

# REVISITING HATE CRIMES ENHANCEMENTS IN THE SHADOW OF MASS INCARCERATION

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*Although civil rights advocates have largely supported hate crimes laws over the last four decades, growing concern over mass incarceration is now leading some to question the focus on enhancing prison sentences. This Essay explores two alternatives to the traditional sentence enhancement model that might retain the expressive message of hate crimes laws—to convey society’s particular condemnation of crimes of bias—while relying less heavily on police and prisons: the reformation of victim compensation programs to help victims and targeted communities and the application of restorative justice processes to hate crimes. Each of these alternatives presents complications, but both offer sufficient potential to justify further exploration.*

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## INTRODUCTION

After four decades of concerted civil rights advocacy, hate crimes laws are now nearly universal within the United States. The federal government and most states have enacted laws directed at crimes targeting victims on the basis of race, ethnicity, religion, and other characteristics.<sup>1</sup> These statutes

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<sup>1</sup> Avlana Eisenberg, *Expressive Enforcement*, 61 UCLA L. REV. 858, 861 (2014) (noting hate crimes laws adopted by forty-eight states, the District of Columbia, and the federal government). All state hate crimes statutes include protections for race, ethnicity, and religion, while federal law

operate primarily by enhancing the severity of punishment that would be imposed for a similar offense that did not stem from bias.<sup>2</sup> The goal of such enhancements is to express society's special condemnation for crimes of bias in recognition of the harm caused both to immediate victims of the crimes as well as to those who share the victims' identity.<sup>3</sup>

Civil rights advocates and groups representing communities of color and other marginalized identity groups have largely supported these laws,<sup>4</sup> but now some are questioning the hate crimes sentence enhancement model as existing uneasily with growing calls to end mass incarceration.<sup>5</sup>

These concerns are not entirely new. Hate crimes laws arose out of a convergence between civil rights advocates and a more conservative victims' rights movement, and arguably won acceptance by capitalizing on law-and-order politics.<sup>6</sup> In light of these origins, a few progressives long ago criticized

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and the law of some states include protections for gender, gender identity, sexual orientation, and disability. *Id.* at 921–22; *see also* MICHAEL GERMAN & EMMANUEL MAULEÓN, BRENNAN CTR. FOR JUSTICE, FIGHTING FAR-RIGHT VIOLENCE AND HATE CRIMES 10, 21–41 (2019) (identifying forty-four states with hate crimes laws). Note that the recent passage of state hate crimes legislation, especially in Georgia, may change these tallies. *See* Ben Nadler, *Georgia's Kemp Signs Hate Crimes Law After Outcry over Death*, AP NEWS (June 26, 2020), <https://apnews.com/5fd5d599dfd0e5f1ebbbd2d5351de12>.

<sup>2</sup> GERMAN & MAULEÓN, *supra* note 1, at 21–41 (observing that most state laws involve expanding criminal liability or penalty enhancements and identifying thirty-seven states with at least one law enhancing penalties for hate crimes against certain protected groups); Eisenberg, *supra* note 1, at 922–25 (identifying twenty-seven state laws that consider hate crimes an aggravating factor at sentencing or that create a sentence enhancement, and twenty-two state laws that establish hate crimes as a standalone offense).

<sup>3</sup> Eisenberg, *supra* note 1, at 868–70 (describing how lawmakers considering hate crimes legislation shared the goal of “send[ing] a message” regarding the scope and severity of harms caused); *see* FREDERICK M. LAWRENCE, PUNISHING HATE: BIAS CRIMES UNDER AMERICAN LAW 45, 61–63 (1999) (explaining that the hate crimes victim's “injury to autonomy . . . and . . . personal dignity” exacerbates the effect of bias crimes on victims).

<sup>4</sup> For example, an extensive coalition of such organizations advocated for the passage of a landmark federal hate crimes law in 2009. *Local Law Enforcement Hate Crimes Prevention Act of 2007: Support for This Legislation*, HUM. RTS. CAMPAIGN (Feb. 2007), [http://web.archive.org/web/20070516110138/http://www.hrc.org/Content/NavigationMenu/HRC/Get\\_Informed/Federal\\_Legislation/LLEEA\\_Coalition\\_Endorsement\\_Fact\\_Sheet/LLEEA\\_Coalition\\_Endorsement\\_Fact\\_Sheet.htm](http://web.archive.org/web/20070516110138/http://www.hrc.org/Content/NavigationMenu/HRC/Get_Informed/Federal_Legislation/LLEEA_Coalition_Endorsement_Fact_Sheet/LLEEA_Coalition_Endorsement_Fact_Sheet.htm) (archived May 16, 2007) (listing supporters of the Local Law Enforcement Hate Crimes Prevention Act of 2007, the precursor bill to the Matthew Shepard and James Byrd Jr. Hate Crimes Prevention Act of 2009). Many of these groups continue to call for bias crime laws in the few states that lack them. *See* Am. Jewish Comm. et al., *Coalition Letter to Indiana Governor Regarding Inclusive Hate Crime Legislation*, ANTI-DEFAMATION LEAGUE (Mar. 13, 2019), <http://www.adl.org/news/letters/coalition-letter-to-indiana-governor-regarding-inclusive-hate-crime-legislation> (listing major national civil rights organizations in support of a “strong bias crime law” in Indiana).

<sup>5</sup> *See infra* notes 8–10, 18–20 and accompanying text.

<sup>6</sup> On the convergence of the civil rights and victims' rights movements in support of hate crimes laws, *see* ELY AARONSON, FROM SLAVE ABUSE TO HATE CRIME: THE CRIMINALIZATION OF RACIAL VIOLENCE IN AMERICAN HISTORY 164–65 (2014); CHRISTOPHER WALDREP, AFRICAN AMERICANS CONFRONT LYNCHING: STRATEGIES OF RESISTANCE FROM THE CIVIL WAR TO THE

the hate crimes model for relying on law enforcement to protect communities.<sup>7</sup> But once rare, such critiques now resonate more broadly as a result of the shifting national conversation on the need to restrict the scope and punitive approach of criminal legal systems.<sup>8</sup>

In an example of particularly staunch opposition, the Sylvia Rivera Law Project (SRLP), a group that advocates on behalf of trans and gender-nonconforming people in New York, rejects hate crimes laws because they “expand and increase the power of the same unjust and corrupt criminal punishment system” that disproportionately incarcerates people of color and queer and transgender people.<sup>9</sup> SRLP opposed a federal hate crimes law that would expand coverage to anti-LGBTQ hate crimes because it considered “a law that links our community’s experiences of violence and death to a demand for increased criminal punishment . . . [to be] a strategic mistake of significant proportion.”<sup>10</sup>

SRLP’s approach is consistent with a growing interest in police and prison abolition, a vision for replacing punitive criminal legal institutions with systems of “transformative justice,” in which governments respond to crimes with restorative processes and reinvest in programs to eliminate

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CIVIL RIGHTS ERA 117–25 (2009); Terry A. Maroney, Note, *The Struggle Against Hate Crime: The Movement at a Crossroads*, 73 N.Y.U. L. REV. 564, 571–85 (1998) (“Once hate crime could be seen as a victims’ issue, anti-hate efforts became a politically palatable species of civil rights measure.”).

<sup>7</sup> See, e.g., KATHERINE WHITLOCK, AM. FRIENDS SERV. COMM., IN A TIME OF BROKEN BONES: A CALL TO DIALOGUE ON HATE VIOLENCE AND THE LIMITATIONS OF HATE CRIMES LEGISLATION 18 (2001) (criticizing the centrality of penalty enhancements in hate crimes laws as compounding the violence and racism of the criminal justice system). By contrast, most historical opposition to hate crimes enhancements came from those who argued that they created “thought crimes” by punishing some people more heavily than others because of their views. See, e.g., Martin H. Redish, *Freedom of Thought as Freedom of Expression: Hate Crime Sentencing Enhancement and First Amendment Theory*, CRIM. JUST. ETHICS, Summer/Fall 1992. The Supreme Court considered—and rejected—that critique as a First Amendment matter in *Wisconsin v. Mitchell*, 508 U.S. 476, 489 (1993). That critique, as well as the argument that hate crimes laws unfairly protect certain victims over others, is often associated with the political right. See, e.g., Rick Callahan, *Gov. Holcomb Signs Indiana Hate Crimes Measure into Law*, CHI. TRIB. (Apr. 3, 2019), <https://www.chicagotribune.com/suburbs/post-tribune/ct-ptb-indiana-holcomb-hate-crimes-st-0404-story.html> (noting strong conservative opposition to hate crimes law on such grounds).

<sup>8</sup> The shift in the national conversation on mass incarceration can be seen in bipartisan support for reform bills at both the federal and state level. See, e.g., First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194 (allowing, among other things, retroactive application of the Fair Sentencing Act, whereby people subject to the crack-powder cocaine sentencing disparity could reduce terms of incarceration and compassionate release for people who are terminally ill); Nicole D. Porter, *Top Trends in State Criminal Justice Reform, 2019*, SENT’G PROJECT (Jan. 17, 2020), <http://www.sentencingproject.org/publications/top-trends-in-state-criminal-justice-reform-2019> (summarizing reforms focused on issues such as sentencing and racial disparity in multiple states).

<sup>9</sup> *SRLP on Hate Crime Laws*, SYLVIA RIVERA L. PROJECT, <http://srlp.org/action/hate-crimes> (last visited Apr. 21, 2020).

<sup>10</sup> *Id.*

structural inequalities.<sup>11</sup> As this essay went to press, the police killings of George Floyd and Breonna Taylor and the massive protests that ensued brought unprecedented attention to abolitionist ideas, as calls to defund the police gained traction in communities nationwide.<sup>12</sup> But for many years preceding this political moment, abolitionists have pushed back against the law-and-order and “carceral feminis[t]”<sup>13</sup> approach to even the most serious offenses—homicides and physical assault,<sup>14</sup> sexual assault,<sup>15</sup> and domestic violence<sup>16</sup>—including hate crimes.<sup>17</sup>

Yet, it is not just avowed abolitionists, but a broader range of progressive civil rights advocates who now question hate crimes enhancements as increasingly out of step with the desire to reduce the reliance on punishment as the primary response to social problems.<sup>18</sup> While enhancing sentences

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<sup>11</sup> See Dorothy E. Roberts, *Abolition Constitutionalism*, 133 HARV. L. REV. 3, 46, 3–48 (2019) (providing a detailed account of abolitionism).

<sup>12</sup> See, e.g., Maya King, *How ‘Defund the Police’ Went from Moonshot to Mainstream*, POLITICO (June 17, 2020, 4:30 AM), <https://www.politico.com/news/2020/06/17/defund-police-mainstream-324816> (describing how the movement to defund the police “suddenly broke[] into mainstream discourse” and noting the growing number of cities proposing reductions in police budgets).

<sup>13</sup> Elizabeth Bernstein, *The Sexual Politics of the “New Abolitionism,”* 18 DIFFERENCES 128, 137 (2007) (coining the term “carceral feminism” to describe the neoliberal feminist approach to sex work that focuses on punishing individual deviancy, in contrast to the abolitionist focus on systems of structural inequality).

<sup>14</sup> See, e.g., DANIELLE SERED, UNTIL WE RECKON: VIOLENCE, MASS INCARCERATION, AND A ROAD TO REPAIR 115–18, 137–38, 144–45, 152 (2019) (providing examples of restorative justice practices in cases involving serious violence).

<sup>15</sup> See, e.g., Kelly Hayes & Mariame Kaba, *The Sentencing of Larry Nassar Was Not ‘Transformative Justice.’ Here’s Why.*, APPEAL (Feb. 5, 2018), <http://theappeal.org/the-sentencing-of-larry-nassar-was-not-transformative-justice-here-s-why> (discussing how the sentencing of serial sexual predator Larry Nassar “challenges those . . . who are committed to justice for survivors of sexual assault and who also believe that prisons are the wrong answer to violence and should be abolished”).

<sup>16</sup> See generally GENERATION FIVE, TOWARD TRANSFORMATIVE JUSTICE: A LIBERATORY APPROACH TO CHILD SEXUAL ABUSE AND OTHER FORMS OF INTIMATE AND COMMUNITY VIOLENCE (2007), [http://www.generationfive.org/wp-content/uploads/2013/07/G5\\_Toward\\_Transformative\\_Justice-Document.pdf](http://www.generationfive.org/wp-content/uploads/2013/07/G5_Toward_Transformative_Justice-Document.pdf).

<sup>17</sup> See *supra* notes 9–10.

<sup>18</sup> For one recent example, see Kai Wiggins, *The Dangers of Prosecuting Hate Crimes in an Unjust System*, AM. CONST. SOC’Y: EXPERT F. (Aug. 5, 2019), <http://www.acslaw.org/expertforum/the-dangers-of-prosecuting-hate-crimes-in-an-unjust-system> (“Despite general support for hate crime penalty enhancement within the civil rights community, there is an obvious tension between these provisions and certain fundamental principles of criminal justice reform.”). In a further sign of the interest in alternatives to incarceration, a new federal hate crimes bill supported by mainstream civil rights groups permits courts to order “alternative sentencing” for federal hate crimes, such as the requirement that defendants take educational classes or perform community service as a condition of supervised release. Jabara-Heyer NO HATE Act, S. 2043, 116th Cong. § 8 (as introduced June 27, 2019); see also Vanita Gupta, *Oppose a New Federal Domestic Terrorism Crime*, LEADERSHIP CONF. ON CIV. & HUM. RTS. (Sept. 6, 2019), <http://civilrights.org/resource/oppose-a-new-federal-domestic-terrorism-crime-2> (supporting the

responds symbolically to the serious harms that hate crimes inflict on victims and their communities, there is concern that extending incarceration may do little to achieve deterrence, rehabilitation, or restoration of safety for victims.<sup>19</sup> And many fear that, given pervasive biases within criminal legal systems, hate crimes enhancements may disproportionately affect people of color or others from marginalized groups.<sup>20</sup>

This is not to say that progressives do not see hate crimes as uniquely problematic. Those who question the sentence enhancement model are often deeply concerned about the impact of hate crimes on racial, religious, and LGBTQ communities—especially at a time when high-profile mass shootings and spiking hate crimes reports have created widespread fear among these communities.<sup>21</sup>

In light of these concerns, the question becomes whether measures other than sentence enhancements can express societal condemnation for the

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NO HATE Act on behalf of a coalition of two hundred civil and human rights groups). In addition, one of the authors of this essay has spoken privately with staff from several civil rights groups who acknowledged internal divisions on hate crimes laws.

<sup>19</sup> See GERMAN & MAULEÓN, *supra* note 1, at 14–15 (questioning the value of incarceration); see also Daniel S. Nagin, *Deterrence in the Twenty-First Century*, 42 CRIME & JUST. 199, 201 (2013) (concluding from a review of empirical studies that “there is little evidence that increases in the length of already long prison sentences yield general deterrent effects that are sufficiently large to justify their social and economic costs”).

<sup>20</sup> See GERMAN & MAULEÓN, *supra* note 1, at 14 (citing data indicating high levels of hate crimes prosecutions of anti-white bias and overrepresentation of Black Americans as hate crimes offenders). *But see* JEANNINE BELL, POLICING HATRED: LAW ENFORCEMENT, CIVIL RIGHTS, AND HATE CRIME 182–83 (2002) (reporting no evidence of differential enforcement of hate crimes laws against minorities based on study of a hate crimes unit in one large urban police department); 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, 210 (2017) (concluding from Pennsylvania Human Relations Commission data that reported hate crimes involving white offenders and Black victims were more likely to result in arrests). Even if police and prosecutors do not differentially target people of color in hate crimes cases, community distrust of law enforcement may prevent victims of color from reporting incidents to police in the first place. See *infra* notes 43–50 and accompanying text. In addition, new state laws making the police a protected category under hate crimes laws have added to fears that the police will use hate crimes laws to target people of color. At least five states have incorporated police as a protected category under hate crimes laws or passed new laws using language typical of hate crimes laws to enhance sentences for crimes against police. H.B. 14, 2017 Leg., Reg. Sess. § 1 (Ky. 2017), <http://legiscan.com/KY/text/HB14/2017>; H.B. 953, 2016 Leg., Reg. Sess. § 1 (La. 2016), <http://legiscan.com/LA/text/HB953/2016>; H.B. 645, 2017 Leg., Reg. Sess. § 1 (Miss. 2017), <http://billstatus.ls.state.ms.us/documents/2017/html/HB/0600-0699/HB0645SG.htm>; H.B. 2908, 85th Leg., Reg. Sess. (Tex. 2017), <http://legiscan.com/TX/text/HB2908/id/1547056>; S.B. 103, 2019 Leg., Gen. Sess. § 1 (Utah 2019), <http://le.utah.gov/~2019/bills/static/SB0103.html>.

<sup>21</sup> See, e.g., Erin Coulehan et al., *Federal Hate Crime Charges Filed in El Paso Shooting that Targeted Latinos*, N.Y. TIMES (Feb. 6, 2020), <http://www.nytimes.com/2020/02/06/us/politics/el-paso-shooting-federal-hate-crimes.html> (describing the mass shooting that targeted Latinx people, rising hate crimes numbers nationally, and fear in communities of color); Sharon Otterman, *Anti-Semitic Attacks Fuel Continuing Rise in Hate Crimes in New York*, N.Y. TIMES (Feb. 18, 2019), <http://www.nytimes.com/2019/02/18/nyregion/anti-semitism-brooklyn-new-york.html> (describing fears created by a rise in anti-Semitic hate crimes in New York).

distinct harms hate crimes cause to those directly affected and other members of targeted communities, address the needs of those who are harmed, and do both without reliance on traditional punitive approaches that contribute to mass incarceration.

To open that conversation, this essay explores two possible reforms: the reformation of victim compensation funds and the use of restorative justice processes. The first approach—reformation of victim compensation funds—is of particular interest because, like sentence enhancements, these programs were designed in recognition of a need to better respond to harm caused by crime writ large.<sup>22</sup> If reformed to account for the variety of harms caused by hate crimes and to provide alternative reporting mechanisms beyond traditional law enforcement, victim compensation programs have the potential to take up the expressive function that enhancements were designed to serve. The second approach—the use of restorative justice processes—is of interest because such processes are widely understood to be a potential alternative to incarceration and therefore may serve as a substitute for enhancements, or even incarceration altogether, at least in some hate crime cases. Note that in considering these approaches, we have assumed the continuing existence of an investigative body that identifies people who are suspected of having committed hate crimes, even if policing is reduced and transformed in other fundamental respects.<sup>23</sup>

As detailed below, both approaches have complications. In the case of reforming victim compensation programs, the key challenges involve moving program funding away from revenues generated from fines, fees, and

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<sup>22</sup> See James K. Stewart, *Foreword* to DANIEL MCGILLIS & PATRICIA SMITH, NAT'L INST. OF JUSTICE, COMPENSATING VICTIMS OF CRIME: AN ANALYSIS OF AMERICAN PROGRAMS iii (1983), <http://www.ncjrs.gov/pdffiles1/Digitization/86442NCJRS.pdf>. There are, of course, other policies that could be adopted to help address the needs of both individual and organizational hate crimes victims, including improved access to mental health care and safe housing. See, e.g., NYC AGAINST HATE, NYC AGAINST HATE COALITION POLICY FRAMEWORK: INVESTING IN A RESTORATIVE COMMUNITY-BASED APPROACH 2, <http://static1.squarespace.com/static/5e1b96b78d93e3087ddd7675/t/5e4720bc9f8d66363b969e34/1581719741136/NYC+Against+Hate+Policy+Platform.pdf> (calling for improved access to social services for people affected by hate crimes).

<sup>23</sup> The national debate over the funding and continued existence of law enforcement, which has gained significant attention in the weeks preceding the publication of this essay, raises important questions about the scope and severity of criminal legal systems and is worthy of serious attention beyond that which can be afforded here. See, e.g., Amna A. Akbar, *How Defund and Disband Became the Demands*, N.Y. REV. OF BOOKS: NYR DAILY (June 15, 2020, 7:00 AM), <https://www.nybooks.com/daily/2020/06/15/how-defund-and-disband-became-the-demands>. While aspects of the proposals presented herein are consistent with models of responses to crime that do not rely on law enforcement, see *infra* notes 42–62 and accompanying text, and the essay generally seeks to identify potential alternatives to sentence enhancements consistent with reducing reliance on carceral approaches and institutions, we do not directly address the question of whether these approaches are appropriate or feasible if defunding or dismantling law enforcement came to pass.

other economic sanctions, as well as setting eligibility qualifications for hate crimes victims that remediate the full extent of harm that hate crimes cause. For restorative justice methods, the challenges are still more fundamental: questions remain as to whether program design can sufficiently address the power asymmetries between victims and perpetrators of many hate crimes, and these programs are likely to be a viable option only where victims and perpetrators are open to participating in them. In sum, while alternatives to the traditional hate crimes model offer promise, they also present challenges that reformers must work through.

## I

### REFORMING VICTIM COMPENSATION PROGRAMS FOR HATE CRIMES

Victim compensation programs—which exist in all fifty states to provide financial support to victims of violent crimes<sup>24</sup>—could play an important role in responding to hate crimes in ways consistent with increasing concerns among progressives about the scope and severity of the carceral state. To do so, however, these programs must be designed to capture what makes hate crimes distinctly problematic: the breadth of physical, psychological, and citizenship harms caused to direct victims, as well as members of the broader community who share, and organizations who represent, that victim’s identity. This Part begins by outlining how current programs do, and do not, provide compensation in hate crimes cases,<sup>25</sup> and then considers potential reforms to help ensure such programs can be amended to express society’s recognition of hate crimes as especially problematic.

#### A. *Victim Compensation Programs: Current Eligibility Requirements*

As detailed below, a variety of eligibility requirements in victim compensation programs—including harm-type requirements, definitional limitations on what constitutes an eligible “victim,” and reporting and cooperation requirements—limit their ability to serve an expressive function in the hate crimes context.

*Harm-Type Requirements.* Victim compensation programs typically restrict eligibility based on the type of harm experienced by a crime victim. Compensation is generally limited to medical, dental, and mental health

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<sup>24</sup> *Crime Compensation: An Overview*, NAT’L ASS’N CRIME VICTIM COMP. BDS., <http://www.nacvcb.org/index.asp?bid=14> (last visited Apr. 21, 2020) [hereinafter *NACVCB, Overview*].

<sup>25</sup> For a discussion of limitations in crime victim compensation programs outside of the hate crimes context, see, e.g., Beth A. Colgan, *Beyond Graduation: Economic Sanctions and Structural Reform*, 69 DUKE L.J. 1529, 1558–61, 1579–80 (2020).

treatment, lost earnings, loss of support, and funeral expenses.<sup>26</sup> These requirements do, of course, allow some hate crime victims to seek financial support.

Harms caused by hate crimes, however, often go beyond those covered by victim compensation eligibility requirements. For example, hate crimes often result in damage to property caused in the perpetration of violent acts or from property offenses where no physical harm occurs.<sup>27</sup> Yet, in most jurisdictions, eligibility requirements preclude compensation for property damage in part or in full.<sup>28</sup> For example, Louisiana's victim compensation program does allow for awards related to catastrophic property losses, but only if the property in question constitutes the victim's current residence.<sup>29</sup> That rule would preclude financial support for three Louisiana churches that a man intentionally destroyed by fire because they were houses of worship.<sup>30</sup> Similarly, Minnesota's crime victim compensation program allows for compensation for mental health counseling, but only for a limited subset of crimes that excludes crimes against property.<sup>31</sup> Therefore, any members of the Dar al-Farooq Islamic Center in suburban Minneapolis in need of trauma counseling following the 2017 bombing of the center<sup>32</sup> would likely be deemed ineligible for aid.

Definition of "Victim." Each state's victim compensation program includes a definition of what constitutes a "victim" eligible for financial support. As with harm-type requirements, victim definitions do allow some hate crime victims to seek relief. For example, states make compensation

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<sup>26</sup> See, e.g., *Benefits*, NAT'L ASS'N CRIME VICTIM COMP. BDS., <http://www.nacvcb.org/index.asp?bid=16> (last visited Apr. 21, 2020) [hereinafter NACVCB, *Benefits*].

<sup>27</sup> See, e.g., *The Latest: Muslim Leader: Life Sentence for Mosque Attack*, AP NEWS (Jan. 24, 2019), <http://apnews.com/898e8758ce7e43d28ee36a73cd77548c> (describing the bombing of a mosque and cultural center, which resulted in property damage but no physical injuries).

<sup>28</sup> See, e.g., NACVCB, *Benefits*, *supra* note 26 (noting that property losses are typically not available); *Crime Victims Compensation*, N.D. DEP'T CORR. & REHAB., <http://www.docr.nd.gov/crime-victims-compensation> (last visited Apr. 21, 2020) ("No recovery is available for property loss or damage."); *Victim Compensation*, COLO. DIVISION CRIM. JUST., DEP'T PUB. SAFETY, [http://www.colorado.gov/pacific/dcj/Vic\\_Comp](http://www.colorado.gov/pacific/dcj/Vic_Comp) (last visited Aug. 7, 2020) (limiting covered property damage to broken locks, windows, and doors).

<sup>29</sup> *Crime Victim Reparations*, LA. COMM'N ON L. ENF'T & ADMIN. CRIM. JUST., <http://www.lcle.state.la.us/programs/cvr.asp> (last visited Aug. 7, 2020).

<sup>30</sup> See Meagan Flynn, *Arsonist Pleads Guilty to Torching Three Black Churches to 'Raise His Profile as a Black Metal Musician' Feds Say*, WASH. POST (Feb. 11, 2020), <http://www.washingtonpost.com/nation/2020/02/11/matthews-churches-blackmetal>.

<sup>31</sup> *Minnesota Crime Victims Reparations Board*, MINN. DEP'T PUB. SAFETY OFF. JUST. PROGRAMS, <http://dps.mn.gov/divisions/ojp/help-for-crime-victims/Pages/crime-victims-reparations.aspx> (last visited May 25, 2020) (limiting eligibility to homicide, assault, child abuse, sexual assault, robbery, kidnapping, domestic abuse, stalking, and criminal vehicular operation and drunk driving).

<sup>32</sup> See *The Latest: Muslim Leader: Life Sentence for Mosque Attack*, *supra* note 27 (emphasizing the Islamophobic motives of the perpetrators).

available for physical harms to direct victims, and in most cases allow for mental health expenses incurred by direct victims and family members of homicide victims, as well as coverage of additional expenses for a small subset of other people with direct losses.<sup>33</sup>

In most jurisdictions, however, the definition of what constitutes a victim is not yet sufficiently capacious to account for the breadth of harm caused by hate crimes. For example, North Carolina's program limits eligibility to direct victims, dependents of deceased victims, and those who are authorized to act on behalf of or provide benefits to direct victims.<sup>34</sup> The 2017 murder of three young Muslim students in Chapel Hill, North Carolina, shows how that limitation is too narrow to account for hate crimes harms. At the sentencing of the man who committed the crimes, Dr. Suzanne Barakat, the sister of one victim, described the "horrific trauma that [would] continue to forever haunt" her family.<sup>35</sup> Unless a particular family member met North Carolina's very limited definition of "victim," however, the letter of the law would render them ineligible for aid.

Because it is not only direct victims and their families who experience harm, but also members of the broader community who share characteristics that were the basis of the bias motivating the hate crime, current definitions of "victim" need to be expanded. Hate crimes may leave people in targeted communities with trauma, fear, and a reduced sense of belonging, equality, and social inclusion.<sup>36</sup> As Dr. Barakat explained, the murder of her loved ones "didn't happen in a vacuum," but were part and parcel of Islamophobia faced by the broader Muslim community.<sup>37</sup> Following the homicides, members of the area's Muslim community reported feeling afraid to wear head scarves that would make them readily identifiable as Muslim and to be out in public at night.<sup>38</sup> Again, if a community member in need of counseling or other forms of assistance applied, North Carolina's definition of "victim"

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<sup>33</sup> CRIMINAL INJURIES COMP. FUND, POLICIES AND PROCEDURES OF THE VIRGINIA VICTIMS FUND 44–46 (2019), <http://www.cicf.state.va.us/sites/default/files/Documents/VVF-Policies-and-Procedures.pdf> (regarding the availability of mental health services for direct victims and relatives of homicide victims, as well as other expenses); *Eligibility Requirements*, NAT'L ASS'N CRIME VICTIM COMPENSATION BOARDS, <http://www.nacvcb.org/index.asp?bid=6> (last visited Apr. 21, 2020) [hereinafter NACVCB, *Eligibility Requirements*].

<sup>34</sup> *Eligibility*, N.C. DEP'T PUB. SAFETY, <http://www.ncdps.gov/dps-services/victim-services/crime-victim-compensation/claims-and-application/eligibility> (last visited Apr. 21, 2020).

<sup>35</sup> Our Three Winners, *Dr. Suzanne Barakat-Court Sentencing 6/12/2019*, FACEBOOK WATCH (June 13, 2019), <http://www.facebook.com/watch/?v=2487268451500545>.

<sup>36</sup> See, e.g., Flynn, *supra* note 30 (following the 2017 arson of three Black churches in Louisiana, the NAACP described the crimes as "the same domestic terrorism that has been the hammer and chisel used to chip away at the humanity of black Americans and the suppression of our political power").

<sup>37</sup> Our Three Winners, *supra* note 35.

<sup>38</sup> Margaret Talbot, *The Story of a Hate Crime*, NEW YORKER (June 15, 2015), <http://www.newyorker.com/magazine/2015/06/22/the-story-of-a-hate-crime>.

would render them ineligible for support.

In addition to certain individuals, organizational victims also typically would not fall within a state's definition of what constitutes a victim eligible for compensation.<sup>39</sup> Mississippi's compensation fund, for example, is limited to individuals.<sup>40</sup> This definition means that, even if property damage were compensable, the Emmett Till Memorial Commission would be ineligible to receive compensation to replace a sign commemorating the 1955 murder of the fourteen-year-old by white supremacists after it was riddled by bullets in 2019.<sup>41</sup>

In short, the restrictive definitions of "victim" used for compensation eligibility reflects a limited understanding of the extent of the individualized harms that people directly targeted may suffer, and also the harms hate crimes may cause to members of, and organizations representing, the targeted community.

*Reporting and Cooperation Requirements.* Victim compensation programs require victims to report crimes to, and otherwise cooperate with, law enforcement in order to qualify for assistance.<sup>42</sup> Though this will not be a barrier in some hate crime cases, the Bureau of Justice Statistics (BJS) has estimated that fifty-four percent of the approximately 250,000 annual hate crime incidents each year go unreported.<sup>43</sup>

Many victims of hate crimes do not report incidents due to a belief that "police would not want to be bothered or to get involved, would be inefficient or ineffective, or would cause trouble for the victim."<sup>44</sup> One reason appears to be the general distrust of law enforcement in communities that are

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<sup>39</sup> See, e.g., *Eligibility for Crime Victims' Compensation Program*, KEN PAXTON ATT'Y GEN. TEX., <http://www.texasattorneygeneral.gov/crime-victims/crime-victims-compensation-program/eligibility-crime-victims-compensation-program> (last visited May 14, 2020) ("A business, agency, or organization cannot apply as a claimant.")

<sup>40</sup> See *Victim Compensation Application*, OFF. ATT'Y GEN., <http://www.ago.state.ms.us/wp-content/uploads/2013/06/Victim-Compensation-Application-Guidelines-2013.pdf> (last visited Apr. 21, 2020).

<sup>41</sup> See Nicole Chavez & Jamiel Lynch, *3 College Students Posed with Guns by the Emmett Till Memorial. The Justice Department May Investigate*, CNN (July 26, 2019), <http://www.cnn.com/2019/07/25/us/emmett-till-marker-mississippi-students-suspended/index.html> (describing the memorial vandalism incident and introducing the Emmett Till Memorial Commission as the custodians of the sign).

<sup>42</sup> NACVCB, *Eligibility Requirements*, *supra* note 33.

<sup>43</sup> MADELINE MASUCCI & LYNN LANGTON, BUREAU OF JUST. STAT., *HATE CRIME VICTIMIZATION, 2004-2015*, at 5 (2017). This is a distinct problem from the failure of police to adequately investigate, document, and make public information about reported hate crimes. See, e.g., U.S. COMM'N ON CIVIL RIGHTS, *IN THE NAME OF HATE: EXAMINING THE FEDERAL GOVERNMENT'S ROLE IN RESPONDING TO HATE CRIMES*, 175-79, 220-21 (2019) (describing inadequacies in law enforcement documentation of reported hate crimes and noting that "[m]any cities, and even the entire state of Hawaii, does [sic] not report hate crime data to the FBI"). For proposals related to these and other problems related to hate crimes, see *id.* at 226-27.

<sup>44</sup> MASUCCI & LANGTON, *supra* note 43, at 5 (describing the rationale provided by twenty-three percent of victims for not reporting hate crimes).

both over-policed—disproportionately subjected to stops, surveillance, and the use of force—and neglected through law enforcement failures to respond to crime reports.<sup>45</sup> For example, when an investigative reporter reached out to community members in Chico, California about the lack of hate crime reporting, local activists and religious leaders pointed to the police shooting of Desmond Phillips, a young Black man experiencing a mental health crisis, or described prior incidents in which police officers had responded to reports of a crime with disinterest.<sup>46</sup>

Furthermore, the concern that reporting to law enforcement would result in “trouble for the victim”<sup>47</sup> can stem from a fear of legal or social consequences. For example, some Latinx people experience deep-seated fear that reporting will lead to deportation of themselves or others in their family or community.<sup>48</sup> Muslim, Arab, and South Asian victims may avoid reporting due to concerns that doing so will prompt law enforcement to surveil them, rather than their assailants.<sup>49</sup> Further, some LGBTQ victims state that they do not report “due to fear of retaliation, humiliation, or having to disclose their sexual orientation or gender identity.”<sup>50</sup>

In addition to a lack of trust in law enforcement, an additional nineteen percent of hate crime victims who declined to report incidents that do not involve physical harm “stated that the victimization was not important enough to report to police,”<sup>51</sup> even though such incidents—including threats and intimidation—may fall within the scope of what constitutes a hate crime.<sup>52</sup> When people are routinely subject to intolerance, including epithets and other threatening behavior, that experience may become “normalized.”<sup>53</sup> As a result, incidents short of serious violence may feel routine, leading to a perception among victims that their experiences are not worth reporting.<sup>54</sup>

In sum, though hate crimes are understood as distinct because of the

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<sup>45</sup> See, e.g., David Kennedy, *Reading Los Angeles: Black Communities: Overpoliced for Petty Crimes, Ignored for Major Ones*, L.A. TIMES (Apr. 10, 2015), <http://www.latimes.com/opinion/bookclub/la-reading-los-angeles-kennedy-ghettoside-20150404-story.html>.

<sup>46</sup> Leslie Layton, *Chico Cops Report Zero Hate Crimes in 2018: Anecdotal Reports Tell Another Story*, CHICOSOL (Dec. 11, 2019), <http://chicosol.org/2019/12/11/chico-cops-report-zero-hate-crimes-2018>.

<sup>47</sup> MASUCCI & LANGTON, *supra* note 43, at 5.

<sup>48</sup> U.S. COMM’N ON CIVIL RIGHTS, *supra* note 43, at 77–78.

<sup>49</sup> See *id.* at 77 (noting Muslims’ fear of “additional consequences” from interactions with government officials).

<sup>50</sup> *Id.* at 76.

<sup>51</sup> MASUCCI & LANGTON, *supra* note 43, at 5.

<sup>52</sup> See *Learn About Hate Crimes*, U.S. DEP’T JUST., <http://www.justice.gov/hatecrimes/learn-about-hate-crimes> (last visited May 14, 2020) (noting that threats to commit violence motivated by animus may constitute a hate crime even if the violent act does not occur).

<sup>53</sup> See U.S. COMM’N ON CIVIL RIGHTS, *supra* note 43, at 75, 77 (discussing normalization of intolerance experienced by members of the LGBTQ and Muslim communities).

<sup>54</sup> *Id.*

scope of harms they cause, victim compensation programs will require redesign to adequately capture society's recognition of those harms and better address the needs of those affected by them.

### B. Potential Reforms to Victim Compensation Programs<sup>55</sup>

An opportunity exists to reform victim compensation programs to more fully express society's understanding of the serious harms caused by hate crimes. First, states could exempt hate crimes from harm-type limitations to ensure that property damage, psychological injury, and citizenship harms are made eligible.<sup>56</sup> Second, states could expand "victim" definitions to include members of the broader community who share the targeted characteristic that served as the basis of the bias triggering the offense, as well as to include direct organizational victims.

In addition to reforms related to eligibility, and in light of evidence that hate crimes often go unreported, lawmakers might establish mechanisms for reporting hate crimes outside of traditional law enforcement channels that can also serve as a pass-through mechanism to provide victim compensation funds to victims who choose not to report through traditional means.<sup>57</sup> For example, after a man yelled epithets at a teenage girl wearing a hijab and her friend, and then killed two men and seriously injured a third who came to their aid,<sup>58</sup> city officials in Portland, Oregon offered \$350,000 in city grants for community groups "to act as a point of contact for those who have

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<sup>55</sup> Though discussed here as reforms to existing programs, the expansion of aid eligibility could also be addressed through the creation of a separate program. See Monica C. Bell, *The Case for Racism Response Funds—A Collective Response to Racist Acts*, APPEAL (July 17, 2020), <https://theappeal.org/the-case-for-racism-response-funds-a-collective-response-to-racist-acts> (proposing the creation of funds to address harms created by behaviors rooted in racism).

<sup>56</sup> California has added hate crimes to its list of qualifying offenses. *Who's Eligible*, CAL. VICTIM COMPENSATION BOARD, <http://victims.ca.gov/victims/eligibility.aspx> (last visited Apr. 23, 2020). This does not yet ensure full compensation for hate crimes, however, because such offenses are still limited by harm type, with property-related expenses restricted to crime scene clean-up, moving and relocation, and improvements to home security. *Application for Crime Victim Compensation*, CAL. VICTIM COMP. BD., [http://victims.ca.gov/docs/forms/victims/apps/victimcompensationapp\\_eng.pdf](http://victims.ca.gov/docs/forms/victims/apps/victimcompensationapp_eng.pdf) (last visited Apr. 23, 2020). Our thanks to Mariel Pérez-Santiago for bringing this program's listing of hate crimes in its eligible crimes list to our attention.

<sup>57</sup> While victim compensation programs have long been seen as having the potential benefit of improving cooperation between victims and law enforcement, even in their early days there was little evidence suggesting that such results occurred. See MCGILLIS & SMITH, *supra* note 22, at 72–73. Allowing for compensation through non-traditional means may, of course, further disincentivize people from reporting hate crimes to law enforcement. But for victims who would never have turned to law enforcement, community-based victim compensation programs could provide societal recognition of harm.

<sup>58</sup> Maxine Bernstein, *MAX Attack Unfolded Quickly: Extremist Cut Three in Neck, Police Say*, OREGONIAN (May 28, 2017), [http://www.oregonlive.com/portland/2017/05/horrific\\_scene\\_unfolds\\_on\\_max.html](http://www.oregonlive.com/portland/2017/05/horrific_scene_unfolds_on_max.html).

experienced hate crimes, to train individuals or groups on how to resist hate crimes, or to gather, analyze and publicize data about such crimes.”<sup>59</sup> As a result, a coalition of community-based organizations has created a reporting system that allows victims and witnesses to report hate crimes in person at neighborhood centers throughout the city<sup>60</sup> or anonymously online.<sup>61</sup> Officials have taken pains to assure users that the anonymous reporting system is not operated by the government.<sup>62</sup> Though Portland’s system has not yet coordinated with the state’s victim compensation program, the system could be designed to do so.

These reforms are not without their complications, including one that contributed to the eligibility restrictions noted above: limitations on funding for victim compensation. Since their inception in the United States in the 1960s, eligibility restrictions in victim compensation programs have largely been driven by lawmaker concerns that requests for compensation will outpace fund resources.<sup>63</sup>

Yet, the expansion of these programs to accommodate hate crimes may not actually result in significant pressure on available funds, so long as they are adequately supported. Victim compensation funds are designed to be a resource of last resort, meaning that if an otherwise eligible victim has “collateral resources”—e.g., insurance benefits, coverage through government programs such as Medicaid, or restitution paid directly to the victim—those resources must be used up prior to accessing victim compensation programs.<sup>64</sup> Organizational victims and many individuals made eligible by these reforms will undoubtedly have access to at least some collateral resources, thereby limiting a potential drain on program resources.<sup>65</sup>

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<sup>59</sup> Jessica Floum, *Portland Offers Grants to Combat City’s Rising Hate Crimes*, OREGONIAN (July 5, 2017), [http://www.oregonlive.com/portland/2017/07/portland\\_offers\\_grants\\_to\\_comb.html](http://www.oregonlive.com/portland/2017/07/portland_offers_grants_to_comb.html). For an example of methods of resisting hate crimes, see generally S. POVERTY L. CTR., *TEN WAYS TO FIGHT HATE: A COMMUNITY RESOURCE GUIDE* (2017), <http://www.splcenter.org/20170814/ten-ways-fight-hate-community-response-guide>.

<sup>60</sup> *PUAH Member Directory*, PORTLAND UNITED AGAINST HATE, <http://sites.google.com/view/portland-tracks-hate/report-in-person> (last visited May 14, 2020).

<sup>61</sup> *Home*, PORTLAND UNITED AGAINST HATE, <http://sites.google.com/view/portland-tracks-hate/home> (last visited May 14, 2020); *Report Online*, PORTLAND UNITED AGAINST HATE, <http://docs.google.com/forms/d/e/1FAIpQLSfMtulUHIj3zOtWrtmHaViv1y7PhBg97NjCtj3JTl69qvCJgw/viewform> (last visited May 14, 2020).

<sup>62</sup> *Community & Civic Life: Portland United Against Hate*, CITY PORTLAND OR., <http://www.portlandoregon.gov/civic/72583> (last visited May 14, 2020) (“ReportHatePDX.com takes you to a website outside the City system and is \*not\* a government website.”).

<sup>63</sup> See, e.g., MCGILLIS & SMITH, *supra* note 22, at 20–21, 40–43, 61, 69 (documenting that property crimes and property damage were often excluded largely because of “the fear that the costs of such compensation would be astronomical” given the frequency of property offenses).

<sup>64</sup> NACVCB, *Eligibility Requirements*, *supra* note 33.

<sup>65</sup> In addition, victim compensation programs cap awards, which if retained would also help

The fiscal implications of these reforms also raise a related issue regarding the source of funding for victim compensation programs that complicates efforts to use them in a way that is commensurate with the goal of shrinking the carceral state. Victim compensation programs primarily draw funds from fines, fees, forfeitures, and other economic sanctions.<sup>66</sup> As many civil rights organizations and progressives have recognized, the use of economic sanctions can result in serious, long-term financial and social instability for people of limited means and operates as a form of regressive taxes against heavily policed communities, thereby working against efforts to decrease the footprint of criminal legal systems.<sup>67</sup>

This does not mean that victim compensation programs are unworkable in the hate crimes context, but rather that to be consistent with broader goals, the sources for these funds require reform. This may be possible with the adoption of meaningful systems for graduating economic sanctions according to ability to pay along with a redirection of economic sanction revenues away from more punitive law enforcement projects.<sup>68</sup> In addition, governments could invest tax revenue or work with private foundations or other donors to generate funding independent from economic sanctions revenues, as the federal government has done to support victim compensation programs through the Office for Victims of Crime since 2002.<sup>69</sup> Thus, the reform and expansion of current funding structures for victim compensation programs, alongside the loosening of existing restrictions on their use, could benefit hate crimes victims and affected communities outside traditional law enforcement approaches. Full financial support for such funds would also better acknowledge collective responsibility for societal structures that perpetuate or enable individual acts of hate.<sup>70</sup>

Beyond their fiscal implications, and whether crimes are reported through traditional or non-traditional reporting mechanisms, these reforms raise other programmatic design issues. Given that prosecutors may decline

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prevent a serious drain on the system. *See, e.g.*, CRIMINAL INJURIES COMP. FUND, *supra* note 33, at 3 (noting the cap on awards of \$35,000 with up to an additional \$10,000 to cover funeral expenses in homicide cases).

<sup>66</sup> NACVCB, *Overview*, *supra* note 24.

<sup>67</sup> *See, e.g.*, Joanna Weiss, *New York State Testimony: The Regressive Tax Burden*, FINES & FEES JUST. CTR., [http://finesandfeesjusticecenter.org/content/uploads/2019/02/2.11-NYS-State-Testimony\\_02072019.pdf](http://finesandfeesjusticecenter.org/content/uploads/2019/02/2.11-NYS-State-Testimony_02072019.pdf) (last visited May 14, 2020). Traditionally conservative organizations and advocates often share these concerns about abuses related to economic sanctions. *See generally*, *e.g.*, DICK M. CARPENTER II ET AL., INST. FOR JUST., *THE PRICE OF TAXATION BY CITATION* (2019), <http://ij.org/wp-content/uploads/2019/10/Taxation-by-Citation-FINAL-USE.pdf>.

<sup>68</sup> *See generally* Colgan, *supra* note 25.

<sup>69</sup> *About OVC: Crime Victims Fund*, OFF. FOR VICTIMS CRIME, <http://www.ovc.gov/about/victimsfund.html> (last visited Apr. 23, 2020).

<sup>70</sup> *See* Bell, *supra* note 55 (noting that funds for aid following incidents grounded in racism “can also be a concrete way of expressing the community’s recognition of its complicity in perpetuating racism, segregation, and their accompanying ills”).

to include hate crime charges in a given case despite evidence of bias, and that police reports may not capture such evidence<sup>71</sup> or may not exist at all where crimes go unreported,<sup>72</sup> other mechanisms for verifying a hate crime has occurred must be devised. Further, expanding victim compensation programs beyond direct victims and their families raises complicated questions about the bounds of the arguably affected community and what organizational victims should be considered eligible.<sup>73</sup> The answers to these questions are beyond the scope of this essay, but directly affect the extent to which victim compensation programs adequately capture society's understanding of the scope of harms caused by hate crimes.

If such questions can be resolved, victim compensation programs provide an opportunity to satisfy the desire to express the distinct nature of the harms created by hate crimes. In doing so, they may reduce the need for enhancements to serve that expressive function while simultaneously providing much needed support to hate crime victims.

## II

### RESTORATIVE JUSTICE RESPONSES TO HATE CRIMES

A second set of potential alternatives to the sentence enhancement model presents harder questions and would likely generate greater controversy. Over several decades, a set of ideas and practices under the heading of “restorative justice” has emerged as a leading alternative to the existing criminal legal system.<sup>74</sup> Restorative justice encompasses “apologies, restitution, and acknowledgments of harm and injury, as well as . . . other efforts to provide healing and reintegration of offenders into their communities, with or without additional punishment.”<sup>75</sup> Restorative justice programs vary widely with respect to whether they supplement, replace in part, or exist entirely outside of criminal legal processes.<sup>76</sup> In its most common form,

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<sup>71</sup> See Eisenberg, *supra* note 1, at 885–87.

<sup>72</sup> See *supra* notes 43–54 and accompanying text. Even where an alternative reporting channel, like that in Portland, relies on self-reporting of victims, there must be some mechanism to verify that a reported incident falls within the broader eligibility requirements detailed herein. Verification need not, however, require a finding beyond a reasonable doubt as would be required in a criminal prosecution. See *In re Winship*, 397 U.S. 358, 364 (1970) (“[T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.”).

<sup>73</sup> For a related discussion of what constitutes the affected “community,” see *infra* notes 101–02 and accompanying text.

<sup>74</sup> See Carrie Menkel-Meadow, *Restorative Justice: What Is It and Does It Work?*, 3 ANN. REV. L. & SOC. SCI. 10.1, 10.3–10.4 (2007) (describing the beginning of the restorative justice model and its growing movement into larger national and international areas).

<sup>75</sup> *Id.* at 10.2.

<sup>76</sup> See Thalia González, *The Legalization of Restorative Justice: A Fifty-State Empirical Analysis*, 5 UTAH L. REV. 1027, 1030–32 (2019) (describing a variety of restorative justice practices

restorative justice involves facilitated interactions between victims, people who cause harm, and, sometimes, other community members, and are designed to acknowledge fault and reach agreement on how people can repair the harm they inflicted.<sup>77</sup>

### A. *The Appeal of Restorative Justice for Hate Crimes*

Within the United States, restorative justice programs have only sporadically addressed hate crimes, though interest in their use appears to be expanding.<sup>78</sup> For example, in early 2020, San Francisco prosecutors dropped charges, including a hate crimes charge, against a twenty-year-old who videotaped the beating of an elderly Asian man after the victim expressed interest in a restorative proceeding.<sup>79</sup> A coalition of progressive New York City organizations has also called for a restorative justice pilot program for minors who commit hate violence.<sup>80</sup>

Advocates argue that restorative justice meets the needs of both survivors and responsible parties more effectively than incarceration. For instance, Danielle Sered, director of a New York organization that offers an opt-in, restorative justice alternative to incarceration for violent crimes, contends that the guided process of meeting those responsible for a crime and determining reparative steps validates survivors' pain, facilitates healing by providing information about what happened, gives survivors an opportunity to be heard, and restores survivors' lost sense of control and safety.<sup>81</sup> For those who commit harm, she argues, the process replaces conventional punishment with a more meaningful form of accountability because it requires people to face the consequences of their actions and take steps to repair the harm.<sup>82</sup>

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and providing evidence of the growing codification of such programs into statutory or regulatory law).

<sup>77</sup> Menkel-Meadow, *supra* note 74, at 10.2.

<sup>78</sup> For past U.S. examples of restorative justice responses to hate crimes, see Robert B. Coates et al., *Responding to Hate Crimes Through Restorative Justice Dialogue*, 9 CONTEMP. JUST. REV. 7, 8 (2006) (noting a study identifying seven U.S. communities that used "dialogue" to prevent or respond to hate crimes) and SERED, *supra* note 14, at 115–18 (describing Common Justice's work with the victim and perpetrator of an anti-Semitic hate crime).

<sup>79</sup> Evan Sernoffsky & Alejandro Serrano, *SF District Attorney Withdraws Charges Against Defendant in Attack on Asian Man*, S.F. CHRON. (Mar. 2, 2020, 3:55 PM), <http://www.sfchronicle.com/crime/article/SF-Bayview-attack-Second-suspect-surrenders-to-15098296.php>. Prosecutors retain the ability to reinstate charges should a restorative justice process fail, but the choice to attempt a restorative proceeding shows the expanding interest in that option.

<sup>80</sup> See NYC AGAINST HATE, *supra* note 22.

<sup>81</sup> SERED, *supra* note 14, at 23–30, 133–40.

<sup>82</sup> *Id.* at 96. For a discussion of why rehabilitative programs designed to enable people to confront their biases are particularly important in cases where the crime is committed by a youth, see generally Jordan Blair Woods, Comment, *Addressing Youth Bias Crime*, 56 UCLA L. REV. 1899 (2009).

In a hate crimes context, a restorative proceeding could enable some survivors to request forms of reparation that they often do not get in a traditional process—such as an acknowledgment by the person who committed the crime that they did so out of bias or an apology for their actions. Hate crimes victims often desire hate crimes charges to receive acknowledgment that bias motivated a crime.<sup>83</sup> But prosecutors often do not charge crimes as hate crimes or seek sentence enhancements because of the difficulty of proving such a motivation beyond a reasonable doubt.<sup>84</sup> More flexible than criminal legal processes, restorative proceedings might allow for reparations that respond to survivors' desire for an acknowledgment of bias or expression of regret.<sup>85</sup>

### B. *Assessing Restorative Justice for Hate Crimes*

In an overview of empirical studies assessing whether restorative justice programs achieve their stated goals, Professor Carrie Menkel-Meadow concluded that a “variety of different studies on at least three continents” substantiated 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.”<sup>86</sup> In addition, while little research examines restorative justice programs focused on hate crimes in the United States, some research on programs abroad finds such efforts to be promising. Professor Mark Walters, a criminologist who studied U.K. programs used in hate crime cases, concluded that restorative justice practices helped mitigate many victims' harm by allowing them to vocalize their experience, receive support from facilitators, and obtain “assurances of desistance” from those who had hurt them.<sup>87</sup>

This research has important qualifications. As Professor Menkel-Meadow noted, most empirical restorative justice studies are affected by significant methodological limitations, especially the difficulty of comparing across restorative and conventional criminal processes when participants are

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<sup>83</sup> One such example is the public statement of the father of a murdered Muslim college student. See Talbot, *supra* note 38 (“We are not seeking any revenge. Our children are much more valuable than any revenge. When we say that this was a hate crime, it’s all about protecting all other children in the U.S.A. . . . We need to identify things as they really are.”).

<sup>84</sup> See Eisenberg, *supra* note 1, at 862–64 (describing reasons that prosecutors often fail to charge cases as hate crimes).

<sup>85</sup> See, e.g., Coates, *supra* note 78, at 14 (describing the public apology of a man who phoned in death threats to a mosque).

<sup>86</sup> Menkel-Meadow, *supra* note 74, at 10.14; see also MARK AUSTIN WALTERS, HATE CRIME AND RESTORATIVE JUSTICE 53 (2014) (“[T]he growing body of research now strongly suggests that [restorative justice] practices provide both material and emotional reparation to a greater percentage of victims when compared to those whose cases go to court.”).

<sup>87</sup> WALTERS, *supra* note 86, at 184.

not randomly assigned to different settings.<sup>88</sup> In addition, the study of restorative justice in the hate crimes context is too early and small-scale to permit generalization.<sup>89</sup>

Moreover, restorative justice methods present several challenges when applied to hate crimes in light of the subordinated status of many survivors and targeted communities vis-à-vis offenders and society at large. Some feminist scholars have long argued that restorative justice applied to domestic violence or sexual assault may fail to account for asymmetries of power and the societal trivialization of violence against women.<sup>90</sup> The use of restorative justice methods for hate crimes invites similar critiques.

One concern is that some members of the public may interpret the use of restorative justice as expressing insufficient condemnation for hate crimes. The concern is greatest in contexts where segments of society equivocate in condemning certain acts or only weakly recognize a form of bias. For instance, calls for restorative justice to deal with post-9/11 hate crimes targeting Muslims<sup>91</sup> may have communicated the message that such crimes were “understandable” or undeserving of complete condemnation.<sup>92</sup> Separately, for hate crimes survivors in communities afflicted by mass incarceration, the exposure to lengthy prison terms sometimes *heightens* the belief that society should respond to hate crimes with harsh sentences—at least as a way of equalizing treatment across crimes.<sup>93</sup>

Another concern is that meetings between victims and those who committed hate crimes might revictimize survivors. People whose biases find support in a dominant community—or among friends and family who take

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<sup>88</sup> Menkel-Meadow, *supra* note 74, at 10.12–13.

<sup>89</sup> For instance, Professor Walters’s positive findings stemmed largely from a single program: the Hate Crimes Project at the Southwark Mediation Centre in London. WALTERS, *supra* note 86, at 91, 95, 119–20 (describing the interviews of twenty-three victims who took part in the Hate Crimes Project). Walters found his interview findings on victims’ emotional reparation to be corroborated by interviews with twenty-three other U.K. restorative justice practitioners who had handled twenty-eight other hate crimes cases, although those practitioners’ impressions were secondhand. *Id.* at 115–16.

<sup>90</sup> See, e.g., Julie Stubbs, *Beyond Apology?: Domestic Violence and Critical Questions for Restorative Justice*, 7 CRIMINOLOGY & CRIM. JUST. 169, 173 (2007).

<sup>91</sup> See generally Maria R. Volpe & Staci Strobl, *Restorative Justice Responses to Post-September 11 Hate Crimes: Potential and Challenges*, 22 CONFLICT RESOL. Q. 527 (2005).

<sup>92</sup> See generally Muneer I. Ahmad, *A Rage Shared by Law: Post-September 11 Racial Violence as Crimes of Passion*, 92 CALIF. L. REV. 1259, 1264 (2004) (arguing that, unlike other hate crimes, post-9/11 hate crimes against those who appeared to be Muslim were viewed as morally understandable “crimes of passion” stemming from widely-shared societal biases).

<sup>93</sup> For one example, see Michael E. Miller & Steven Rich, *Hate Crime Reports Have Soared in D.C. Prosecutions Have Plummeted.*, WASH. POST (Aug. 21, 2019), <https://www.washingtonpost.com/graphics/2019/local/dc-hate-prosecutions-drop>. The article describes the perspective of Ashley Taylor, a Black lesbian woman who—on account of her lesbian identity—was shot by a co-worker. *Id.* Taylor expressed outrage that her assailant received only three years in prison with no hate crimes enhancement when her father had been imprisoned for ten years for a shooting. *Id.*

part in a meeting with victims—might offer insincere apologies or even shift the blame to those victims.<sup>94</sup> Some perpetrators might be unrepentant, such as those who remain ideologically committed to excluding racial minorities from white neighborhoods or to instigating a “race war” to preserve white supremacy.<sup>95</sup>

There is also a risk that individuals from subordinated communities might be subject to “coerced compassion”—the gendered or racialized social expectation that certain victims forgive perpetrators rather than demand punishment.<sup>96</sup> As an example even out of the hate crimes context, after a Black man embraced the white Dallas police officer convicted of murdering his brother, many commentators argued that society improperly expected Black victims “to ‘make nice’ with the perpetrators of their trauma.”<sup>97</sup> Social pressure could lead some victims to consent to restorative processes or accept offers of reparation even when they would have preferred more retributive measures.

Questions remain as to whether the careful design of restorative justice processes can surmount these challenges. For instance, Professor Walters concluded that, in the hate crimes restorative justice meetings he studied, the comprehensive preparation of participants before a face-to-face encounter, the active involvement of facilitators trained to counter prejudice, and the setting of clear ground rules largely preempted survivor revictimization.<sup>98</sup> Other aspects of program design may also partially address the concern that some perpetrators will seek to exploit restorative processes. In jurisdictions with restorative alternatives, prosecutors who have charged a person with a crime often have the choice to proceed with conventional prosecution and

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<sup>94</sup> For a discussion of these concerns, see Stubbs, *supra* note 90, at 174; WALTERS, *supra* note 86, at 189–91. A separate problem faces accused individuals who genuinely wish to participate in restorative justice processes but who hesitate to do so if the backstop in a given jurisdiction is prosecution. Some may fear, for instance, that admissions of guilt in a restorative process will be used against them if the restorative process fails. See González, *supra* note 76, at 1051–52 (noting limited court rules guaranteeing confidentiality of restorative justice processes, leading many programs to rely on memoranda of understanding with prosecutors instead).

<sup>95</sup> See generally JEANNINE BELL, *HATE THY NEIGHBOR: MOVE-IN VIOLENCE AND THE PERSISTENCE OF RACIAL SEGREGATION IN AMERICAN HOUSING* (2013) (detailing the rise and contemporary persistence of violent tactics aimed at preventing residential racial integration); Jason Wilson, *Prepping for a Race War: Documents Reveal Inner Workings of Neo-Nazi Group*, *GUARDIAN* (Jan. 25, 2020, 4:10 AM), <http://www.theguardian.com/world/2020/jan/25/inside-the-base-neo-nazi-terror-group> (documenting the workings of a white supremacist group that promotes a race war).

<sup>96</sup> See Stubbs, *supra* note 90, at 174, 177–78 (describing the gendered nature of expectations of forgiveness).

<sup>97</sup> Tayo Bero, *Amber Guyger Deserves to Go to Jail. Black People Shouldn't Have to Feel Sorry for Her*, *GUARDIAN* (Oct. 9, 2019), <http://www.theguardian.com/commentisfree/2019/oct/09/amber-guyger-jail-black-forgiveness>.

<sup>98</sup> WALTERS, *supra* note 86, at 198–204.

punishment or refer a person to a restorative alternative.<sup>99</sup> Screening mechanisms can help ensure that people who have committed hate crimes are amenable to meaningful participation in the process.

With respect to the risk of “coerced compassion,” a combination of well-articulated opt-in procedures making clear that participation is voluntary, alongside the training of facilitators on the cultural or social dynamics that might pressure some victims to consent, could reduce the risk. But it is not clear whether such practices could eliminate a risk that stems from deep-seated norms or hierarchies, such as structures of racial subordination that disempower some victims from articulating true preferences.

A separate question raised by restorative justice models is how much these programs can do to alleviate the effect of hate crimes on affected identity groups, as opposed to direct victims. Restorative justice meetings sometimes include community representatives who speak to the hate crime’s wider impact and ask those responsible to work towards its repair, for instance, by making public apologies or attending classes to learn about the group they targeted.<sup>100</sup> But any expansion of participants beyond those immediately involved necessarily raises questions of who has the right to speak for a “community.”<sup>101</sup> This challenge may be relatively surmountable when a hate crime targets a preexisting group with designated leaders, such as a membership-based religious institution.<sup>102</sup> It becomes harder when no such bounded community exists and where many people broadly linked to the victim’s identity care deeply about the state’s response. It is not clear who should have a role in deciding how the accused should repair the harm when “communities” are internally divided or where advocacy groups seek a different resolution from the direct victims.<sup>103</sup> Some in affected communities, for instance, will not want a process they view as putting the onus on community members to reeducate those who have committed hate crimes.

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<sup>99</sup> See, e.g., Sernoffsky & Serrano, *supra* note 79 (noting San Francisco’s ability to reinstate charges if a restorative process fails).

<sup>100</sup> See, e.g., Coates et al., *supra* note 78, at 14 (describing a meeting between the victims, perpetrator, and twenty community members in response to a death threat targeting an Oregon Islamic center that led to the perpetrator’s public apology and continued attendance at lectures on Islam).

<sup>101</sup> For the classic critique of the concept of “community” in restorative justice discourse, see generally Robert Weisberg, *Restorative Justice and the Danger of “Community,”* 2003 UTAH L. REV. 343 (2003) (warning against the uncritical use of the term “community” and arguing that greater awareness of what “community” means is essential to implementing successful restorative justice programs).

<sup>102</sup> Even here, questions remain about whether such leaders represent all segments of such communities, given internal stratifications of race, gender, and class within many communities.

<sup>103</sup> Cf. Nicolas Carrier & Justin Piché, *Blind Spots of Abolitionist Thought in Academia*, 12 CHAMP PÉNAL 1, 8–9 (2015) (articulating a critique of abolition theory—in which many restorative justice programs have roots—regarding a lack of clarity as to whether and when to designate the relevant community as local, national, or international).

In short, while the use of restorative justice processes may better aid some victims and community members in processing the harm caused by hate crimes, as well as help some perpetrators in taking responsibility for their actions, such processes present difficult questions that advocates and researchers have yet to resolve. At a minimum, the design of such programs will be critical to preempting problematic power asymmetries. Moreover, programs to implement restorative justice in hate crime cases will likely gain traction with subordinated groups only as part of a larger move towards restorative justice in all contexts. Otherwise, such programs risk sending the message that those who commit hate crimes deserve opportunities to avoid prison that are not available to others who commit harm.

Still, the possibility that restorative justice processes will better serve both victims and perpetrators suggests they should be explored further, whether to replace incarceration in a given case or, at least, to replace a sentence enhancement. Restorative programs could begin with categories of hate crimes or perpetrators that might suggest greater potential for growth: for instance, less serious offenses or crimes committed by youth.<sup>104</sup> Programs could then be expanded more broadly as appropriate based on lessons learned. Further, though the goal of some advocates is to replace incarceration entirely, restorative justice is not an all-or-nothing proposition, particularly in this context. It may well be that in the most serious cases, restorative processes could be used to replace the sentence enhancement that might otherwise be applied, if not the sentence itself.

#### CONCLUSION

Conceived of in the tough-on-crime era, hate crimes sentence enhancements were designed to express society's condemnation of the distinct harms that hate crimes inflict on direct victims and those who share the victims' identity. They arose out of a desire to recognize and respond to the physical harm, psychological trauma, and citizenship harms that left the targets of hate crimes feeling cut out from the fabric of society.

Though the tough-on-crime movement is by no means defunct, there has been a sea change in the national conversation on crime—its scope, how it is policed, how it is prosecuted, and whether it is better addressed by attending to social inequality rather than through punitive measures. This shift allows for reexamination of whether sentence enhancements are the appropriate means of addressing the harms that hate crimes create.<sup>105</sup> Seven

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<sup>104</sup> See Woods, *supra* note 82, at 1926 (arguing that youth who commit bias crimes are more amenable to intervention and reform).

<sup>105</sup> See, e.g., Akbar, *supra* note 23 (describing the recent shift in the national debate towards divestment from the prison industrial complex and investment in responses to social problems “that do not rely on violence and punishment”).

decades of ramping up punishment as the primary means of addressing crime<sup>106</sup> has left the nation with a crisis of mass incarceration, resulting in the confinement of nearly 2.2 million juveniles and adults today.<sup>107</sup> This crisis has left civil rights advocates across the progressive spectrum questioning the efficacy of carceral policies, creating a tension between the desire to treat hate crimes as especially harmful and the broader progressive push to reduce the scope and severity of the criminal legal system.

This essay raises two potential alternatives to sentence enhancements—reforms to victim compensation programs and the use of restorative justice mechanisms—that may preserve the expressive message of hate crimes laws while de-linking that message from lengthening prison terms. Though some questions regarding issues of design remain, victim compensation programs could be reformed to exempt hate crimes from harm-type limitations, expand the definition of victim to include both members of the broader community who share the victim’s targeted characteristic as well as organizational victims, and provide alternatives to reporting and cooperation requirements for the significant number of hate crime victims who choose not to report to law enforcement. Restorative justice approaches present a more difficult set of questions. They may benefit some hate crimes victims and affected community members in healing from hate crimes and subject some of those responsible to a more meaningful form of accountability. But questions remain as to whether program design can sufficiently mitigate concerns raised by power asymmetries—where perpetrators from socially dominant groups victimize individuals from subordinated communities—and regarding the scope of hate crimes offenses for which restorative programs should be employed. Far from resolving the range of questions that potential alternatives present, this essay has advanced them with the hope of generating further experimentation and study.

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<sup>106</sup> See generally ELIZABETH HINTON, FROM THE WAR ON POVERTY TO THE WAR ON CRIME: THE MAKING OF MASS INCARCERATION IN AMERICA (2016) (documenting how the “War on Crime” began in the Civil Rights Era).

<sup>107</sup> These figures exclude tribal, territorial, immigration, and involuntary confinement facilities. Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2020*, PRISON POL’Y INITIATIVE (Mar. 24, 2020), <http://www.prisonpolicy.org/reports/pie2020.html>.