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A Trauma-Centered Approach to Addressing Hate Crimes

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A TRAUMA-CENTERED APPROACH TO ADDRESSING HATE CRIMES

AVLANA EISENBERG*

A dominant justification for hate crime laws is that they serve a crucial expressive function—sending messages of valuation to victims, and of denunciation to defendants. Yet, as this Essay will demonstrate, the focus on criminalizing hate—through the enactment of either sentencing enhancements or stand-alone hate crime statutes—has resulted in a thin conception of messaging that fails to recognize the limitations of the criminal law in addressing psychic harm.

This Essay argues that a more robust approach to addressing hate crimes must consider alternatives—beyond incarceration—that would center the trauma associated with hate crimes. This includes restorative justice models that might benefit both victims and defendants. Ultimately, the Essay calls into question conventional assumptions about the expressive function of hate crime laws while demonstrating the importance of a broad, holistic, and interdisciplinary lens, as well as interventions beyond the parameters of criminal law.

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INTRODUCTION

The category of hate crimes spans a vast spectrum, from instances of vandalism to mass shootings. These otherwise unrelated crimes are understood to be united by the significant psychic harms they cause to the intended victims as well as to members of targeted identity groups who may also suffer harm.¹ When enacting hate crime laws, legislators at both the state and federal levels have emphasized the expressive weight of these laws and the importance of sending messages to victims, defendants, and society at large promoting tolerance and equality and condemning bigotry and bias.²

Yet, this approach to combatting bias-motivated conduct through criminalization—through the enactment of either sentencing enhancements or stand-alone hate crime statutes—suffers from substantial limitations at the enforcement stage and fails to fully address the harms of hate crimes. Prosecutors face strong incentives against charging hate crimes, especially in particularly heinous cases, since the more serious the crime, the less likely a hate crime conviction would increase the defendant’s sentence.³ Even when these crimes are charged, they may not have the intended messaging effect. Many hate crime perpetrators view themselves as martyrs and are unlikely to be deterred.⁴ And, while some victims may gain solace from the labeling of a crime as hate-motivated, a hate crime conviction is unlikely to address a victim’s deep-seated trauma; the criminal law is ill-equipped to address the emotional harms experienced by individual victims.⁵

¹ See *infra* Section I.A.

² See *infra* Section I.B.

³ See *infra* Section II.A.

⁴ See *infra* Section II.B.

⁵ See *infra* Section II.C.

A more robust approach to addressing hate crimes must consider alternatives beyond the traditional criminal law to address the psychic harms associated with hate crimes. This includes restorative justice models that may benefit both victims and defendants.⁶ There are many possible models, and program design choices should include safeguards to ensure that participation is voluntary, that proxies are used when appropriate, and that there is equal access to participate in these programs such that restorative justice programs do not replicate existing inequities in the criminal legal system.⁷

This Essay calls into question conventional assumptions about the expressive function of hate crime laws while demonstrating that the harms of hate crimes will require a broad, holistic, and interdisciplinary lens, as well as interventions beyond the parameters of criminal law. In doing so, it exposes alternatives to traditional criminal law, relevant well beyond the hate crime context, that could better address victims' needs while curbing a reliance on incarceration as the primary way to address criminal harms.

The Essay proceeds as follows. Part I introduces the special psychic harms of hate crimes, and the intended expressive function of hate crime laws. Part II highlights the limitations of hate crime laws in sending their intended messages, as well as the limits of a traditional criminal justice approach in addressing victims' psychic harms. Part III explores a "trauma-centered approach," examining the potential for restorative justice programs in the hate crime context and proposing program design choices that could optimize fairness, promote equality, and most effectively address the psychic harms at the root of hate crimes.

I. EXPRESSIVE THEORY AND PSYCHIC HARMS

A. THE PSYCHIC HARMS OF HATE CRIMES

The category "hate crime" is vast. As defined by the FBI, a hate crime is a "criminal offense . . . motivated . . . by an offender's bias against a race, religion, disability, sexual orientation, ethnicity, gender, or gender identity."⁸ Accordingly, hate crimes can range in seriousness, from vandalism to a mass

⁶ See *infra* Section III.B. An exploration of other approaches that might serve as alternatives to prosecution is beyond the scope of this Essay but a subject ripe for future research.

⁷ See *infra* Section III.C.

⁸ *Overview of Hate Crime*, NAT'L INST. OF JUST., (Sept. 13, 2021), <https://nij.ojp.gov/topic/s/articles/overview-hate-crime> [<https://perma.cc/DP35-MT5K>].

shooting. One unifying feature of these otherwise vastly different crimes is that they are understood to be impactful beyond the particular crime and to a larger group of people than the direct victim or victims of the crime. Harm from these crimes thus can have an exponential reach, rippling through communities that otherwise have no connection to the crime or victim.

This harm that ripples through communities is best described as psychic harm. The psychological trauma caused by hate crimes has been documented, both as it affects direct victims and as it affects other members of the identity group targeted by the crime. Research findings suggest that hate crime victims, to a greater degree than victims of parallel non-hate motivated crimes, “tend to experience psychological symptoms such as depression or withdrawal, as well as anxiety, feelings of helplessness, and a profound sense of isolation.”⁹ Studies also demonstrate collateral harms of hate crimes—members of a hate crime victim’s identity group may “perceive that crime as an attack on themselves directly and individually.”¹⁰

B. THE EXPRESSIVE PURPOSE OF HATE CRIME LAWS

Proponents of hate crime legislation have sought to address the psychic harm that affects both the direct victims of hate crimes and those who belong to targeted identity groups. Proponents have long argued that these laws serve a crucial expressive function: “if a perpetrator sends a message of hatred to the victim and the victim’s group, the state in turn should send a message that such hatred is not acceptable in our pluralistic society.”¹¹ According to Yale Law professor Dan Kahan, this “call and response” represents a dialogue between crime and punishment.¹²

Legislators have publicly announced their expressive purposes in enacting these laws. For example, in support of federal hate crime legislation during congressional debates, Senator Levin encouraged the U.S. Senate to “send a clear message that America is an all-inclusive nation—one that does not tolerate acts of violence based on bigotry and discrimination” and stressed that hate crime legislation “will send the message that we are a

⁹ FREDERICK M. LAWRENCE, *PUNISHING HATE: BIAS CRIMES UNDER AMERICAN LAW* 40 (1999) (footnote omitted).

¹⁰ *Id.* at 41–42.

¹¹ Avlana Eisenberg, *Expressive Enforcement*, 61 *UCLA L. REV.* 858, 879 (2014) [hereinafter Eisenberg, *Expressive Enforcement*].

¹² Dan M. Kahan, *The Secret Ambition of Deterrence*, 113 *HARV. L. REV.* 413, 463 (1999).

country that treasures equality and tolerance.”¹³ Senator Cardin similarly referred to the message sent through hate crime legislation, explaining, “[t]he message when we pass this—and I certainly hope that we will pass this—is that America has made a priority protecting people from violence because of diversity, that diversity is embraced in America as our strength.”¹⁴

II. LIMITATIONS OF THE TRADITIONAL APPROACH

A. OBSTACLES TO ENFORCEMENT

An expressivist account might identify distinct messages sent by hate crime laws to different groups: to the victim and victim’s group, the message is one of valuation; to the defendant, it is one of stigma and denunciation; and to society, it is one of a commitment to tolerance and equality.¹⁵ However, at every stage of enforcement, there are significant limitations on how the intended messages of hate crime laws are delivered. The reasons for these expressive limitations include statutory inconsistencies across jurisdictions, prosecutorial incentives, and contextual factors regarding the place of hate crime laws in the broader lexicon of criminal laws and sentencing.

First, there are limitations regarding what crimes can be named as hate crimes. Given that jurisdictions define hate crimes differently, a crime could be classified as a hate crime in one state but not in another.¹⁶ Or the same crime could be classified as a hate crime at the federal level but not at the state level.

¹³ 146 CONG. REC. S5334–35 (daily ed. June 19, 2000) (statement of Sen. Carl Levin).

¹⁴ *The Matthew Shepard Hate Crimes Prevention Act of 2009: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 39 (2009) [hereinafter *Hearing*] (statement of Sen. Ben Cardin).

¹⁵ Eisenberg, *Expressive Enforcement*, *supra* note 11, at 879.

¹⁶ For example, hate crime statutes can be divided into two categories: “those that define hate crimes as motivated substantially or in part by ‘animus’ or ‘prejudice’ against the victim because of the victim’s group membership, and those that do not require a showing of animus but merely require that the victim be ‘intentionally selected’ on the basis of group membership.” *Id.* at 870–71. Hate crime statutes also differ widely with respect to which protected categories they include. All existing state hate crime statutes include the categories of race, ethnicity, and religion. Some states include the additional federally protected categories of disability, sexual orientation, gender, and gender identity. A few states have expanded the protected categories further to include such categories as age, political affiliation, and personal appearance. *See id.* at 921–26.

Second, there are substantial limitations to hate crime enforcement based on prosecutorial incentives and resulting charging decisions. For example, prosecutors may choose not to charge what appears to be a crime motivated by animus because of such factors as contravening statutory incentives (e.g., a hate crime conviction would not increase the maximum penalty for a particular crime),¹⁷ the challenge of proving motive,¹⁸ and concerns about muddying the waters for jurors by delving into fraught cultural and social issues.¹⁹ If a crime widely perceived to be a hate crime is not charged as such, the intended messages of hate crime laws are arguably thwarted by this lack of enforcement.²⁰

Third, even if a crime is charged as a hate crime and the defendant is convicted of this charge, if the defendant's sentence is not materially affected by this conviction, again this may thwart the intended messages of hate crime laws. Once one contextualizes hate crime laws within the broader framework of sentencing, it becomes clear that the messaging potential of these laws often breaks down at the sentencing stage.²¹ In archetypal hate crime cases that are particularly violent and traumatic to the victim's identity group (such as Matthew Shepard's brutal murder), there is simply no possibility for a meaningful sentence increase since, depending on the state, a defendant will likely already be sentenced either to life without parole or to death.²²

B. "HATE ENTREPRENEURS" AND THE PROBLEM OF DETERRING MARTYRS

The traditional approach also fails to account for the fact that many perpetrators of hate crimes do not attempt to cover their tracks, with some even viewing themselves as martyrs. Utilitarian proponents of hate crime laws argue that these laws are appropriate to "counterbalance strong impulses

¹⁷ *Id.* at 888–91.

¹⁸ *Id.* at 892–93.

¹⁹ *Id.* at 893–95.

²⁰ *See id.* at 900–01.

²¹ *See id.* at 863.

²² Aaron McKinney was convicted of Matthew Shepard's murder and sentenced to two consecutive life terms in prison. *New Details Emerge in Matthew Shepard Murder*, ABC NEWS (Nov. 26, 2004), <https://abcnews.go.com/2020/story?id=277685&page=1> [<https://perma.cc/A3HR-32H7>].

motivated by animus.”²³ Yet, where a person self-identifies as a martyr, that person is not engaged in a rational cost-benefit analysis and deterrence is not possible.²⁴ The claim that hate crime laws deter perpetrators is also dubious in reference to the person who considers it a point of pride—even an integral part of that person’s identity—to hate members of another group because that group in some way harmed or threatened them.

Many hate crime perpetrators go to great lengths to broadcast their views by leaving extensive manifestos,²⁵ often citing the crimes of others and glorifying them.²⁶ In recent years, we have seen the emergence of networks of hate and the rise of what this Essay terms “hate entrepreneurs”—people who are valorized and seen to pave the way for others who feel similarly situated and are “inspired” to act out on their own hateful fantasies.²⁷ These hate-motivated individuals may never meet, but the internet enables “virtual terrorist cells” to flourish online.²⁸

²³ Eisenberg, *Expressive Enforcement*, *supra* note 11, at 877 (citing Kahan, *supra* note 12, at 467).

²⁴ See James B. Jacobs, *Implementing Hate Crime Legislation Symbolism and Crime Control*, 1992 ANN. SURV. AM. L. 541, 543 (identifying hate crime offenders as unlikely to be deterred because among “the most alienated, hostile, and sociopathic members of society”).

²⁵ See, e.g., Tim Arango, Nicholas Bogel-Burroughs & Katie Benner, *Minutes Before El Paso Killing, Hate-Filled Manifesto Appears Online*, N.Y. TIMES (Aug. 3, 2019), <https://www.nytimes.com/2019/08/03/us/patrick-crusius-el-paso-shooter-manifesto.html>; Kevin Roose, *On Gab, an Extremist-Friendly Site, Pittsburgh Shooting Suspect Aired His Hatred in Full*, N.Y. TIMES (Oct. 28, 2018), <https://www.nytimes.com/2018/10/28/us/gab-robert-bowers-pittsburgh-synagogue-shootings.html>; Harriet McLeod, *Dylann Roof Wrote White Supremacist Manifestos: Prosecutors*, REUTERS (Aug. 22, 2016, 5:51 PM), <https://www.reuters.com/article/us-south-carolina-shooting/dylann-roof-wrote-white-supremacist-manifestos-prosecutors-idUSKCN10X29A> [<https://perma.cc/W22F-RPE8>].

²⁶ See Weiyi Cai, Troy Griggs, Jason Kao, Juliette Love, & Joe Ward, *White Extremist Ideology Drives Many Deadly Shootings*, N.Y. TIMES (Aug. 4, 2019), <https://www.nytimes.com/interactive/2019/08/04/us/white-extremist-active-shooter.html> (describing—and providing a graphic that depicts—the “growing international connections” among perpetrators of mass shootings).

²⁷ See *id.*; see also Roose, *supra* note 25.

²⁸ See, e.g., N. Velásquez, R. Leahy, N. Johnson Restrepo, Y. Lupu, R. Sear, N. Gabriel, O. K. Jha, B. Goldberg & N. F. Johnson, *Online Hate Network Spreads Malicious COVID-19 Content Outside the Control of Individual Social Media Platforms*, 11 SCI. REPS., June 2021, at 1.

C. PSYCHIC HARMS IN THE SHADOW OF CRIMINAL ENFORCEMENT

The traditional approach fails to recognize the limitations of the criminal law in addressing psychic harm. While the criminal law acknowledges psychic harm, it is not equipped to address such harm to victims, beyond punishing defendants based on a generalized notion of when victims are likely to have experienced such harm.²⁹ It does not probe a victim's particular experience, let alone endeavor to make the victim psychically whole.³⁰ Criminal law is, after all, primarily about defendants and prospective defendants.³¹

While victim emotion has always been relevant to criminal law, the focus is on how victim psychic harm affects the defendant's punishment. As I have discussed elsewhere, "[a] traditional account of the injury associated with a particular crime includes, in addition to physical harm, an implicit assessment of the victim's emotional harm."³²

Victim psychic harm, however, while assumed, is not individualized. The prosecutor need not prove that the victim experienced psychic harm, and the law relies on a generalized assumption that certain crimes result in greater emotional harm:

Substantive criminal law has always assumed that victims experience certain kinds of physical violence as more emotionally traumatic than others, and it has scaled punishments accordingly . . . [H]istorically, victims' emotions have largely been considered in the abstract; if a particular crime has been deemed to cause severe emotional harm, it is punished with extra seriousness but requires no specific inquiry into the harm suffered by a particular victim.³³

²⁹ Avlana Eisenberg, *Criminal Infliction of Emotional Distress*, 113 MICH. L. REV. 607, 616 (2015) [hereinafter Eisenberg, *Criminal Infliction of Emotional Distress*].

³⁰ See *id.*; cf. Abraham S. Goldstein, *Defining the Role of the Victim in Criminal Prosecution*, 52 MISS. L.J. 515, 522–23 (1982) (“[T]he majority of restitution programs rarely concern themselves very much with making victims whole or attending to their needs, desires, or rights.”) (quoting Richard Hofrichter, *Techniques of Victim Involvement in Restitution*, in VICTIMS, OFFENDERS, AND ALTERNATIVE SANCTIONS 103 (Joe Hudson & Burt Galaway eds., 1980)).

³¹ But see PEGGY M. TOBOLOWSKY, DOUGLAS E. BELOOF, MARIO T. GABOURY, ARRICK L. JACKSON & ASHELY G. BLACKBURN, *CRIME VICTIM RIGHTS AND REMEDIES* 8–9 (3d ed. 2016) (explaining how the victims' rights movement has, since the early 1970s, sought to amplify the voices of victims in the prosecutorial process).

³² Eisenberg, *Criminal Infliction of Emotional Distress*, *supra* note 29, at 615.

³³ *Id.* at 615–16.

In the hate crime context, the assumption is that punishing the defendant more will send messages of valuation to the victim.³⁴ However, the criminal law does not have any mechanism for ascertaining the particular harm to victims or members of victims' identity groups, and is relying on a zero-sum calculus—i.e., making the defendant suffer more will decrease the suffering of victims—which is almost surely conceptually flawed and lacks any particularity or precision (as well as any way to measure).³⁵ Further, whereas some victims and victim group members may take solace in the naming of a crime as hate-motivated, a sentencing increase is unlikely, in and of itself, to address a person's deep-seated trauma.³⁶

Even in cases where a hate crime charge and conviction would provide closure to the victim or victim's family, ultimately, the choice of charge (not to mention the ultimate conviction) is not within the victim's control. Prosecutors are not always aligned with victims³⁷—including in hate crime cases³⁸—and their goals may even be at odds.³⁹

III. A TRAUMA-CENTERED APPROACH

Given the limitations of a traditional criminal law approach to address the harms of hate crimes, this Part explores approaches beyond the criminal

³⁴ See *Hearing*, *supra* note 14, at 39 (statement of Sen. Ben Cardin) (noting that passing the Matthew Shepard Hate Crimes Prevention Act would send a message “that America has made a priority protecting people from violence because of diversity”).

³⁵ See Eisenberg, *Criminal Infliction of Emotional Distress*, *supra* note 29, at 616 (noting that harsher punishment is considered appropriate for some crimes due to an assumption that those crimes lead to greater emotional harm).

³⁶ See Alyssa H. Shenk, *Victim-Offender Mediation: The Road to Repairing Hate Crime Injustice*, in *HATE AND BIAS CRIME: A READER* 439, 439 (Barbara Perry ed., 2003).

³⁷ See, e.g., Andrew Cohen, *When Victims Speak Up in Court—in Defense of the Criminals*, *ATLANTIC* (Jan. 28, 2014), <https://www.theatlantic.com/national/archive/2014/01/when-victims-speak-up-in-court-in-defense-of-the-criminals/283345> [<https://perma.cc/SV5N-B93W>] (discussing a case where the district attorney attempted to block parents who opposed capital punishment for the man who killed their son from participating in the sentencing phase); Bennett L. Gershman, *Prosecutorial Ethics and Victims' Rights: The Prosecutor's Duty of Neutrality*, 9 *LEWIS & CLARK L. REV.* 559, 561–64 (2005).

³⁸ See, e.g., Avlana Eisenberg, *The Federal Trial of Ahmaud Arbery's Killers Shows the Limits of Hate-Crime Laws*, *WASH. POST* (Feb. 25, 2022, 12:04 PM), <https://www.washingtonpost.com/outlook/2022/02/25/hate-crime-law-conviction> [<https://perma.cc/3LBG-F25A>].

³⁹ See *id.* (quoting Ahmaud Arbery's mother, Wanda Cooper-Jones, recounting “how she felt ‘ignored’ by the Justice Department when, over her staunch objection, prosecutors struck a plea deal instead of going to trial.”).

law—and beyond law more generally—that might better address these psychic harms. Such alternative approaches could eventually replace a traditional approach, or they might supplement it. However, it is worth noting that, on a practical front, even if criminal prosecution is not the most effective way to address hate crimes, it would be politically unviable for federal or state governments to rollback existing hate crime laws. Nonetheless, the existence of these laws on the books does not mean they will be used, especially if interested parties prefer a different approach. The further development of non-prosecutorial options may provide a compelling alternative, and initial experiments appear promising.

A. RESTORATIVE JUSTICE AND THE CRIMINAL LEGAL PROCESS

In recent years, there has been a spate of interest in the practice of restorative justice,⁴⁰ with many scholars and practitioners considering how aspects of this practice could be used in the American criminal justice context.⁴¹ Some restorative approaches involve the actual victim of a crime, while others involve a proxy. Proxies might include a member of the victim's family, a close friend, or a person who experienced the same type of crime.

Restorative justice approaches have been used in addition to or as a substitute for incarceration, or as a hybrid. As a substitute, it has been offered as an option for a defendant to avoid incarceration, with the understanding that if the defendant does not comply with its terms, a sentence of incarceration will be imposed. It has also been used to shorten a defendant's term of incarceration, and as a way to avoid a sentencing enhancement. Restorative justice approaches have also been piloted in prisons as a way for prisoners to take accountability for their actions and for victims (or their proxies) to gain some sense of closure, without any expectation that it will affect the incarcerated person's prison term.

⁴⁰ See generally HOWARD ZEHR, *THE LITTLE BOOK OF RESTORATIVE JUSTICE, REVISED AND UPDATED* (2015) (providing an overview of restorative justice practices and exploring how these practices differ from a traditional criminal justice approach).

⁴¹ Carrie Menkel-Meadow, *Restorative Justice: What Is It and Does It Work?*, 3 ANN. REV. L. & SOC. SCI. 161, 168–70, 179–80 (2007); Thalia González, *The Legalization of Restorative Justice: A Fifty-State Empirical Analysis*, 5 UTAH L. REV. 1027, 1038–39 (2019).

B. RESTORATIVE APPROACHES IN THE HATE CRIME CONTEXT

While restorative justice approaches have not been used widely in the hate crime context, they have been used in some cases where the victim of a hate crime has specifically requested the use of a restorative approach rather than the criminal punishment of the perpetrator. One such victim-initiated example involved an anti-Asian assault in Portland, Oregon. According to officials, the defendant approached the victim at a Portland light rail stop and asked him, “Are you Chinese?” before punching him in the face.⁴² The 38-year-old defendant pled guilty to a second-degree bias crime.⁴³ Prosecutors agreed to a restorative justice approach after the victim, who was not publicly identified, requested a resolution that did not include additional jail time beyond the few months that the defendant had already spent in custody.⁴⁴

In lieu of incarceration, the defendant received three years of probation and agreed to write a letter apologizing to the victim and participate in a restorative justice dialogue facilitated by the Oregon Chinese Coalition, a local advocacy group.⁴⁵ The defendant was also required to submit to alcohol, drug, and mental health evaluations, and to complete any recommended treatment.⁴⁶ This alternative sentence was framed as serving the principle of “education through accountability”⁴⁷ The Oregon Chinese Coalition released a statement, explaining, “Racially motivated violence will not be tolerated at any time, but education through accountability is one of the first steps we, as a city, can take towards resolving these injustices.”⁴⁸

Another example of a victim-initiated use of a restorative approach in the hate crime context comes from San Francisco, where Chesa Boudin, San Francisco’s District Attorney, campaigned on a progressive platform

⁴² Jaimie Ding, *Attacker in Asian American Bias Crime Sentenced to Restorative Justice, Not More Jail Time*, OREGONIAN (Apr. 2, 2021, 5:51 PM), <https://www.oregonlive.com/portland/2021/04/attacker-in-asian-american-bias-crime-sentenced-to-restorative-justice-not-more-jail-time.html> [https://perma.cc/HH3J-JL5C].

⁴³ *Id.*

⁴⁴ *Man in Asian American Bias Crime Gets Restorative Justice*, AP NEWS (Apr. 2, 2021), <https://apnews.com/article/portland-oregon-crime> [https://perma.cc/N2VX-V89Z].

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ Ding, *supra* note 42.

⁴⁸ *Bias Crime Case Ends with Restorative Justice Agreement*, MULTNOMAH CNTY. DIST. ATT’Y (Apr. 1, 2021), <https://www.mcda.us/index.php/news/bias-crime-case-ends-with-restorative-justice-agreement> [https://perma.cc/6CUC-RPE2].

including restorative justice.⁴⁹ In early 2020, the district attorney's office withdrew charges against a 20-year-old man charged with elder abuse against an Asian man that was captured on a video that went viral, deciding instead to pursue a restorative justice model.⁵⁰ A spokesman for the district attorney's office explained that the victim had requested that a restorative approach be used instead of incarceration, stating, "We've been in conversation with the victim who expressed interest in a restorative justice outcome in this case We respect victims and their desires, and we will explore a restorative justice outcome."⁵¹ Core to this arrangement was the understanding that, if this restorative approach was not deemed effective, the district attorney's office had the option to file charges.⁵²

Other uses of restorative justice are programmatic and do not require initiation by the victim. For example, *DIVERSIONfirst*, a program for minors in Edmonton, Canada, supports a "trauma-informed approach" to address bias-motivated crimes.⁵³ Launched in 2018, this program allows minors facing criminal charges to enter a restorative justice program and complete a one to two-month plan customized for each participant.⁵⁴ Participants in this program (and their families) are assigned an officer and social worker, and together the parties design an "agreement plan" that meets their needs.⁵⁵ So far, 340 minors have participated in this program, and the

⁴⁹ See Evan Sernoffsky & Alejandro Serrano, *SF District Attorney Withdraws Charges Against Defendant in Attack on Asian Man*, S.F. CHRONICLE (Mar. 2, 2020, 3:55 PM) <https://www.sfchronicle.com/crime/article/SF-Bayview-attack-Second-suspect-surrenders-to-15098296.php> [<https://perma.cc/7W8J-2ZU4>] (noting that Boudin advocated for expanding restorative justice).

⁵⁰ Sernoffsky & Serrano, *supra* note 49.

⁵¹ *Id.*

⁵² *Id.*

⁵³ Alex Antoneshyn, *Teens Involved in Rosslyn Schoolyard Assault to Enter Restorative Justice Program*, CTV NEWS EDMONTON (July 5, 2021, 8:29 PM), <https://edmonton.ctvnews.ca/teens-involved-in-rosslyn-schoolyard-assault-to-enter-restorative-justice-program-1.5497775> [<https://perma.cc/4Z2M-WKET>] (internal quotation marks omitted); see also *DIVERSIONfirst*, BOYS & GIRLS CLUBS BIG BROTHERS BIG SISTERS OF EDMONTON & AREA, <https://bgcbigs.ca/diversion-first> [<https://perma.cc/439M-N57F>] (Aug. 17, 2022) (noting that *DIVERSIONfirst*'s partners include the YMCA of Northern Alberta and the Edmonton Police Services).

⁵⁴ Antoneshyn, *supra* note 53.

⁵⁵ *DIVERSIONfirst*, EDMONTON POLICE SERV., <https://www.edmontonpolice.ca/CommunityPolicing/CommunityInitiatives/YouthSupportBranch/DiversionFirst> [<https://perma.cc/D82X-BVWQ>]. Agreement plans can include "written and/or in-person apologies to

program boasts a success rate of more than 90%.⁵⁶ In a recent case, four minors involved in the assault of a Black student began this restorative justice program rather than facing criminal charges.⁵⁷ None of these minors had previous criminal involvement. The decision to pursue this alternative to a punitive criminal approach was explained as recognizing that “criminalizing these youths would be inconsistent with a trauma-informed approach”⁵⁸

While these models have been used only minimally in the hate crime context, there is a growing literature examining the use of restorative approaches in this context. Some extrapolate from research about restorative justice in other contexts to suggest that this approach would also be effective in the hate crime context.⁵⁹ Others have highlighted limited, anecdotal uses of restorative justice techniques to address hate crimes.⁶⁰ A few scholars have noted some challenges of restorative justice approaches in this context, for example, that “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.”⁶¹ Notably, these concerns are not unique to the hate crime context, but core to broader concerns about the viability of restorative justice approaches.

victims, volunteer service and projects, and self-reflection projects that could include resume building, creative projects, job shadowing, skill development, art projects and more.” *Id.*

⁵⁶ Antoneshyn, *supra* note 53.

⁵⁷ At the outset of this investigation, the Edmonton police chief maintained that, despite the use of a racial slur, the attack was not hate-motivated. Phil Heidenreich, *Police Chief Condemns Edmonton Schoolyard Beatdown but Says Attack Not Believed to be ‘Hate-motivated,’* GLOB. NEWS (Apr. 30, 2021, 8:20 PM), <https://globalnews.ca/news/7822146/edmonton-police-chief-rosslyn-school-assault> [<https://perma.cc/FN92-MRPV>]. He noted that some of the boys who took part in the attack were also from racialized communities and had experienced trauma, and that the victim and defendants knew each other. *Id.*

⁵⁸ Antoneshyn, *supra* note 53.

⁵⁹ *E.g.*, MARK AUSTIN WALTERS, HATE CRIME AND RESTORATIVE JUSTICE: EXPLORING CAUSES, REPAIRING HARMS 53 (Robert Reiner ed., 2014).

⁶⁰ *E.g.*, Robert B. Coates, Mark S. Umbreit & Betty Vos, *Responding to Hate Crimes Through Restorative Justice Dialogue*, 9 CONTEMP. JUST. REV. 7, 10–14 (2006).

⁶¹ *E.g.*, Shirin Sinnar & Beth A. Colgan, *Revisiting Hate Crime Enhancements in the Shadow of Mass Incarceration*, 95 N.Y.U. L. REV. ONLINE 149, 155 (2020).

C. OPTIMIZING PROGRAM DESIGN

Ultimately, program design is crucial to addressing and preempting power asymmetries and to ensuring equal access. This section highlights key features of restorative justice programs that can help to avoid potential pitfalls while also examining some limitations of these programs.

1. *Consent of both parties*

First, the restorative justice process should be entirely voluntary. No defendant should be pressured into participating, and no victim should feel any obligation to participate in the process.

There are legitimate concerns that even a consent requirement may not safeguard against some soft mechanisms of coercion. There is a risk that victims may feel pressure to participate, and especially, 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.”⁶² Enlisting a victim advocate—someone trained to offer assistance and support to victims—may be helpful to avoid such coercion.⁶³ However, even absent any coercion, a victim may be of two minds about whether or not to participate—eager for the possible closure and healing that these models can foster, while also apprehensive because the outcome of such meetings are impossible to predict in advance.

There is also some concern that defendants may agree to participate solely as a way to get out of serving prison time. However, this too may be difficult to ascertain in advance, and there is a real possibility that, even if the defendant approaches the process with some skepticism, the actual experience of interacting with the victim (or a proxy) may shift that person’s

⁶² *Id.* at 167; see also Julie Stubbs, *Beyond Apology?: Domestic Violence and Critical Questions for Restorative Justice*, 7 *CRIMINOLOGY & CRIM. JUST.* 169, 174 (2007) (citations omitted) (explaining that “victims of violence often express guilt” or take “responsibility for their victimization . . . to reassert control over events that challenge their sense of identity and autonomy”).

⁶³ For a brief overview of the role of victim advocate, see *What is a Victim Advocate?*, VICTIM SUPPORT SERVICES, https://victimssupportservices.org/help-for-victims/what-is-a-victim-advocate_[<https://perma.cc/P2S5-MEBW>]; see also WALTERS, *supra* note 59, at 198 (reporting a positive impact when facilitators trained to support victims were involved in restorative justice meetings).

mindset and cultivate unexpected and genuine feelings of contrition and accountability.⁶⁴

2. Proxies

When the direct victim is unavailable or unwilling to participate in the restorative justice process, a proxy or surrogate victim could take that person's place. A proxy might be a member of the direct victim's family, a close friend, or a member of the direct victim's identity group. While some proxies will have a close tie to the direct victim, others will have no connection to the direct victim but will have suffered a similar offense.

The use of proxies may reduce concerns that a victim will be revictimized through the experience of meeting that person's perpetrator. However, it may be impossible to know what the effect will be ahead of time or to ensure that a proxy, especially if an immediate family member or close friend of the victim, will not experience any trauma associated with the meeting. Nonetheless, the proxy should be free to make this choice, balancing such concerns with the very real possibility of a sense of relief or closure that may result from the restorative justice process. Moreover, the limited data available suggest that programs intended for offenders and surrogate victims have been experienced by both groups as positive and even "life-changing."⁶⁵

3. Equal access

It is imperative that defendants who are similarly situated are granted equal access to restorative justice programs. This is of special concern where these programs are being used as a substitute for incarceration.⁶⁶ Otherwise, these programs risk perpetuating the inequities already existing in our criminal legal system, for example, the disproportionate incarceration rate of members of racial minorities, and especially Black men.⁶⁷

⁶⁴ See Adriaan Lanni, *Taking Restorative Justice Seriously*, 69 *BUFF. L. REV.* 635, 665 (2021). Further, many restorative justice programs do not implicate a person's prison sentence yet still have the potential to be "life-changing" for participants. *See id.*

⁶⁵ *See id.* at 665–66.

⁶⁶ *Id.* at 671 (detailing studies of restorative justice diversion programs that have exposed "the bias problem in referrals").

⁶⁷ *See, e.g.*, ASHLEY NELLIS, SENT'G PROJECT, *THE COLOR OF JUSTICE: RACIAL AND ETHNIC DISPARITY IN STATE PRISONS 5* (2021), <https://www.sentencingproject.org/reports/the-color-of-justice-racial-and-ethnic-disparity-in-state-prisons-the-sentencing-project>

This concern has been raised in reaction to Edmonton's DIVERSION^{first} program, mentioned above.⁶⁸ While many have praised this program and its successes, others, concerned about whether minority defendants would receive comparable treatment, have criticized it.⁶⁹ In reaction to the recent case involving the assault of a Black student, a member of Canadians United Against Hate and Edmonton's anti-racism advisory committee maintained that the restorative justice outcome was appropriate but said it symbolized "two different Edmontons," observing: "Had the roles been reversed and had it been one white kid getting beat up by peers that were racialized, I don't feel that racialized youth would get the same kind of treatment, you know, being referred into special programs to lift them up."⁷⁰

4. *Limitations*

One concern associated with using a restorative justice approach in lieu of incarceration is that doing so may send a signal that, since the perpetrator of the crime did not receive a carceral sentence, the crime that person committed must not have been particularly serious. In the hate crime context, this concern manifests as worry that a restorative justice approach would not sufficiently condemn a hate crime.⁷¹

Concerns about proportionality are salient in the hate crimes context and beyond—both about how different defendants are treated, and about how victims of certain crimes are treated compared to victims of other crimes. For example, similar arguments are made—including by those who otherwise

[<https://perma.cc/HS5P-3FZK>] (noting that the incarceration rate for Black Americans is nearly five times the rate for white Americans); *Race and Ethnicity*, PRISON POL'Y INITIATIVE, https://www.prisonpolicy.org/research/race_and_ethnicity [<https://perma.cc/U4US-EXHT>]; *Criminal Justice Fact Sheet*, NAACP (Oct. 14, 2022), <https://naacp.org/resources/criminal-justice-fact-sheet> [<https://perma.cc/9TDC-KY8K>]; Brett E. Garland, Cassia Spohn & Eric J. Wodahl, *Racial Disproportionality in the American Prison Population: Using the Blumstein Method to Address the Critical Race and Justice Issue of the 21st Century*, JUST. POL'Y J., Fall 2008, at 1, 4, http://www.cjcj.org/uploads/cjcj/documents/racial_disproportionality.pdf [<https://perma.cc/JV3X-ZSDD>] (pointing to higher percentage of Black males ages 25–29 in prison compared to Hispanic or white males).

⁶⁸ See *supra* nn.53, 55.

⁶⁹ Antoneshyn, *supra* note 53.

⁷⁰ *Id.*

⁷¹ Sinnar & Colgan, *supra* note 61, at 166–67. For discussion of a related concern that, in the case of serious crimes, restorative justice approaches may be too lenient, see Paul Robinson, *The Virtues of Restorative Processes, The Vices of "Restorative Justice,"* 2003 UTAH L. REV. 375, 381 (2003).

favor decarceral policies—when crimes of sexual assault, which disproportionately affect women, are punished less harshly than other crimes. Here, the concern is that sexual assault, when not punished as harshly as possible, is not taken seriously, and that this is consistent with a long history of not taking violence against women seriously.⁷²

Among those who might resist the use of restorative justice approaches in the hate crime context are members of minority groups most affected by mass incarceration.⁷³ For example, Black individuals, who are disproportionately represented in U.S. carceral facilities,⁷⁴ are also among those individuals who are statistically most likely to be the victims of hate crimes.⁷⁵ Unless restorative justice approaches were used more broadly, members of those groups most affected by mass incarceration may react to the use of restorative justice approaches in the hate crime context by questioning why such alternatives to incarceration are available here and not more widely in other contexts.⁷⁶

Given the characteristically harsh sentencing practices in the United States, people understandably associate long sentences with condemnation and, to some, anything less than a long sentence may seem insufficiently punitive.⁷⁷ Moreover, the notion that someone could avoid prison entirely may be met with skepticism if one is primed to associate punishment with

⁷² See, e.g., Recent Election, *Sexual Assault Law—Judicial Recall—California Judge Recalled for Sentence in Sexual Assault Case*, 132 HARV. L. REV. 1629, 1373–74 (2019).

⁷³ Sinnar & Colgan, *supra* note 61, at 166.

⁷⁴ NELLIS, *supra* note 67, at 6.

⁷⁵ Hate crimes have been rising each year since 2014, including a 9% increase in 2018. BRIAN LEVIN & LISA NAKASHIMA, CTR. FOR THE STD. OF HATE & EXTREMISM, REPORT TO THE NATION 2019—FACTBOOK ON HATE & EXTREMISM IN THE U.S. & INTERNATIONALLY 5 (Brian Levin, Kevin Grisham & Lisa Nakashima eds., 2019), <https://www.csusb.edu/hate-and-extremism-center> [<https://perma.cc/SQ4H-EXEL>]. The largest driver of the increase in offenses since 2014 is the Anti-Race/Ethnicity/Ancestry category, which accounts for 42% of the increase in hate crimes between 2014 and 2019, and within that category, Anti-Black hate crimes are the most prevalent. *Hate Crime Data: The Value in Expanding Our Sources*, USA FACTS (June 8, 2021, 3:35 PM), <https://usafacts.org/articles/hate-crime-data-value-expanding-our-sources> [<https://perma.cc/NQB6-ZJUR>].

⁷⁶ Sinnar & Colgan, *supra* note 61 at 166.

⁷⁷ See, e.g., John M. Darley, *On the Unlikely Prospect of Reducing Crime Rates by Increasing the Severity of Prison Sentences*, 13 J. L. & POL'Y 189, 205–06 (2005); MARC MAUER, RYAN S. KING & MALCOLM C. YOUNG, SENT'G PROJECT, THE MEANING OF “LIFE”: LONG PRISON SENTENCES IN CONTEXT 1 (2004), <https://www.sentencingproject.org/reports/the-meaning-of-life-the-case-for-abolishing-life-sentences> [<https://perma.cc/LAH5-VR3N>].

incarceration.⁷⁸ This concern is of course not limited to the hate crime context and presents a substantial impediment to the proliferation of alternatives to incarceration more generally.

Other concerns relate to how we might assess the effectiveness of these approaches. Since these programs have yet to be used widely, the only available data are anecdotal information.⁷⁹ Yet, as pilot programs are launched, metrics related to program effectiveness can be collected and analyzed. Further, district attorney offices that use restorative justice approaches as an alternative to incarceration can make probationary terms contingent on the completion of the restorative justice program and make clear that failure to complete the program satisfactorily would result in a term of incarceration.⁸⁰

In any individual case it may be impossible to know if a defendant's apology is sincere, and whether that person is genuinely committed to disavowing prejudiced ideologies. Yet, to ascertain the effectiveness of restorative justice models in the hate crime context will require expanding the use of these nontraditional approaches, and the potential (based on other contexts) suggests that it is worth at least embarking on this experiment.⁸¹ Some have suggested that youth who commit bias crimes may be particularly

⁷⁸ See, e.g., Kevin B. Smith, *The Politics of Punishment: Evaluating Political Explanations of Incarceration Rates*, 66 J. POL. 925, 926, 928 (2004) (discussing the understanding of incarceration as an essential means of preserving social order that “mete[s] out ‘just desserts’ to those who cross the bounds of socially tolerable behavior” and “provide[s] a credible threat that deviant behavior will incur harsh costs”).

⁷⁹ For empirical studies comparing the results of restorative justice approaches and traditional criminal law approaches beyond the hate crime context, see Lawrence W. Sherman, Heather Strang, Evan Mayo-Wilson, Daniel J. Woods & Barak Ariel, *Are Restorative Justice Conferences Effective in Reducing Repeat Offending? Findings From a Campbell Systematic Review*, 31 J. QUANT. CRIMINOLOGY 1 (2015); Shih-Ya Kuo, Dennis Longmire & Steven J. Cuvelier, *An Empirical Assessment of the Process of Restorative Justice*, 38 J. CRIM. JUST. 318 (2010). For discussion of the limited data on restorative practices, see Lanni, *supra* note 64, at 676.

⁸⁰ Sernoffsky & Serrano, *supra* note 49 (“The DA’s Office has the option to file charges if restorative justice does not work.”).

⁸¹ See Kuo et al., *supra* note 79, at 318; TYLER BISHOP, ARIELLE ANDREWS, SAM BECKER, LAUREN MARTIN, BENJY MERCER-GOLDEN, MARIEL PÉREZ-SANTIAGO, TIARRA ROGERS, KAI WIGGINS, SHIRIN SINNAR & MICHAEL GERMAN, STANFORD L. SCH. POL’Y LAB ON ASSESSING ALT. RESPONSES TO HATE CRIMES & BRENNAN CTR. FOR JUST., *EXPLORING ALTERNATIVE APPROACHES TO HATE CRIMES* 21 (2021), <https://law.stanford.edu/publications/exploring-alternative-approaches-to-hate-crimes> [<https://perma.cc/TH67-BQ3M>].

amenable to intervention and reform,⁸² making a youth-focused program a potentially attractive starting point for piloting restorative justice programs in this space.⁸³

Finally, there are concerns about the breadth of the expressive impact of restorative justice models.⁸⁴ Even if a restorative approach is more effective for the individuals involved, what of those who were not directly targeted but who may experience psychic harms because another member of their identity group was targeted in a hate-motivated incident? And what of prospective hate crime perpetrators?

A public disavowal of prejudice is not mutually exclusive of the more private relational focus of many restorative justice models, and it may be possible to experiment with a hybrid approach. For example, proceedings could begin with the public naming of a crime as a hate crime, which is understood to convey community condemnation. An offender could then be invited to participate in the restorative justice process and, if that person agrees, expresses remorse, and accepts responsibility, both to the targeted victim and more broadly to members of that person's identity group, this process could have a salutary and far-reaching expressive effect. Such an approach could also have an impact on potential defendants. First, the offender who undergoes a restorative justice process—if this process is effective—will be far less likely to commit another hate crime. Second, if the hate crime perpetrator was part of a broader network—even perhaps functioning as a “hate entrepreneur”—that person's disavowal of prejudice and participation in a restorative justice process might motivate others to reconsider their own prejudiced beliefs.

CONCLUSION

The uptick in hate crimes nationally should sharpen our resolve to think expansively about how best to combat these crimes by addressing both their root causes and the psychic harm resulting from them. Given the limitations of a traditional criminal law approach, the time is ripe to consider alternative approaches to addressing the harms of hate crimes beyond prosecution.

⁸² See Jordan Blair Woods, *Addressing Youth Bias Crime*, 56 UCLA L. REV. 1899, 1926 (2009).

⁸³ See Antoneshyn, *supra* note 53.

⁸⁴ Indeed, the example of hate crime laws illustrates the inevitable tradeoffs between sweeping messages about social norms intended by legislatures and case-specific interventions that may be more effective to address individual cases but fall short of broader expressive aims. See generally Eisenberg, *Expressive Enforcement*, *supra* note 11.

Restorative justice is one such approach, and future work will investigate other relational approaches that might address the psychic harm of victims, challenge perpetrators to confront their prejudices, and even disrupt hate networks. Ultimately, addressing the psychic harm resulting from hate crimes and the root causes of hate—including deeply disruptive financial, social, and psychological afflictions—will require a broad, holistic, and interdisciplinary lens, as well as interventions beyond the parameters of criminal law.