made the case that the budget sent a powerful message “that government has the back of communities, communities of faith, communities of minorities, communities under attack, communities that are being persecuted. ...”²⁹⁰ Security enhancement programs thus may also serve the “messaging” function of current hate crime legislation.

Challenges and Limitations of Security Improvement Grant Programs

If security enhancements are not carefully implemented, however, such programs risk exacerbating existing tensions and anxieties. Many security improvements involve collaborating with law enforcement and other state and local government agencies. In fact, Maryland’s Protecting Against Hate Crimes program requires applicants to “describe how they will work collaboratively with Federal and State agencies and/or local partners as needed.”²⁹¹ Moreover, when grants are used to hire off-duty police officers to act as guards at religious institutions, the increased police presence can lead to greater surveillance of people of color. Some members of the Jewish community, for instance, have expressed concern that increased police patrols of synagogues in the wake of anti-Semitic attacks would exacerbate the “specific dangers faced by black people, who are viewed with suspicion and treated as potential criminals by the police. Increased security also fails to consider black Jews, who have been regarded as impostors, or potential criminals, who are not really Jewish and who do not belong in a synagogue.”²⁹²

Concerns about the uses of security grants arise in other contexts as well. For instance, most programs permit security grants to be used to install video cameras and other surveillance technology. But these technologies raise serious red flags for some minority communities. For instance, in 2016, San Diego installed 14,000 LED “smart” streetlights throughout the city equipped with cameras, mics, and sensors to collect data for city planning and traffic control and to provide the San Diego Police Department with raw video footage and other data.²⁹³ An analysis of the program found that “[m]any of the Mosques in the city of San Diego are under direct surveillance from these streetlights” and expressed concern that, given the involvement of Joint Terrorism Task Forces in the city, federal agencies could monitor the cameras, see who was entering and exiting mosques, and even pick up conversations among attendees.²⁹⁴ Given these issues, an Anti-Surveillance Coalition of civil rights and community leaders called on government officials to stop using smart streetlights until policy decisions involved the public and addressed these concerns.²⁹⁵

Justice Department and DHS violence prevention grant programs can also increase law enforcement surveillance of vulnerable communities more surreptitiously, triggering distrust. The Obama administration’s Countering Violent Extremism (CVE) grant program was an anti-terrorism program that targeted predominantly American Muslim communities. It provided teachers, public health officials, social workers, and community leaders with training to identify potentially “radicalized” individuals based on dubious indicators that treated common religious practices and the expression of political grievances as warning signs to be reported to law enforcement.²⁹⁶ Some CVE grant recipients ultimately refused the funds in the face of community opposition to these programs. The Trump administration expanded CVE grant programs to cover a wider range of violent activity, renaming them Targeted

Violence and Terrorism Prevention (TVTP) grants. According to the Privacy Impact Statement for the TVTP grant program, the DHS Office of Intelligence and Analysis is explicitly authorized to conduct security investigations of TVTP grant applicants, their organizations, boards of directors, members, and anyone who publicly associates with them.²⁹⁷ DHS claims that the authority to conduct such investigations is based on implied consent, but not all of those subjected to these security measures may be aware a TVTP application had been submitted. Dozens of civil rights and community organizations appealed to DHS to end the TVTP grant program.²⁹⁸

Given these concerns with the implementation of security measures, participation in the grant program should not require increased presence of law enforcement officers or the installation of surveillance technology.²⁹⁹ Some communities have developed resources to help make difficult decisions regarding protecting institutions without exacerbating the risks of surveillance. For example, the Council on American-Islamic Relations’ manual on “Best Practices for Mosque and Community Safety” provides several recommendations for community leaders working to safeguard Islamic institutions against bias-motivated violence and vandalism.³⁰⁰ In addition to addressing their own communities’ concerns, institutions should collaborate across racial, religious, and other lines to ensure that one institution’s attempt to bolster security does not inadvertently heighten insecurity for subsets of its own membership or others who live in the same neighborhoods.

An additional concern is that current eligibility requirements for security grants may disqualify highly targeted communities under models that rely on state statutory hate crime definitions. Funding eligibility in most existing security grant programs is tied to an institution’s risk of falling victim to hate crime.³⁰¹ That stipulation requires that the institution serve people who are covered by current

hate crime legislation. This requirement does not pose a problem for jurisdictions with robust hate crime coverage, but jurisdictions with limited hate crime definitions may leave out certain at-risk groups, especially LGBTQ communities, whose institutions and social spaces are frequent targets. One option, even for states with inclusive hate crime laws, is to require applicants to show a risk of bias-motivated violence without the wholesale exclusion of groups that are not included in hate crime legislation.³⁰²

Institutional security improvement grant programs enjoy wide support from affected communities and have the potential to serve some important objectives—in particular, mitigating community harms and risks. However, the effectiveness of these programs in serving these purposes in the hate crime context has not been subjected to any substantial study. Communities establishing such programs should take particular care not to require collaboration with law enforcement agencies as a condition of such grants, avoid security measures that heighten suspicion of marginalized people, and establish inclusive eligibility requirements that don't leave out targeted groups.

COMMUNITY SOLIDARITY INITIATIVES

Given concern that law enforcement responses to hate violence often fail to address, or even exacerbate, the problem, targeted communities have organized to find alternative mechanisms to address the unmet needs of survivors and build collective resilience. Community solidarity actions have taken different forms in the hate crime context, such as providing survivors a non-law enforcement mechanism to seek assistance, collecting data about the scope of hate violence, expressing community outrage at the crimes and advocating in support of impacted individuals and communities. Following the mass shooting at the Pittsburgh Tree of Life Synagogue, Jewish community leaders noted that the united support

they received across communities contributed to people feeling safe again.³⁰³ After recent anti-Asian attacks on elderly people in San Francisco and Oakland, community groups initiated interracial solidarity peace rallies, strolls through Chinatown to make Asian community members feel safe, bystander intervention trainings and cross-racial fundraising campaigns to support Asian American organizations.³⁰⁴

Establishing Non-Law Enforcement Hate Crime Reporting Mechanisms

As discussed, many hate crime victims are reluctant to report these incidents to police, so organizations have developed to assist survivors outside, or parallel to, the criminal justice system. The New York City Anti Violence Program was established in 1980 to address a growing number of hate crimes targeting the LGBTQ community. NYC AVP started as a confidential emergency hotline for LGBTQ victims of violence and harassment. It has expanded over the years to provide free counseling, legal services, and advocacy to LGBTQ and HIV-affected survivors of any type of violence, whether from hate incidents, domestic violence, sexual violence, or police violence.³⁰⁵ From July 1, 2017 to June 30, 2018, NYC AVP received over 3,100 hotline calls and provided services to 1,333 clients impacted by violence.³⁰⁶ By comparison, the New York Police Department, which has a dedicated hate crimes unit, reported a total of 310 hate crimes over the same period, 67 of which targeted LGBTQ victims.³⁰⁷ While this is not a perfect comparison because NYC AVP responds to multiple forms of violence, the volume of calls evidences the need for a non-law enforcement reporting mechanism in the LGBTQ community.

In addition to directly assisting hate crime survivors, non-law enforcement reporting mechanisms provide community organizations with a data source to measure the scope of the problem, both to raise public awareness and to assist advocacy efforts in support of victim communities. As anti-Asian hate

crimes increased during the Covid-19 pandemic, Asian Americans Advancing Justice – Asian Law Caucus, an organization formed in 1972 to address police harassment of Asian American youth in San Francisco, California, established its own hate crime tracker to measure the impact of these crimes.³⁰⁸ The AAAJ-ALC hate tracker webpage includes anonymized survivor stories that humanize the data into lived experiences, which is a powerful way to build empathy and spread awareness regarding the trauma resulting from racial harassment and violence. At a national level, the Stop AAPI Hate initiative was launched in March 2020 to report on anti-Asian hate incidents, identifying more than 6,000 incidents in its first year.³⁰⁹

Building Cross-Community Alliances in Response to Hate Crimes

Since hate crimes are often intended to inflict a communal injury, community building practices can be an effective way to restore social cohesion in the aftermath of bias-motivated violence. In addition to establishing a hate crime tracker, AAAJ-ALC also partnered with Communities Against Hate, a consortium of more than 35 civil rights and social justice organizations across the nation led by the Leadership Conference Education Fund and the Lawyers’ Committee for Civil Rights Under Law, to act as a force multiplier in collecting data across communities, directing survivors to services, and raising public awareness to the national scope and impact of hate violence.³¹⁰

Local coalition building is also underway. In New York City, NYC AVP joined with eight other community-based organizations at a 2019 rally to urge the City Council to support the Hate Violence Prevention Initiative, a grassroots effort to reduce hate violence through community-led programs. The rally organizers noted that the traditional law enforcement response to hate violence does not prevent these crimes, nor “educate and heal communities.” The Hate Violence Prevention Initiative proposed to establish community-based, culturally competent hate violence reporting mechanisms; community-led transformative justice

processes to hold accountable those that do harm and provide peer support and counseling to survivors; bystander trainings to empower community members to respond to hate violence and support survivors; and rapid incident response to provide support and education to impacted communities.³¹¹ The City Council funded \$1 million to support the initiative, and later that year Mayor Bill de Blasio established the Office of Hate Crime Prevention to work with communities to address the roots of hate violence.³¹²

Community-led efforts in the aftermath of hate violence can serve the expressive function that hate crime laws were intended to achieve. Regardless of the law enforcement response to highly publicized incidents of hate violence, community-led efforts also allow the public to express condemnation of the crime and solidarity with the impacted individuals and communities. After a series of deadly anti-Semitic attacks in New Jersey and New York, tens of thousands of people marched from Manhattan to Brooklyn in support of the Jewish community.³¹³

Building community solidarity is an important avenue for elevating public awareness of hate crime issues and creating healing opportunities for victims and communities. Government support for these community-led initiatives may be a more effective way to respond to hate violence than re-investments in law enforcement efforts that often create more division than unity. Where hate crimes are intended to isolate and alienate targeted communities, programs designed to build social cohesion may provide a more effective response.

Conclusion

Over the last several decades, the U.S. Congress and most state legislatures have responded to public concerns about bigoted violence targeting minority communities by enacting hate crime laws that increased criminal penalties for a wide array of bias-motivated crimes. Many of these laws have been on the books for decades, but only a small percentage of law enforcement agencies acknowledge that hate crimes occur within their jurisdictions, and they report just a fraction of the bias crimes consistently documented in crime victim surveys. The persistent lack of enforcement of hate crime laws undermines the expressive purpose in passing them.

The primary impediments to a more effective law enforcement approach to hate crimes—including the distrust of police in many of the impacted communities and the reluctance of many in law enforcement to acknowledge these crimes in federal reporting—are unlikely to be resolved over the short term. As a result of these and other concerns, affected communities are seeking more effective responses to hate crimes. Some have begun experimenting with alternative approaches better designed to redress the harms inflicted by these crimes and empower resilience within targeted communities. This report examined these alternative approaches, documented the available evidence supporting them, and raised potential issues of concern. The purpose was not to advocate for or against any particular model or methodology, but rather to provide communities seeking to implement alternative responses to hate crimes with information they can use to design effective programs and avoid potential pitfalls.

The alternative models studied fall into two categories: restorative justice programs and social service programs designed to assist impacted communities. These models can be implemented separately or together and can operate either as an alternative to prosecution in the criminal

justice system or as a parallel process designed to address unmet needs of impacted persons and communities.

Restorative justice programs are designed to identify and repair the individual and community harms caused by hate crimes, while demanding meaningful accountability for those who cause harm. Existing restorative justice programs have shown promise in providing more satisfying outcomes for impacted persons and decreasing recidivism among offenders, but the existing research examining the effectiveness of such programs *in the hate crimes context* evaluated programs outside the U.S. One of the primary concerns with implementing restorative justice programs, particularly when conducted in lieu of prosecution, is ensuring that participation by both victims and offenders is sincere and uncoerced.

Directing social services to individuals and communities impacted by hate violence is another method of restoring a sense of security, support, and well-being. Governments, individuals, and communities can invest in programs that provide compensation, professional support, and mental health services for survivors and others affected by hate crimes, including programs run by community

groups serving particular racial, religious, or LGBTQ communities. Grant programs can also enhance security at frequently targeted gathering places and institutions, if designed carefully to avoid the unintended consequences of government or private surveillance. Building stronger, inclusive, and caring communities can be a bulwark against hate violence.

Finally, this report demonstrates the need for greater investments in alternatives to the traditional law enforcement approach to hate crimes, to allow communities to experiment with these and other methodologies that might more effectively mitigate the harms they inflict. These programs should be subjected to rigorous study, to ensure they are implemented with the necessary attention to the constitutional rights of accused parties and the safety and well-being of impacted individuals and communities.

Appendix

The following individuals graciously participated in the March 6, 2020 Convening at Stanford Law School on “Empowering Communities in the Face of Hate Crimes.” The convening was hosted by Professor Shirin Sinnar, Brennan Center Fellow Mike German, and a team of Stanford Law students.

This report benefited greatly from the insight of participants, but represents the views of its authors alone.

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8. Becky Monroe, Director, Divided Communities Project
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10. Arjun Sethi, Georgetown Law, Activist, Author of American Hate
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16. Eesha Ramanujam, Senior Campaign Researcher, Color of Change
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ENDNOTES

- 1 The Stanford Law School students enrolled in the Policy Lab were Arielle Andrews, Sam Becker, Tyler Bishop, Lauren Martin, Benjy Mercer-Golden, Mariel Pérez-Santiago, and Tierra Rogers. In addition, Kai Wiggins provided invaluable assistance as a research assistant to the project.
- 2 Terry A. Maroney, Note, *The Struggle Against Hate Crime: The Movement at a Crossroads*, 73 N.Y.U. L. REV. 564, 568-78 (1998); VALERIE JENNESS & RYKEN GRATTEY, MAKING HATE A CRIME: FROM SOCIAL MOVEMENT TO LAW ENFORCEMENT 26-32 (2001).
- 3 John White, *His Life Cut Short, Vincent Chin is Remembered for What Might Have Been*, Nat. Pub. Radio, June 23, 2017; Becky Little, *How the 1982 Murder of Vincent Chin Ignited a Push for Asian American Rights*, history.com, May 5, 2020.
- 4 For an extended discussion of this issue, see Faiza Patel, *New Domestic Terrorism Laws Are Unnecessary for Fighting White Nationalists*, BRENNAN CTR. FOR JUST. (Oct. 2, 2019), <https://www.brennancenter.org/our-work/research-reports/new-domestic-terrorism-laws-are-unnecessary-fighting-white-nationalists>; Francesca Laguardia, *Considering a Domestic Terrorism Statute and Its Alternatives*, 114 Nw. U. L. Rev. 1061 (2020), <https://scholarlycommons.law.northwestern.edu/nulr/vol114/iss4/4>; Shirin Sinnar, *Separate and Unequal: The Law of “Domestic” and “International” Terrorism*, 117 MICH. L. REV. 1333, 1394-1404 (2019), <https://repository.law.umich.edu/cgi/viewcontent.cgi?article=2654&context=mlr>.
- 5 *Hate Crimes*, FED. BUREAU OF INVESTIGATION, <https://www.fbi.gov/investigate/civil-rights/hate-crimes> (last visited Jan 27, 2020). These categories are practically equivalent to the protected characteristics enumerated in the Matthew Shepard and James Byrd, Jr., Hate Crimes Prevention Act, 18 U.S.C. § 249, which prohibits violent criminal offenses committed because of actual or perceived race, color, religion, national origin, gender, sexual orientation, gender identity, or disability.
- 6 *See State Hate Crimes Statutes*, BRENNAN CTR. FOR JUST., <https://www.brennancenter.org/our-work/analysis-opinion/state-hate-crimes-statutes> (last updated July 2, 2020). Another more recent development in protected categories is the introduction, in some states, of so-called “Blue Lives Matter” laws to protect police. *See* Julia Craven, *32 Blue Lives Matter Bills Have Been Introduced Across 14 States This Year*, HUFFPOST (Dec. 11, 2017), https://www.huffpost.com/entry/blue-black-lives-matter-police-bills-states_n_58b61488e4b0780bac2e31b8. Critics of such laws note that they are politically motivated, that they are redundant given the existing protections for law enforcement in all states, and that they dilute the meaning of a hate crime. *Id.*
- 7 *See* FED. BUREAU OF INVESTIGATION, *supra* note 5; Rob Kuznia, *As Hate Crime Laws Expand, Who to Exclude as Victims?*, WASH. POST (Sept. 10, 2019), https://www.washingtonpost.com/national/as-hate-crime-laws-expand-who-to-exclude-as-victims/2019/09/03/796fe814-bd30-11e9-a5c6-1e74f7ec4a93_story.html.
- 8 Wesley S. McCann & Nicolas Pimley, *Eliminating Extremism: A Legal Analysis of Hate Crime and Terrorism Laws in the United States*, TERRORISM & POL. VIOLENCE 20-21 (2019) (concluding from Uniform Crime Reports data published from 1992 to 2016 that close to 32% of reported hate crimes involved vandalism or property destruction, 30% involved intimidation, and about 30% were classified primarily as simple or aggravated assault). The FBI has defined intimidation to mean “unlawfully plac[ing] another person in reasonable fear of bodily harm through the use of threatening words and/or other conduct, but without displaying a weapon or subjecting the victim to actual physical attack.” UNIF. CRIME REPORTING PROGRAM, FED. BUREAU OF INVESTIGATION, NIBRS OFFENSE DEFINITIONS 2 (2012), <https://ucr.fbi.gov/nibrs/2012/resources/nibrs-offense-definitions>. For reasons explained in Section I.C., UCR statistics are not an accurate measure of the actual incidence of hate crimes. *See also* CAL. STATE AUDITOR, HATE CRIMES IN CALIFORNIA: LAW ENFORCEMENT HAS NOT ADEQUATELY IDENTIFIED, REPORTED, OR RESPONDED TO HATE CRIMES 10 (2018) (reporting that, based on California Department of Justice reports on hate crimes, “the most common types of hate crimes [from 2007-2016] were destruction of property, damage to property, and vandalism, followed by intimidation, simple assault, and aggravated assault.”).
- 9 2019 Hate Crime Statistics, FBI, <https://ucr.fbi.gov/hate-crime/2019/topic-pages/incidents-and-offenses>.
- 10 *See R.A.V. v. St. Paul*, 505 U.S. 377 (1992).
- 11 *See, e.g.*, Jack Levin, *Hate Crimes: Myths and Realities*, 7 INT’L J. DIVERSITY ORGS., CMTYS. & NATIONS 81, 83 (2007) (“[N]o more than 5% of all hate crimes in the United States are committed by the members of organized groups.”). *See also* Matt E. Ryan & Peter T. Leeson, *Hate Groups and Hate Crime*, 31 INT’L REV. L. & ECON. 256, 262 (2011) (“Contrary to conventional wisdom, our analysis finds little evidence that hate groups are related to hate crime in the United States.”). For studies finding a correlation between hate crimes and the presence of hate groups, see Amy Adamczyk et al., *The Relationship Between Hate Groups and Far-Right Ideological Violence*, J. CONTEMP. CRIM. JUST. (2014), <https://www.start.umd.edu/publication/relationship-between-hate-groups-and-far-right-ideological-violence>; and Sean E. Mulholland, *White Supremacist Groups and Hate Crime*, 157 PUB. CHOICE 91 (2013), <https://jstor.org/stable.42003194>.
- 12 Jack McDevitt et al., *Hate Crimes Offenders: An Expanded Typology*, 58 J. SOC. ISSUES 303 (2002). This influential study posed two additional categories of offenders: “defensive” offenders who see other groups as a threat to a certain way of life, and “retaliatory” offenders seeking revenge for perceived past harms. Although it is difficult to see how these categories represent distinct rather than overlapping motivations, the broader point is that the motives of offenders may vary considerably.
- 13 Mark A. Walters et al., *Causes and Motivations of Hate Crime*, EQUAL. & HUM. RTS. COMM’N (2016), <https://www.equalityhumanrights.com/sites/default/files/research-report-102-causes-and-motivations-of-hate-crime.pdf>. Although this study was conducted by an international team, its analysis drew in part on U.S. research. *See also* JEANNINE BELL, HATE THY NEIGHBOR: MOVE-IN VIOLENCE AND THE PERSISTENCE OF RACIAL SEGREGATION IN AMERICAN HOUSING (2013) (discussing vandalism, harassment, and other hate crimes targeting racial minorities who move in to white neighborhoods).
- 14 MADELINE MASUCCI & LYNN LANGTON, BUREAU OF JUST. STATS., HATE CRIME VICTIMIZATION 2004-2015, 7 (2017), <https://www.bjs.gov/content/pub/pdf/hcv0415.pdf> (showing that, for violent hate crimes recorded in the National Crime Victim Surveys (NCVS) from 2011 to 2015, 15.4% of alleged offenders 17 or younger, 16.7% were between 18 and 29, and 43.3% were 30 or older—while the remainder committed crimes as part of a group, or their ages were not known by the victim; the age characteristics for reported violent hate crime offenders are roughly consistent with those of reported violent non-hate crime offenders, though according to the NCVS, offenders aged 18-29 account for a significantly smaller percentage of reported violent hate crimes than reported violent non-hate crimes.). As with the UCR data, the accuracy of the NCVS data is not entirely reliable, as discussed below. *See also* MASS. EXEC. OFF. OF PUB. SAFETY & SECURITY, HATE CRIME IN MASSACHUSETTS 2017, 20, tbl. 8 (Dec. 2018), <https://www.mass.gov/files/documents/2018/12/13/2017%20MA%20Hate%20Crime%20Report.pdf> (known offenders representing every age group in Massachusetts except “under 10”).

- 15 See 2019 Hate Crime Statistics: Known Offender's Race, Ethnicity, and Age, 2019, FED. BUREAU OF INVESTIGATION, <https://ucr.fbi.gov/hate-crime/2019/topic-pages/offenders> (last visited Jan. 24, 2021).
- 16 Edward Dunbar, *Symbolic, Relational, and Ideological Signifiers of Bias-Motivated Offenders: Toward a Strategy of Assessment*, 73(2) AM. J. ORTHOPSYCHIAT. 203 (2003), <http://edunbar.bol.ucla.edu/papers/symbolicrelational.pdf> (finding that nearly 60% of sample of 58 individuals convicted of a hate crime had a history of substance abuse and more than 20% had received prior psychiatric treatment).
- 17 Racial and ethnic characteristics of reported hate crime offenders and victims are considered elsewhere in the report. See discussion *infra* Section II.B.4.
- 18 FED. BUREAU OF INVESTIGATION, *supra* note 5.
- 19 See Gregory M. Herek et al., *Psychological Sequelae of Hate-Crime Victimization Among Lesbian, Gay, and Bisexual Adults*, 67 J. CONSULTING & CLINICAL PSYCHOL. 945, 949-50 (1999), <https://psycnet.apa.org/fulltext/1999-01811-012.pdf>; JENNY PATERSON ET AL., UNIV. OF SUSSEX, THE SUSSEX HATE CRIME PROJECT 1 (2018), <https://www.sussex.ac.uk/webteam/gateway/file.php?name=sussex-hate-crime-project-report.pdf&site=430> <https://www.sussex.ac.uk/webteam/gateway/file.php?name=sussex-hate-crime-project-report.pdf&site=430> (noting that “[h]ate crimes, whether experienced directly, indirectly, through the media, in person or online were consistently linked to . . . [i]ncreased feelings of vulnerability, anxiety, anger, and sometimes shame” as well as “[b]eing more security conscious [and] avoidant”).
- 20 See Herek et al., *supra* note 19, at 949.
- 21 Press Release, Am. Psych. Ass’n, Statement of APA President in Response to Shooting at Pittsburgh Synagogue (Oct. 28, 2018), <https://www.apa.org/news/press/releases/2018/10/pittsburgh-shooting>.
- 22 *The Psychology of Hate Crimes*, AM. PSYCH. ASS’N, <https://www.apa.org/advocacy/interpersonal-violence/hate-crimes> (last visited Oct. 3, 2020) (citing Monique Noelle, *The Ripple Effect of the Matthew Shepard Murder: Impact on Assumptive Worlds of Members of the Targeted Group*, 46 AM. BEHAV. SCIENTIST 27 (2002); James G. Bell & Barbara Perry, *Outside Looking In: The Community Impacts of Anti-Lesbian, Gay, and Bisexual Hate Crime*, 62 J. HOMOSEXUALITY 98 (2015)).
- 23 Shannon K. McCoy & Brenda Major, *Group Identification Moderates Emotional Responses to Perceived Prejudice*, 29 PERSONALITY & SOC. PSYCHOL. BULL. 1005, 1015 (2003).
- 24 Barbara Perry & Shahid Alvi, *‘We Are all Vulnerable’: The In Terrorem Effects of Hate Crimes*, 18 INT’L REV. VICTIMOLOGY, Jan. 2012, at 57, 63-65.
- 25 *Id.* at 67-68.
- 26 For example, 18 U.S.C. § 245, which, according to the Congressional Research Service, was “the primary federal hate crimes statutes prior to the enactment of Section 249,” was enacted as part of the Civil Rights Act of 1968 and prohibits violent interference with an enumerated set of “federally protected activities.” Nathan James, CONG. RSCH. SERV., DEPARTMENT OF JUSTICE’S ROLE IN INVESTIGATING AND PROSECUTING HATE CRIMES (Sept. 17, 2019), <https://fas.org/sgp/crs/misc/IF11312.pdf>.
- 27 For commentary on the linkages among these and other recent high-profile acts of hate violence, see Jelani Cobb, *From Charleston to Pittsburgh, an Arc of Premeditated American Tragedy*, NEW YORKER (Nov. 1, 2018), <https://www.newyorker.com/news/dispatch/from-charleston-to-pittsburgh-an-arc-of-premeditated-american-tragedy>; John Eligon, *The El Paso Shooting, and the Racist Doctrine Behind It*, N.Y. TIMES (Aug. 7, 2019), <https://www.nytimes.com/2019/08/07/us/el-paso-shooting-racism.html>.
- 28 Experts have suggested a link between divisive political rhetoric and hate crime. See Michael Kunzelman & Astrid Galvin, *Trump Words Linked to More Hate Crime? Some Experts Think So*, ASSOC. PRESS (Aug. 7, 2019), <https://apnews.com/article/7d0949974b1648a2bb592cab1f85aa16>. Further, civil rights advocates have argued that policies advanced under the Trump Administration have negatively affected communities at risk of experiencing hate crimes and have even legitimized hate or intolerance. See, e.g., Letter from The Leadership Conf. on Civ. & Hum. Rts. et al. to John M. Gore, Acting Assistant Att’y Gen., U.S. Dep’t of Justice (Sept. 15, 2017), <https://civilrights.org/resource/post-charlottesville-hate-crime-summit-coalition-recommendations-department-justice> (“[I]t is disingenuous for this administration to espouse its commitment to addressing hate crimes, while also implementing policies that discriminate against and target communities of color, further marginalizing communities and promoting hate.”).
- 29 See Rachel Treisman, *FBI Reports Dip in Hate Crime, But Rise in Violence*, NPR (Nov. 12, 2019, 3:32 PM), <https://www.npr.org/2019/11/12/778542614/fbi-reports-dip-in-hate-crimes-but-rise-in-violence>; John Eligon, *Hate Crimes Increased for the Third Consecutive Year, F.B.I. Reports*, N.Y. TIMES (Nov. 13, 2018), <https://www.nytimes.com/2018/11/13/us/hate-crimes-fbi-2017.html>.
- 30 For a discussion of underreporting in official hate crime statistics, see Susan Bro & Haifa Jabara, Opinion, *Hate Crimes Are Slipping through the Cracks*, N.Y. TIMES (Aug. 12, 2019), <https://www.nytimes.com/2019/08/12/opinion/hate-crime-statistics-heather-heyer.html>.
- 31 *Uniform Crime Reporting (UCR) Program*, FED. BUREAU OF INVESTIGATION (last visited Oct. 9, 2020), <https://www.fbi.gov/services/cjis/ucr>; 34 U.S.C. 41305 (requiring Attorney General to collect annual hate crimes statistics).
- 32 *Data Collection: National Crime Victimization Survey (NCVS)*, BUREAU OF JUSTICE STATISTICS (last visited Oct. 9, 2020), <https://www.bjs.gov/index.cfm?ty=dcdetail&iid=245>.
- 33 MASUCCI & LANGTON, *supra* note 14.
- 34 *UCR Publications: Hate Crime Statistics*, FED. BUREAU OF INVESTIGATION (last visited Oct. 9, 2020), <https://www.fbi.gov/services/cjis/ucr/publications#Hate-Crime%20Statistics>.
- 35 Masucci & Langton, *supra* note 14, at 2.
- 36 *Id.* at 8.
- 37 For example, federal UCR guidelines recommend that law enforcement agencies use a multi-step review process for determining whether incidents are reportable as hate crimes. See CRIME STAT. MGMT. UNIT., FED. BUREAU OF INVESTIGATION, HATE CRIME DATA COLLECTION GUIDELINES AND TRAINING MANUAL 2-3 (2015), <https://www.fbi.gov/file-repository/ucr-ucr-hate-crime-data-collection-guidelines-training-manual-v2.pdf/view>.

- 38 For example, the Jeffersontown, Kentucky, Police Department did not report the fatal October 24, 2018, hate crime shooting of two Black shoppers at a grocery store because Kentucky’s hate crimes law does not cover the offense of murder. *Recognizing Hate: FBI Begins Counting Its Own Hate Crime Cases in Federal Data, Inaccurate Numbers Remain*, INVESTIGATE.TV (last visited Oct. 18, 2020), <https://www.investigatetv.com/fbi-reports-hate-crimes>.
- 39 See MASUCCI & LANGTON, *supra* note 14, at 7 (“[T]he NCVS is based on victims’ perceptions that a crime was motivated by bias because the offender used hate language, left hate symbols, or police confirmed that it was a hate crime.”).
- 40 *Id.* at 5.
- 41 See, e.g., Emma Keith et al., *Lack of Trust in Law Enforcement Hinders Reporting of LGBTQ Hate Crimes*, CTR. FOR PUB. INTEGRITY (Aug. 24, 2018), <https://publicintegrity.org/politics/lack-of-trust-in-law-enforcement-hinders-reporting-of-lgbtq-crimes> (stating that “chronic distrust between the LGBTQ community and police” contributes to systemic underreporting of hate crimes based on sexual orientation or gender identity); Frank S. Pezzella et al., *The Dark Figure of Hate Crime Underreporting*, AM. BEHAV. SCIENTIST 1, 6 (2019), <https://journals.sagepub.com/doi/full/10.1177/0002764218823844> (“[I]t is well understood that distrust and lack of confidence in the police are significant predictors of victim reporting of hate crimes for a number of marginalized groups protected under contemporary hate crime legislation.”); Jack McDevitt et al., *Improving the Quality and Accuracy of Bias Crime Statistics Generally: An Assessment of the First Ten Years of Bias Crime Data Collection*, in HATE AND BIAS CRIME: A READER 80 (Barbara Perry ed., 2003) (finding that the level of trust between the victim and the police can directly inhibit or encourage hate crime reporting).
- 42 *2018 Hate Crime Statistics: Incidents and Offenses*, FED. BUREAU OF INVESTIGATION (Nov. 12, 2019), <https://ucr.fbi.gov/hate-crime/2018/topic-pages/incidents-and-offenses> (reporting that only 2,026 of 16,039 law enforcement agencies participating in the Hate Crime Statistics program reported a hate crime incident in 2018). The number of U.S. law enforcement agencies participating in the UCR hate crime statistics program increased over time, from 11,354 in 1996 to 16,039 in 2018, while the rate of participating agencies that reported at least one hate crime has decreased. See UCR Publications: Hate Crime Statistics, FED. BUREAU OF INVESTIGATION, *supra* note 34.
- 43 See, e.g., Press Release, Anti-Defamation League, Washington, D.C., ADL Welcomes Release of Annual FBI Report; Urges Action by Congress, Police to Prevent and Respond to Hate Violence (Nov. 12, 2019), <https://dc.adl.org/news/adl-welcomes-release-of-annual-fbi-hate-crime-report-urges-action-by-congress-police-to-prevent-and-respond-to-hate-violence> (“[A]t least 85 cities with populations exceeding 100,000 residents either did not report any data to the FBI or affirmatively reported zero hate crimes.”).
- 44 BRENNAN CTR. FOR JUST., *supra* note 6.
- 45 STEPHEN M. HAAS ET AL., CRIM. JUST. STATISTICAL ANALYSIS CTR., WEST VIRGINIA, ASSESSING THE VALIDITY OF HATE CRIME REPORTING: AN ANALYSIS OF NIBRS DATA (2011), https://djcs.wv.gov/ORSP/SAC/Documents/ORSP_WV_Hate_Crime_Report.pdf.
- 46 See, e.g., Mallory Simon & Sara Sidner, *Heather Heyer’s Not on this FBI List. How Hate Crimes Become Invisible*, CNN (Aug. 12, 2019) <https://www.cnn.com/2019/08/12/us/charlottesville-heather-heyer-death-not-in-fbi-report-soh/index.html> (examining the causes of underreporting, including with respect to high-profile hate crimes, in official statistics). See also Ken Schwencke, *Why America Fails at Gathering Hate Crime Statistics*, PROPUBLICA (Dec. 4, 2017), <https://www.propublica.org/article/why-america-fails-at-gathering-hate-crime-statistics> (highlighting procedural errors and insufficient training).
- 47 COMMUNITIES AGAINST HATE, HATE MAGNIFIED: COMMUNITIES IN CRISIS (2019), <https://hatemagnified.org/CAH-hatemagnified2019.pdf>.
- 48 *Id.* at 7.
- 49 SOUTH ASIAN AM. LEADING TOGETHER, COMMUNITIES ON FIRE 6, 9 (2018), <https://saalt.org/wp-content/uploads/2018/01/Communities-on-Fire.pdf> (reporting a 64 percent increase in hate incidents against members of the South Asian, Muslim, Sikh, Hindu, Middle Eastern, and Arab communities in the year following the 2016 election); ANTI-DEFAMATION LEAGUE, AUDIT OF ANTI-SEMITIC INCIDENTS: YEAR IN REVIEW 2018 7 (2019) <https://www.adl.org/media/12857/download> (reporting anti-Semitic incidents in 2017 that amounted to “a 57% increase over the previous year, and the biggest annual jump since [the ADL] began tracking four decades ago.”).
- 50 Any new or alternative policy approach to hate crimes, many of which are discussed in Section IV, should incorporate best practices with regard to developing comprehensive reporting and data practices. By way of example, the city of Seattle recently audited its hate-crimes reporting and data practices and issued several findings and recommendations See MELISSA ALDERSON ET AL., SEATTLE OFFICE OF CITY AUDITOR, REVIEW OF HATE CRIME PREVENTION, RESPONSE, AND REPORTING IN SEATTLE: PHASE 2 REPORT (May 2019), https://www.seattle.gov/Documents/Departments/CityAuditor/auditreports/2017-09%20Hate%20Crimes%20Ph2_Final.pdf.
- 51 Avlana Eisenberg, *Expressive Enforcement*, 61 UCLA L. REV. 858, 860 (2014). See also *State Hate Crimes Statutes*, BRENNAN CTR. FOR JUST. (July 1, 2019), <https://www.brennancenter.org/our-work/analysis-opinion/state-hate-crimes-statutes>. The passage of new hate crimes statutes may have changed this number.
- 52 BRENNAN CTR. FOR JUST., *supra* note 6.
- 53 Eisenberg, *supra* note 51, at 881, 888.
- 54 Terry A. Maroney, Note, *The Struggle Against Hate Crime: The Movement at a Crossroads*, 73 N.Y.U. L. REV. 564, 568-78 (1998); VALERIE JENNESS & RYKEN GRATIET, MAKING HATE A CRIME: FROM SOCIAL MOVEMENT TO LAW ENFORCEMENT 26-32 (2001). See also CHRISTOPHER WALDREP, AFRICAN AMERICANS CONFRONT LYNCHING: STRATEGIES OF RESISTANCE FROM THE CIVIL WAR TO THE CIVIL RIGHTS ERA, 117-25 (2009) (arguing that the passage of hate crimes laws came about partly because of Democrats’ desire to “take back” tough-on-crime politics from Republicans).
- 55 *Wisconsin v. Mitchell*, 508 U.S. 476, 487-88 (1993) (justifying state penalty enhancement provision on assumption that hate crimes “inflict greater individual and societal harm” and the “[s]tate’s desire to redress these harms” through more severe punishment for offenders).
- 56 Heidi M. Hurd & Michael S. Moore, *Punishing Hatred and Prejudice*, 56 STAN L. REV. 1081, 1083-85 (2004).

- 57 See Eisenberg, *supra* note 51 (describing expressive justifications for hate crimes laws); Janine Young Kim, *Hate Crime Law and the Limits of Inculcation*, 84 NEB. L. REV. 846, 848 (2006) (“[T]he criminal law can and should be used as a tool for expressing society’s commitment to the norm against prejudice”); Dan M. Kahan, *The Anatomy of Disgust in Criminal Law*, 96 MICH. L. REV. 1621, 1641 (1998) (reviewing WILLIAM IAN MILLER, *THE ANATOMY OF DISGUST* (1997)) (“We expect punishment to voice our moral outrage, in addition to protecting us from harm and imposing deserved suffering.”).
- 58 For a classic example of such a critique, see JAMES B. JACOBS & KIMBERLY POTTER, *HATE CRIMES: CRIMINAL LAW & IDENTITY POLITICS* (1998).
- 59 MASUCCI & LANGTON, *supra* note 14.
- 60 Nathan Hall, *Policing Hate Crime in London and New York City: Some Reflections on the Factors Influencing Effective Law Enforcement, Service Provision and Public Trust and Confidence*, 18 INT’L REV. VICTIMOLOGY 73, 76 (2012).
- 61 See generally Matthew Desmond et al., *Police Violence and Citizen Crime Reporting in the Black Community*, 18 AM. SOCIO. REV. 857 (2016) (examining the effect of police misconduct on citizen crime reporting in Milwaukee). See also Elaine B. Sharp & Paul E. Johnson, *Accounting for Variation in Distrust of Local Police*, 26 JUST. Q. 157, 176 (2009) (“Black residents’ distrust of their police department is higher if they live in jurisdictions where this extreme manifestation of aggressive policing is relatively high, while Whites’ attitudes are not affected.”).
- 62 S.E. JAMES ET AL., NAT’L CTR. FOR TRANSGENDER EQUAL., *THE REPORT OF THE 2015 U.S. TRANSGENDER SURVEY 185-87* (2019), <https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf>. See also Emma Keith & Katie Gagliano, *Lack of Trust in Law Enforcement Hinders Reporting of LGBTQ Crimes*, CTR. FOR PUB. INTEGRITY (Aug. 24, 2018), <https://publicintegrity.org/politics/lack-of-trust-in-law-enforcement-hinders-reporting-of-lgbtq-crimes> (contextualizing survey findings with underreporting of LGBTQ hate crimes).
- 63 James J. Nolan & Yoshio Akiyama, *An Analysis of Factors that Affect Law Enforcement Participation in Hate Crime Reporting*, 15 J. CONTEMPORARY CRIM. J. 111, 114 (1999). See also Heather Zaykowski, *Racial Disparities in Hate Crime Reporting*, 25 VIOLENCE & VICTIMS 378, 390 (2010) (“Hate crime victims may also fear secondary victimization through humiliation or lack of sympathy from the police”).
- 64 Lonnie Lusardo, *Hate Crimes Are on the Rise, and the Federal Government Isn’t Helping*, SEATTLE TIMES (July 29, 2019), <https://www.seattletimes.com/opinion/we-cant-combat-rising-hate-crimes-with-woefully-inaccurate-data>; Keith & Gagliano, *supra* note 62.
- 65 Catherine Devine & Lillianna Byington, *Millions Are Victims of Hate Crimes, Though Many Never Report Them*, CTR. FOR PUB. INTEGRITY (Aug. 16, 2018), <https://publicintegrity.org/politics/millions-are-victims-of-hate-crimes-though-many-never-report-them>.
- 66 Lusardo, *supra* note 64.
- 67 ARJUN SINGH SETHI, *AMERICAN HATE: SURVIVORS SPEAK OUT* 70 (2018).
- 68 See Katherine A. Culotta, *Why Victims Hate to Report: Factors Affecting Victim Reporting in Hate Crime Cases in Chicago*, 13 KRIMINOLOGIJA I SOCIJALNA INTEGRACIJA 15, 20 (2005) (citing Chicago Commission on Human Relations employee who “believed [law enforcement] officers might make the process seem like a burden to the victim”).
- 69 Annie Steinberg et al., *Youth Hate Crimes: Identification, Prevention, and Intervention*, 160 AM. J. PSYCHIATRY 979, 982 (2003), <https://ajp.psychiatryonline.org/doi/pdf/10.1176/appi.ajp.160.5.979>.
- 70 Harbani Ahuja, *The Vicious Cycle of Hate: Systemic Flaws in Hate Crime Documentation in the United States and the Impact on Minority Communities*, 37 CARDOZO L. REV. 1867, 1882 (2016), <http://cardozolawreview.com/wp-content/uploads/2018/08/AHUJA.37.5.pdf>.
- 71 Eisenberg, *supra* note 51, at 862.
- 72 *Id.* at 885.
- 73 Brendan Lantz, et al, *Stereotypical Hate Crimes and Criminal Justice Processing: A Multi-Dataset Comparison of Bias Crime Arrest Patterns by Offender and Victim Race*, 36 JUST. Q. 193, 197-99 (2017) (summarizing research on police responses to hate crimes).
- 74 Eisenberg, *supra* note 51, at 888.
- 75 *Id.* at 892-94.
- 76 *Id.* at 895-98 (assessing “novel uses” of New York hate crimes law to compel guilty pleas for non-bias-motivated crimes).
- 77 See *United States v. Miller*, 767 F.3d 585 (6th Cir. 2014) (requiring “but for” causation under the Matthew Shepard and James Byrd, Jr., Hate Crimes Prevention Act).
- 78 Saeed Ahmed & Catherine E. Shoichet, *3 Students Shot to Death in Apartment Near UNC Chapel Hill*, CNN (Feb. 11, 2015), <https://www.cnn.com/2015/02/11/us/chapel-hill-shooting/index.html>.
- 79 Joseph Ness & Shaila Dewan, *He Killed 3 Muslim Students. But Did He Commit a Hate Crime?*, N.Y. TIMES (June 12, 2019), <https://www.nytimes.com/2019/06/12/us/hate-crime-muslim-students.html>.
- 80 *Id.*
- 81 *Id.*
- 82 Robert Weisberg, *Can We Shrink the Prisons Without Growing Crime?: Decarceration, Decentralization, and the Meaning of Realignment’s Success*, 15 CRIMINOLOGY & PUB. POL. 367, 372-73 (2016).
- 83 Daniel S. Nagin, *Deterrence in the Twenty-First Century*, 42 CRIME & JUST. AM. 199, 202 (2013) (concluding that “certainty of apprehension and not the severity of the legal consequence ensuing from apprehension is the more effective deterrent.”). See also Marc Mauer, *LONG-TERM SENTENCES: TIME TO RECONSIDER THE SCALE OF PUNISHMENT*, 87 UMKC L. REV. 113, 123-24 (2018), <https://www.sentencingproject.org/wp-content/uploads/2018/11/UMKC-Law-Review-Scale-of-Punishment.pdf> (discussing limited deterrent effects of lengthy sentences).
- 84 Mauer, *supra* note 83, at 123.

- 85 See VALERIE WRIGHT, SENT'G PROJECT, DETERRENCE IN CRIMINAL JUSTICE: EVALUATING CERTAINTY VS. SEVERITY OF PUNISHMENT 2-3 (Nov. 2010) <https://www.sentencingproject.org/wp-content/uploads/2016/01/Deterrence-in-Criminal-Justice.pdf>.
- 86 PHYLLIS B. GERSTENFELD, HATE CRIMES: CAUSES, CONTROLS, AND CONTROVERSIES 20-21 (2018).
- 87 See generally Alfred Blumstein, *Selective Incapacitation as a Means of Crime Control*, 27 AM. BEHAV. SCIENTIST 87, 92-96 (1983) (distinguishing crime control strategy of incapacitation from those of general deterrence and rehabilitation and discussing underlying rationales).
- 88 *Five Things About Deterrence*, NAT'L INST. JUST. (June 5, 2016), <https://nij.ojp.gov/topics/articles/five-things-about-deterrence>. See also Robert J. Sampson & John H. Laub, *Life-Course Desisters? Trajectories of Crime Among Delinquent Boys Followed to Age 70*, 41 CRIMINOLOGY 301, 330 (2003) (concluding from a data set of 500 men analyzed from age 7 to 70 that, “[a]lthough peak ages of offending vary by crime type, we found that all offenses decline systematically in the middle adult years for groups identified prospectively according to extant theory and early risk factors.”).
- 89 NAT'L INST. JUST., *supra* note 88. See also Nagin, *supra* note 83, at 201 (“I have concluded that there is little evidence of a specific deterrent effect arising from the experience of imprisonment compared with the experience of noncustodial sanctions such as probation. Instead, the evidence suggests that that reoffending is either unaffected or increased.”).
- 90 See, e.g., Nicole Lewis & Beatrice Lockwood, *The Hidden Cost of Incarceration*, MARSHALL PROJECT (Dec. 17, 2019), <https://www.themarshallproject.org/2019/12/17/the-hidden-cost-of-incarceration>.
- 91 See Nagin, *supra* note 83, at 201, 233-42.
- 92 NAT'L INST. JUST., *supra* note 88.
- 93 *Hate Crimes and the Rise of White Nationalism: Hearing Before H. Comm. on the Judiciary*, 116th Cong. 1 (2019) (statement of Kristen Clarke, President & Executive Director, Lawyers' Committee for Civil Rights Under Law), <https://www.congress.gov/116/meeting/house/109266/witnesses/HHRG-116-JU00-Wstate-ClarkeK-20190409.pdf>; Lilliana Byington et al., *Black Americans Still Are Victims of Hate Crime More than Any Other Group*, CTR. FOR PUB. INTEGRITY (Aug. 21, 2018), <https://publicintegrity.org/politics/black-americans-still-are-victims-of-hate-crimes-more-than-any-other-group>; see also FED. BUREAU OF INVESTIGATION, 2019 HATE CRIME STATISTICS, INCIDENTS AND OFFENSES (2020), <https://ucr.fbi.gov/hate-crime/2019/topic-pages/incidents-and-offenses>.
- 94 *Wisconsin v. Mitchell*, 508 U.S. 476 (1993).
- 95 See Mahita Gajanan, *Woman Accused of Slapping 3 Jewish Women in New York City Charged with Federal Hate Crimes. Her Case Raises Questions for New York's Bail Reform Laws*, TIME (Jan. 29, 2020), <https://time.com/5773696/tiffany-harris-charged-anti-semitic-attacks>; Kenneth Garger & Ben Cohn, *Woman Accused of Anti-Semitic Attack Gets Supervised Release at Arraignment*, N.Y. POST (Dec. 27, 2019), <https://nypost.com/2019/12/27/woman-accused-of-anti-semitic-attack-gets-supervised-release-at-arraignment>.
- 96 <https://www.census.gov/quickfacts/fact/table/US/RHI225219>.
- 97 <https://ucr.fbi.gov/hate-crime/2018/topic-pages/offenders>.
- 98 US DEPARTMENT OF JUSTICE, SPECIAL REPORT: HATE CRIME VICTIMIZATION, 2004-2015 7 (June 2017). <https://www.bjs.gov/content/pub/pdf/hcv0415.pdf>. The same data identify 22.2% of violent offenders in non-hate crime cases as Black. *Id.*
- 99 James P. O'Neill, N.Y.C. Police Commissioner, *Crime and Enforcement Activity in New York City, Jan 1-Dec. 31, 2018 at 11* (2019), at https://www1.nyc.gov/assets/nypd/downloads/pdf/analysis_and_planning/year-end-2018-enforcement-report.pdf. The U.S. Census Bureau estimates that 24% of New York City's population is Black. <https://www.census.gov/quickfacts/newyorkcitynewyork>.
- 100 See FBI: UCR, 2018 HATE CRIMES: METHODOLOGY (2018), <https://ucr.fbi.gov/hate-crime/2018/resource-pages/methodology> (stating that “Only when a law enforcement investigation reveals sufficient evidence to lead a reasonable and prudent person to conclude that the offender's actions were motivated, in whole or in part, by his or her bias, should an agency report an incident as a hate crime.”).
- 101 While the NCVS data relies on self-reported accounts of hate crimes, rather than incidents reported to, and by, law enforcement agencies, it is possible that these self-reports may also skew in a particular direction if members of one race are more likely to perceive or characterize incidents as hate-motivated. See U.S. DEP'T OF JUSTICE, SPECIAL REPORT: HATE CRIME VICTIMIZATION, 2004-2015 7 (June 2017). <https://www.bjs.gov/content/pub/pdf/hcv0415.pdf>. The NCVS classifies incidents as hate crimes if “the offender used hate language,” “the offender left behind hate symbols,” or “police investigators confirmed that the incident was hate crime.” *Id.* at 3. Almost all hate crime victims in that data relied on the offender's use of hate language as evidence of a bias motivation. *Id.* at 3.
- 102 See *supra*, Part II.1 and II.2. See generally JENNIFER EBERHARDT, UNCOVERING THE HIDDEN PREJUDICE THAT SHAPES WHAT WE SEE, THINK, AND DO (2019) (discussing social psychological research on implicit bias in policing); MICHAEL GERMAN, BRENNAN CTR. FOR JUSTICE, HIDDEN IN PLAIN SIGHT: RACISM, WHITE SUPREMACY, AND FAR-RIGHT MILITANCY IN LAW ENFORCEMENT (2020) (describing presence of law enforcement officers in racist and far-right paramilitary groups and participation in racist exchanges on social media). Criminologists have reached varying results as to which types of reported hate crimes, by offender and victim race, are most likely to result in arrests. Compare Brendan Lantz, et al, *Stereotypical Hate Crimes and Criminal Justice Processing: A Multi-Dataset Comparison of Bias Crime Arrest Patterns by Offender and Victim Race*, JUSTICE Q. 3, 18-20 (2017) (using Pennsylvania Human Relations Commission and National Incident-Based Reporting System data to conclude that hate crimes cases involving white offenders and black victims are more likely to result in arrests because they fit expectations of a “stereotypical” hate crime) and Christopher J. Lyons & Aki Roberts, *The Difference “Hate” Makes in Clearing Crime: An Event History Analysis of Incident Factors*, 30 J. OF CONTEMP. CRIM. JUST. 268, 280-81 (2014) (using National Incident-Based Reporting System data to conclude that, in racially or ethnically motivated hate crimes, arrest rates are higher for cases with white offenders and non-white victims) with Mindy S. Wilson & R. Barry Ruback, *Hate Crime in Pennsylvania, 1984-99: Case Characteristics and Police Responses*, 20 JUSTICE Q. 373, 389 (2003) (finding that police involvement was higher for hate crimes cases in 15-year Pennsylvania Human Relations Commission dataset where victims were white rather than black).
- 103 See, e.g., *Rates of Drug Use and Sales, By Race; Rates of Drug Related Criminal Justice Measures, by Race*, HAMILTON PROJECT (Oct. 21, 2016), https://www.hamiltonproject.org/charts/rates_of_drug_use_and_sales_by_race_rates_of_drug_related_criminal_justice.

- 104 L.A. CTY. COMM'N ON HUMAN RELATIONS, *2018 Hate Crimes Report* 18 (2019), <https://hrc.lacounty.gov/wp-content/uploads/2019/09/2018-Hate-Crime-Report.pdf>.
- 105 *Id.* (“The great majority of African Americans and Latino/as in Los Angeles County co-exist peacefully and are not involved in ongoing racial conflict. However, for many years this report has documented that most hate crimes targeting African Americans are committed by Latino/as and vice versa. This is particularly true in neighborhoods that have undergone rapid demographic shifts from being primarily black to majority Latino/a.”).
- 106 BARBARA PERRY, *IN THE NAME OF HATE: UNDERSTANDING HATE CRIMES* 119-34 (2001) (discussing historical examples of fraught relationships between African Americans and Asian Americans and between Jews and African Americans, and position of gay men within communities of color).
- 107 PHYLLIS B. GERSTENFELD, *HATE CRIMES: CAUSES, CONTROLS, AND CONTROVERSIES* 121 (2018).
- 108 *See* Part I.B. (describing harms from hate crimes).
- 109 ARJUN SINGH SETHI, *AMERICAN HATE: SURVIVORS SPEAK OUT* 41 (2018) (describing a survivor’s preference for an outcome in which assailant would “likely get ten or fifteen years for assault and battery, and we would never see him again.”).
- 110 Sarah Minkewitz, *Victim of Alleged Hate Crime Speaks Out as New Charges Are Filed Against Her Attacker*, WIVB4 (Sept. 7, 2019), <https://www.wivb.com/news/the-victim-of-an-alleged-hate-crime-in-buffalo-is-speaking-out-as-new-charges-are-filed-against-her-attackerh>; James Doubek, *How Well Do Hate Crime Laws Really Work?*, NPR (June 28, 2015), <https://www.npr.org/sections/itsallpolitics/2015/06/28/417231920/how-well-do-hate-crime-laws-really-work> (quoting hate crimes legal expert Fred Lawrence as saying, “If we were to say to the African-American community of Charleston, ‘we’re just going to treat this like any murder, we don’t think the race of the victims is relevant at all,’ I think that would be an enormous affront to that community.”).
- 111 JEANNINE BELL, *HATE THY NEIGHBOR* 185 (2013).
- 112 *A Compilation of Critiques on Hate Crimes Legislation*, BLACK AND PINK (2009), <http://www.againstequality.org/wp-content/uploads/2009/10/critiques-on-hate-crimes.pdf>.
- 113 *A Compilation of Critiques on Hate Crimes Legislation*, BLACK AND PINK (2009), <http://www.againstequality.org/wp-content/uploads/2009/10/critiques-on-hate-crimes.pdf>.
- 114 Rinku Sen, *Look Beyond Police for Solutions: A Response to “Reconsidering Hate,”* POLITICAL RESEARCH ASSOCIATES (Aug. 1, 2012), <https://www.politicalresearch.org/2012/08/01/look-beyond-police-for-solutions-a-response-to-reconsidering-hate>.
- 115 *Id.*
- 116 ARJUN SINGH SETHI, *AMERICAN HATE: SURVIVORS SPEAK OUT* 79 (2018).
- 117 HOWARD ZEHR, *THE LITTLE BOOK OF RESTORATIVE JUSTICE* 40 (2002).
- 118 As one scholar has put it, the “weaknesses of the current criminal justice system are the theoretical strengths of [restorative justice].” Theo Gavrielides, *Restoring Relationships: Addressing Hate Crime Through Restorative Justice*, RACE ON THE AGENDA 24 (June 2007), https://www.rota.org.uk/sites/default/files/webfm/rota_report_on_hate_crime__rj_july_2007_-_final.pdf.
- 119 Terri Lee Kelly, *A Critical Review of Issues in Applying Restorative Justice Principles and Practices to Cases of Hate Crime* 80-84 (2002) (M.sc thesis, Portland State University) (on file with Portland State University Library) (describing Maori conferencing practices); Carol A. Hand, et. al, *Restorative Justice: The Indigenous Justice System*, 15 CONTEMP. J. REV. 449, 452-54 (2012) (describing principles of “the traditional Native American restorative system”).
- 120 Alyssa H. Shenk, *Victim-Offender Meditation: The Road to Repairing Hate Crime Injustice*, 17 OHIO ST. J. DISP. RESOL. 185, 192 (2001). The figures cited in Shenk’s article have likely increased since publication. *See* Thalia González, *The Legalization of Restorative Justice: A Fifty-State Empirical Analysis*, 5 UTAH L. REV. 1027, 1031 (2020) (finding that, as of May 31, 2019, “forty-five states have codified restorative justice in to statutory or regulatory law,” suggesting, when compared to prior research, a significant increase in the incorporation of restorative justice into state legal frameworks).
- 121 *See* Shenk, *supra* note 120, at 197-98 (discussing research on the outcomes of victim-offender mediation processes); MARK UMBREIT & MARILYN PETERSON ARMOUR, *RESTORATIVE JUSTICE DIALOGUE: AN ESSENTIAL GUIDE FOR RESEARCH AND PRACTICE* 130-34 (2011) (reporting results of empirical studies of participant satisfaction, recidivism, and cost in victim-offender mediation programs); LAWRENCE SHERMAN & HEATHER STRANG, THE SMITH INST., *RESTORATIVE JUSTICE: THE EVIDENCE* 86 (2007), http://www.iirp.edu/pdf/RJ_full_report.pdf (considering cost effects of restorative justice programs on U.K. criminal legal system); SUJATHA BALIGA ET AL., *IMPACT JUST., RESTORATIVE COMMUNITY CONFERENCING: A STUDY OF COMMUNITY WORKS WEST’S RESTORATIVE JUSTICE YOUTH DIVERSION PROGRAM IN ALAMEDA COUNTY* 6-16, (2017), https://impactjustice.org/wp-content/uploads/CWW_RJreport.pdf (measuring impact of restorative community conferencing on recidivism rates among youths who commit crimes, examining survey results on satisfaction of different parties, and discussing potential cost savings and other benefits).
- 122 UMBREIT & ARMOUR, *supra* note 121, at 96-101.
- 123 UMBREIT & ARMOUR, *supra* note 121, at 126-27; Robert B. Coates et. al, *Responding to Hate Crimes through Restorative Justice Dialogue*, 9 CONTEMP. JUST. REV. 7, 9 (2006).
- 124 WISC. ADVISORY COMM. TO THE U.S. COMM’N ON C.R., *HATE CRIME AND CIVIL RIGHTS IN WISCONSIN* 55 (June 2017), <https://www.usccr.gov/pubs/docs/08-17-Wisconsin-hate-crimes.pdf> (“Restorative justice may function in collaboration with or as an alternative to the traditional justice system to address the root causes of hate motivated crimes and restore victim’s sense of empowerment and community safety.”).
- 125 Theo Gavrielides, *Contextualizing Restorative Justice for Hate Crime*, 27 J. INTERPERSONAL VIOLENCE 3624, 3625-26 (2012).
- 126 This is not to say that programs that exist as additions to the traditional system cannot have positive consequences for participants. For instance, the voluntary Bridges to Life program, which is based on restorative justice principles, provides only post-hoc programming for prison inmates, but it appears to have a substantial positive impact on recidivism rates. *See generally* Marilyn Peterson Armour et al., *Bridges to Life: Evaluation of an In-prison Restorative Justice Intervention*, 24 Med. & L. 831 (2005). *See also* *Restorative Justice*, Insight Prison Project, <http://www.insightprisonproject.org/a-restorative-justice-agency.html> (last visited Nov. 20, 2020).

- 127 See David B. Moore, *Managing Social Conflict – The Evolution of a Practical Theory*, 31 J. SOCIO. & SOC. WELFARE 71 (2004) (“Conferencing” is the practice of providing “a conversation with a formal structure and that structure enables participants to address constructively an incident or issue that has caused significant conflict between them.”).
- 128 ELIZABETH BECK ET AL., *SOCIAL WORK AND RESTORATIVE JUSTICE: SKILLS FOR DIALOGUE, PEACEMAKING, AND RECONCILIATION* 155 (2010) (emphasis omitted).
- 129 RJOY Trainings, *Restorative Justice for Oakland Youth*, at <http://rjoyoakland.org/rjoy-trainings/> (last visited Feb. 11, 2021). Professor Teiahsha Bankhead, the Executive Director of RJOY, explains that restorative justice does not “identify people by the most horrible thing they’ve done in their lives, or the most horrible thing that’s been done to them. So this idea of perpetrators and survivors, victims and offenders—is not even the language that we like to use.” Zoom Interview by Tyler Bishop & Samuel Becker with Teiahsha Bankhead, Executive Director of Restorative Justice for Oakland Youth (Apr. 29, 2020).
- 130 See Danny Peterson, *‘Restorative Justice’ Aims for Equity at Portland Schools*, KOIN 6 (Oct. 12, 2019), <https://www.koin.com/local/multnomah-county/restorative-justice-aims-for-equity-at-portland-schools>; Stephanie Wang, *Students Need Restorative Skills ‘as Much as They Need Math and Science,’ Indianapolis Educators Say*, INDIANAPOLIS STAR (Jan. 8, 2020), <https://www.indystar.com/story/news/education/2020/01/09/restorative-justice-indianapolis-school-sees-more-than-catchphrase/4419024002>.
- 131 BALIGA ET AL., *supra* note 121, at 2.
- 132 *Id.*
- 133 E-mail from Lauren Brown, Community Works West, to Tyler Bishop, Stanford Policy Lab Student, on May 29, 2020 (noting that “The DA’s office is not informed about the incident nor the youth facing charges. If the youth completes the program successfully OPD dismisses the charges and nothing further happens.”).
- 134 BALIGA ET AL., *supra* note 121, at 2-3.
- 135 Shenk, *supra* note 120, at 194-95.
- 136 *Id.* at 195.
- 137 WISC. ADVISORY COMM. TO THE U.S. COMM’N ON C.R., *supra* note 125, at 50-51 (quoting Professor Jonathan Scharrer, director of the Restorative Justice Project at the University of Wisconsin Law School, as emphasizing during testimony before the United States Commission on Civil Rights that it would be ill-advised to legislate a mandatory restorative justice pathway.”).
- 138 *Id.*
- 139 Umbreit & Armour, *supra* note 121, at 99.
- 140 *Id.*
- 141 Shenk, *supra* note 120, at 195.
- 142 BALIGA ET AL., *supra* note 121, at 3.
- 143 *Restorative Community Conferences*, CMTY. WORKS, <http://communityworkswest.org/program/rcc> (last visited July 20, 2020).
- 144 E-mail from Lauren Brown, Community Works West, to Tyler Bishop, Stanford Policy Lab Student, on May 29, 2020.
- 145 E-mail from Lauren Brown, Community Works West, to Tyler Bishop, Stanford Policy Lab Student, on May 29, 2020.
- 146 Common Justice Model, COMMON JUST., https://www.commonjustice.org/common_justice_model (last visited July 20, 2020). For a more extensive discussion of Common Justice’s approach, see generally DANIELLE SERED, *UNTIL WE RECKON: VIOLENCE, MASS INCARCERATION, AND A ROAD TO REPAIR* (2019).
- 147 SERED, *supra* note 146, at 114-15.
- 148 *Id.* at 115-16.
- 149 Seema Gajwani, *Transforming Prosecutorial Culture through In-House Restorative Justice Programs*, OBAMA FOUND., <https://www.obama.org/fellowship/2019-fellows/seema-gajwani> (last visited Nov. 21, 2020). See also Benjamin Wofford, *The Obama Foundation Just Gave this DC Prosecutor a Fellowship*, WASHINGTONIAN (Apr. 30, 2019), <https://www.washingtonian.com/2019/04/30/the-obama-foundation-just-gave-this-dc-prosecutor-a-fellowship>.
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- 151 *Id.* See also D.C. Off. of the Att’y Gen., *Restorative Justice Program* (unpublished digital upload of a presentation), <https://www.njjn.org/uploads/digital-library/DC%20OAG%20slides.pdf> (providing overview of program).
- 152 D.C. Off. of the Att’y Gen., *supra* note 151.
- 153 Gajwani & Lesser, *supra* note 150, at 88.
- 154 D.C. Off. of the Att’y Gen., *supra* note 151.
- 155 Carrie Johnson, *D.C. Prosecutors, Once Dubious, Are Becoming Believers in Restorative Justice*, NPR (July 2, 2019), <https://www.npr.org/2019/07/02/735506637/d-c-prosecutors-once-dubious-are-becoming-believers-in-restorative-justice>.
- 156 *Id.*
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- 162 *Id.*
- 163 *Id.*
- 164 *Id.*
- 165 Chris Rickert, *Racially Tinged Confrontation Ends In Broken Nose, Remorse — And Lingering Sense Of Violation For Former Badgers Star Trent Jackson*, WISC. STATE J. (Mar. 12, 2018).
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- 167 *Id.*
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- 171 Leena Kurki, *Incorporating Restorative and Community Justice Into American Sentencing and Corrections*, in NAT'L INST. OF JUST., U.S. DEP'T OF JUSTICE, SENTENCING & CORRECTIONS: ISSUES FOR THE 21ST CENTURY 5 (1999).
- 172 *Id.*
- 173 *See, e.g.*, Nancy Blodgett, *Alternative Sentencing: Overcrowded Prisons Prompt New Responses*, 73 ABA J. 32 (1987).
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- 176 H.R. 3545, 116th Cong. (2019); S. 2043, 116th Cong. (2019).
- 177 Covid-19 Hate Crimes Act, S. 937, 117th Cong. (as passed by Senate, Apr. 22, 2021).
- 178 Carrie Menkel-Meadow, *Restorative Justice: What Is It and Does It Work?*, 3 ANN. L. REV. 10.7, 10.14 (2007).
- 179 Mark Walters, *Hate Crime and Restorative Justice: Exploring Causes, Repairing Harms*, INT'L J. HATE STUDIES (2014), <https://internationalhatestudies.com/hate-crime-restorative-justice-exploring-causes-repairing-harms>.
- 180 *See* SERED, *supra* note 146, at 25-27 (describing value of survivors' speaking about their experiences in order to help them form a coherent narrative of what happened and help the healing process). In a Community Circle Pilot Program in Austin, Texas, victims of hate crimes reported reduced isolation and a greater sense of community from participating in a "circle" where they shared their experiences. MARILYN ARMOUR, INST. FOR RESTORATIVE JUST. & RESTORATIVE DIALOGUE, REPORT ON THE COMMUNITY CIRCLE PILOT PROGRAM 1-3 (Feb. 6, 2012), <https://ijrd.org/wp-content/uploads/2015/08/Evaluation-Report-Community-Circles.pdf>. Note that unlike other models, that program does not appear to have included the parties responsible for the hate crimes.
- 181 *See* SERED, *supra* note 146, at 115-17 (describing how the victim of an anti-Semitic attack on a New York train recovered substantially from her "flashbacks, anxiety, depression, and hypervigilance" after meeting the woman responsible and asking the latter to repair the harm, including through not riding New York trains for a year to understand the sense of insecurity that the victim experienced).
- 182 Walters, *supra* note 179, at 97, 106.
- 183 Interview by Shirin Sinnar & Sam Becker of Robert (Roman) Haferd, Restorative Justice Coordinator, Restorative Justice Section, Office of the Attorney General for the District of Columbia, July 24, 2020.
- 184 Rickert, *supra* note 165.
- 185 Menkel-Meadow, *supra* note 179, at 174; Walters, *supra* note 178, at 242. *See also* Gavrielides, *supra* note 118, at 22 ("[T]he ability of hate crime perpetrators to engage in an honest dialogue has been questioned. After all, why would racist a criminal whose attitude towards others has been consistent suddenly agree to engage in an honest dialogue?").
- 186 WALTERS, *supra* note 179, at 198-204.
- 187 Interview by Shirin Sinnar & Sam Becker of Robert (Roman) Haferd, Restorative Justice Coordinator, Restorative Justice Section, Office of the Attorney General for the District of Columbia, July 24, 2020.
- 188 *See generally* Tom Lininger, *Bearing the Cross*, 74 FORDHAM L. REV. 1353 (2005) (discussing the challenge of cross-examination, especially for accusers in domestic violence and sexual assault cases).
- 189 DANA KRALSTEIN & MICHELA LOWRY, CTR. FOR CT. INNOVATION, OFF RAMPES FOR YOUTHS IN THE DISTRICT OF COLUMBIA: PROSECUTION-BASED RESTORATIVE JUSTICE COUNSELING vi (Mar. 2020) (describing need to counter perceptions of restorative justice as "soft on crime.").
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- 191 KRALSTEIN & LOWRY, *supra* note 189, at 21.
- 192 See BALIGA ET AL., *supra* note 121, at 1 (reporting lower youth recidivism rates compared to youth who did not go through Alameda County restorative justice process); Menkel-Meadow, *supra* note 178, at 10.14 (noting that studies from several continents support claims that restorative justice programs reduce recidivism).
- 193 See, e.g., Robert Chappell, *Police Called It a Hate Crime. The Attackers Kept Their Records Clean.*, MADISON365 (Mar. 19, 2018), <https://madison365.com/police-called-hate-crime-attackers-kept-records-clean> (describing restorative justice practitioner’s belief that the practice allows offenders to “confront their ugly, bigoted behavior” in a way that can be a “life-altering experience.”).
- 194 See Shirin Sinnar & Beth A. Colgan, *Revisiting Hate Crimes Laws*, 95 NYU L. REV. ONLINE 149, 166-67 (2020) (noting concerns that restorative justice might be perceived as expressing insufficient condemnation for hate crime and might, in subjecting hate crime victims and their communities to “coerced compassion,” reinforce power disparities within the criminal justice system).
- 195 *Id.* at 169.
- 196 See, e.g., M. Eve Hanan, *Decriminalizing Violence: A Critique of Restorative Justice and Proposal for Diversionary Mediation*, 46 N.M L. REV. 123, 132-133 (2016) (discussing potential for coercion through fear of prosecution).
- 197 See generally Michael M. O’Hear, *Is Restorative Justice Compatible with Sentencing Uniformity?*, 89 MARQ. L. REV. 305 (2005), <https://scholarship.law.marquette.edu/cgi/viewcontent.cgi?article=1099&context=mulr>.
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