

MAKING VICTIMS WHOLE AGAIN: USING RESTORATIVE JUSTICE TO HEAL HATE CRIME VICTIMS, REFORM OFFENDERS, AND STRENGTHEN COMMUNITIES

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The traditional framework for addressing hate crime in the United States centers on punishing offenders. These punitive measures tend to expose offenders, as well as victims and their communities, to more policing and to funnel offenders into the system of mass incarceration—all while failing to address the root causes of hate crime.

Although the rise in anti-Asian hate crimes during the COVID-19 pandemic catalyzed the enactment of federal hate crime legislation, civil rights advocates have increasingly called for a shift away from the punishment paradigm and towards holistic and community-based responses. There has been a particular focus on restorative justice, a process that engages stakeholders of an offense in a dialogue to identify and address the harms experienced by the victim, the victim's needs, and the offender's obligations.

Restorative justice—despite not being widely utilized as a method for addressing hate crime in the United States—has received more interest and support in other parts of the world, including the United Kingdom. This Comment argues that U.S. advocates should examine practices implemented in localities within the United Kingdom that collectively suggest that restorative justice could be a useful framework for combating hate crime domestically. Ultimately, advocates should use information about these practices to encourage U.S. lawmakers to fund thoughtfully designed restorative justice services for hate crime victims. Increasing the prevalence of such services will not only reform offenders while diverting them from the criminal legal system, but also heal victims and strengthen our communities.

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I. INTRODUCTION

On November 17, 2021, four Asian American high school students riding the subway in Philadelphia were assaulted by a group of Black teenagers, who were heard calling the victims racial slurs in a video of the attack.¹ This incident sparked an outcry from the local Asian American community, prompting some members to

1. Emily Rizzo, ‘Students Are Fed Up’: Hundreds March in Philly After 4 Asian American Teens Attacked on Septa, WHYY (Nov. 30, 2021), <https://whyy.org/articles/students-are-fed-up-hundreds-march-in-philly-after-4-asian-american-teens-attacked-on-septa-2/>; *Officials Investigating Violent Attack at SEPTA’s Erie Station Involving Teenagers*, CBS PHILADELPHIA (Nov. 18, 2021, 6:30 AM), <https://www.cbsnews.com/philadelphia/news/septa-attack-philadelphia-erie-station-teenagers-violence/>.

call for an increased police presence on the subway and others for the use of restorative justice practices in schools across the city.² Two days after the attack, the district attorney filed charges against the four assailants, who were between the ages of thirteen and sixteen, for ethnic intimidation, aggravated assault, criminal conspiracy, and more.³ With its decision to funnel these teenagers into the juvenile justice system, the city contributed to the mass incarceration⁴ of children,⁵ a serious problem in the United States that disproportionately affects Black children.⁶

The city's handling of the November incident illustrates the tension in the United States between responding to hate crime⁷—which generally entails using punitive measures to hold offenders accountable⁸—and ending mass incarceration. Although combating hate is critically important, there are limitations on the ability to confront these offenses through a criminal legal system that disproportionately incarcerates people of color.⁹ Beyond this dilemma, the city's response to the November incident was also troubling in light of findings indicating that juvenile incarceration fails to reduce recidivism and may actually increase it in some cases.¹⁰ Because of these factors—along with the assailants' young age and the

2. Rizzo, *supra* note 1.

3. Sophia Schmidt, *Philly DA Files Charges Against Teens for Attack of Asian Students on SEPTA Train*, WHYY (Nov. 19, 2021), <https://whyy.org/articles/philly-da-files-charges-against-teens-for-attack-of-asian-classmates-on-septa-train/>.

4. The term “mass incarceration” is often used as a shorthand when referring to the fact that the United States puts more people in prison than any other country—with a particularly disproportionate effect on minorities—largely due to the existing criminal justice system being overly punitive and retributive. James Cullen, *The History of Mass Incarceration*, BRENNAN CTR. FOR JUST. (July 20, 2018), <https://www.brennancenter.org/our-work/analysis-opinion/history-mass-incarceration>.

5. See Liz Ryan, *Jailed Kids Are the Forgotten Victims of America's Mass Incarceration Crisis*, QUARTZ (Aug. 31, 2016), <https://qz.com/770021/jailed-kids-are-the-forgotten-victims-of-americas-mass-incarceration-crisis/> (describing cyclical nature of juvenile justice system, where emphasizing youth incarceration rather than rehabilitation contributes to cycle of crime and has led the United States to be the world's leading jailer of children).

6. See Barbara Robles-Ramamurthy & Clarence Watson, *Examining Racial Disparities in Juvenile Justice*, 47 J. AM. ACAD. PSYCHIATRY & L. 48, 48 (2019) (citing studies conducted in 1980s and 1990s that demonstrated Black juveniles were detained and confined at higher rates than white juveniles).

7. A hate crime is defined as “a criminal offense against a person or property motivated in whole or in part by an offender's bias against a race, religion, disability, sexual orientation, ethnicity, gender or gender identity.” *The Psychology of Hate Crimes*, AM. PSYCH. ASS'N. (Aug. 2017), <https://www.apa.org/advocacy/interpersonal-violence/hate-crimes>.

8. See Kai Wiggins, *The Dangers of Prosecuting Hate Crimes in an Unjust System*, AM. CONST. SOC'Y: EXPERT F. (Aug. 5, 2019), <https://www.acslaw.org/expertforum/the-dangers-of-prosecuting-hate-crimes-in-an-unjust-system/> (detailing that general punitive approach to hate crimes is penalty enhancements, which increases sentencing and incarceration).

9. *Id.*

10. See THE PEW CHARITABLE TRS., RE-EXAMINING JUVENILE INCARCERATION: HIGH COST, POOR OUTCOMES SPARK SHIFT TO ALTERNATIVES 1 (2015), https://www.pewtrusts.org/-/media/assets/2015/04/reexamining_juvenile_incarceration.pdf (referring to several studies of serious juvenile offenders in Philadelphia, PA and Maricopa County, AZ, where results showed out-of-home placement failed to reduce recidivism).

unique effects of hate crime on victims and community members¹¹—the hate crime committed against the Asian American teenagers represented a missed opportunity to engage in restorative justice to facilitate the healing and growth of all individuals involved.

The past few years have witnessed a significant global rise in hate crimes and incidents.¹² In the United States, hate crimes increased following recent pivotal events, including the 2016 presidential election, Black Lives Matter protests in 2020, and the start of the COVID-19 pandemic.¹³ Hate crimes against people of color,¹⁴ religious minorities,¹⁵ LGBTQ people,¹⁶ and other marginalized groups have also increased in other parts of the world.¹⁷ Against this turbulent backdrop, civil rights advocates in the United States are calling for domestic solutions that invest in communities, rather than more policing.¹⁸

Although the rise in anti-Asian hate crimes—a byproduct of the COVID-19 pandemic¹⁹—provided a major impetus for the passage of the COVID-19 Hate Crimes Act in 2021,²⁰ these advocates want to shift away from the punishment

11. See *The Psychology of Hate Crimes*, *supra* note 7 (describing how hate crimes generate feelings of unease and insecurity in victims and community members by making them feel unsafe and unwelcome in their own spaces as a result of targeted acts of violence).

12. See Zachary Laub, *Hate Speech on Social Media: Global Comparisons*, COUNCIL ON FOREIGN RELS. (June 7, 2019, 3:51 PM), <https://www.cfr.org/backgrounder/hate-speech-social-media-global-comparisons> (noting recent upticks in hate crime incidents, which have been reported on nearly every continent).

13. See *infra* notes 117–27 and accompanying text for a discussion of the rise in hate crime incidents, particularly surrounding the 2016 presidential election, 2020 Black Lives Matter protests, and COVID-19 pandemic.

14. See, e.g., *Hate Crime, England and Wales, 2019 to 2020*, GOV.UK: HOME OFF. (Oct. 28, 2020), <https://www.gov.uk/government/statistics/hate-crime-england-and-wales-2019-to-2020/hate-crime-england-and-wales-2019-to-2020> [hereinafter 2019–2020 Hate Crime Statistics] (noting 6% increase in racially motivated hate crimes in England and Wales between 2019 and 2020).

15. See, e.g., Elis Gjevori, *Islamophobia in Europe Is at a ‘Tipping Point’*, *New Report Warns*, TRT WORLD (Dec. 30, 2021), <https://www.trtworld.com/magazine/islamophobia-in-europe-is-at-a-tipping-point-new-report-warns-53162> (discussing rise in Islamophobic hate crimes in Europe within last two years).

16. See, e.g., Elizabeth Kuhr, *‘It’s Become the “Twilight Zone” Up Here’: Rise in Anti-Gay Attacks Unsettle U.K. Advocates*, NBC NEWS (Sept. 14, 2021, 1:55 PM), <https://www.nbcnews.com/nbc-out/out-news/s-become-twilight-zone-rise-anti-gay-attacks-unsettle-uk-advocates-rcna2009> (noting annual rise in hate crimes motivated by sexual orientation and gender identity in England, Scotland, and Wales since 2015).

17. See, e.g., Laub, *supra* note 12 (discussing global rise in acts of violence towards marginalized groups, including people of color and members of LGBTQ community).

18. See Liza Ramrayka, *Asian Americans Build Trust, Community Solutions in Face of Hate*, AL JAZEERA (Mar. 24, 2021), <https://www.aljazeera.com/news/2021/3/24/asian-americans-build-trust-community-solutions-face-of-hate> (discussing rejection of increased policing in favor of community resourcing, bystander intervention programs, and culturally responsive victim services).

19. See *infra* notes 124–27 for a discussion of the impact of the COVID-19 pandemic in increasing anti-Asian hate crime.

20. See Li Zhou, *The House Passes Bill to Combat Anti-Asian Hate Crimes*, VOX (May 18, 2021, 4:54 PM), <https://www.vox.com/2021/4/22/22385461/senate-anti-asian-hate-crimes-bill>

paradigm in which the Act is situated and towards holistic and community-based responses.²¹ Arguing that reliance on law enforcement and crime statistics does not prevent violence, they are demanding that lawmakers remove police from communities and address the root causes of hate crime by redistributing resources into housing, health care, and social services.²²

Many of these advocates have also focused their attention on restorative justice,²³ a process that involves stakeholders of an offense engaging in a dialogue to collectively identify and address harms, needs, and obligations.²⁴ Restorative justice has existed for a long time, with deep roots in Indigenous peacemaking,²⁵ and its benefits are well documented.²⁶ It exists outside of the punishment paradigm and thus outside of mainstream America's conception of justice.²⁷ Existing restorative justice programs have addressed hate crime on a sporadic basis,²⁸ and the number of programs that focus specifically on hate crime is unknown.²⁹

(stating how COVID-19 Hate Crimes Act was passed with intent to combat anti-Asian hate crimes).

21. See Kimmy Yam, *Why Over 85 Asian American, LGBTQ Groups Opposed the Anti-Asian Hate Crimes Bill*, NBC NEWS (May 14, 2021, 3:30 PM), <https://www.nbcnews.com/news/asian-america/why-over-85-asian-american-lgbtq-groups-opposed-anti-asian-n1267421> (noting how increased policing fails to address root causes of hate crimes and ignores other community effects, such as police violence against Black communities).

22. *Id.*

23. See *id.* (detailing advocates' calls for community-based solutions more closely aligned with restorative justice processes, investment in resources and infrastructure, and noncarceral alternatives to traditional law enforcement mechanisms).

24. STAN. L. SCH. L. AND POL'Y LAB & BRENNAN CTR. FOR JUST., *EXPLORING ALTERNATIVE APPROACHES TO HATE CRIMES* 16 (2021) [hereinafter *EXPLORING ALTERNATIVE APPROACHES*], http://law.stanford.edu/wp-content/uploads/2021/06/Alternative-to-Hate-Crimes-Report_v09-final.pdf.

25. See Courtney Marsh, *Honoring the Global Indigenous Roots of Restorative Justice: Potential Restorative Approaches for Child Welfare*, CTR. FOR THE STUDY OF SOC. POL'Y (Nov. 1, 2019), <https://cssp.org/2019/11/honoring-the-global-indigenous-roots-of-restorative-justice/> (detailing how Indigenous peacemaking is rooted in restorative healing practices of connection to oneself, the community, and nature).

26. See *The Benefits of Restorative Practices*, YOUTH RESTORATION PROJECT, <https://yrpofri.org/benefits-of-restorative-practices/> (last visited Feb. 11, 2020) (detailing numerous benefits conferred by restorative practices, including being victim and community-centered and reducing recidivism).

27. See Patrick Gerkin et al., *Implementing Restorative Justice Under the Retributive Paradigm: A Pilot Program Case Study*, SAGE OPEN (2017), <https://journals.sagepub.com/doi/full/10.1177/2158244017691562#sec-1> (discussing restorative justice's slow emergence as an alternative to traditional forms of retributive justice, largely due to its stark contrast in philosophy and practice).

28. See Shirin Sinner & Beth A. Colgan, *Revisiting Hate Crimes Enhancements in the Shadow of Mass Incarceration*, 95 N.Y.U. L. REV. 149, 164 (2020) (discussing that while restorative justice has historically been implemented on a sporadic basis, interest in the process has increased in recent years, and some prosecutors have even dropped charges upon request of victims who prefer to pursue restorative alternatives).

29. See KATHERINE BECKETT & STEVE HERBERT, *DEVELOPING RESTORATIVE JUSTICE AS A RESPONSE TO HATE CRIME IN WASHINGTON: A PROPOSAL* 5 (2021),

As advocates push for restorative justice solutions, they should examine practices that are being implemented in other parts of the world, such as the United Kingdom. Like the United States, the United Kingdom has witnessed a rise in hate crimes targeting marginalized communities in the past few years,³⁰ and the traditional framework for addressing hate crime in each of its constituent countries focuses on punishing offenders.³¹ Moreover, the effectiveness of this framework is undermined by many of the same difficult issues that weaken the United States' traditional approach to hate crime.³² However, unlike the United States, the United Kingdom has a growing number of stakeholders that support the application of restorative justice to hate crime.³³ They include cities, police departments, and community organizations that have implemented restorative justice programs for hate crime victims; researchers and advocates who have evaluated restorative justice programs; and government leaders who have pledged to improve nationwide strategies.³⁴

These efforts collectively suggest that restorative justice could be a useful framework for addressing hate crime. When properly funded, designed, and administered, restorative justice programs can provide opportunities not only for victims to heal from the harms of hate crime, but also for offenders to express remorse for their actions and to work to reform themselves.³⁵ Such programs can engage the community and facilitate the healing of individual community members.³⁶ Furthermore, restorative justice does not contribute to mass incarceration and instead diverts individuals from the criminal legal system.³⁷ These potential benefits suggest that restorative justice could help communities in

https://apps.leg.wa.gov/ReportsToTheLegislature/Home/GetPDF?fileName=Restorative%20Justice%20as%20a%20Response%20to%20Hate%20Crime_FINAL_bc70a4d9-b405-4ec2-a1a0-b7ea1d2307bd.pdf (stating how it is uncommon for existing restorative justice programs to address hate crimes in particular, and the existence of programs focusing solely on these crimes is unknown).

30. See *infra* notes 230–38 and accompanying text for a discussion of the recent rise in hate crime instances in the United Kingdom.

31. See *infra* Part IV.A for a discussion of the traditional, more retributive framework used in response to hate crimes in the United Kingdom.

32. See *infra* Parts III.C and IV.A for an analysis comparing the challenges posed by the traditional systems in both countries, namely underreporting and lack of confidence in the system.

33. See *infra* Part IV.B for a discussion of the more widespread and robust implementation of restorative justice programs in the United Kingdom.

34. See *infra* Part IV.B for a discussion of the different ideas, stakeholders, and implementation strategies involved with restorative justice programs in the United Kingdom.

35. See EXPLORING ALTERNATIVE APPROACHES, *supra* note 24, at 17 (outlining restorative justice process as a meeting where victims and offenders engage in a dialogue, ending with an agreement on reparative obligations for the offender to reform themselves and help those affected).

36. See *infra* Part II.A for a discussion of the common model of the restorative justice process and the role of the community within these frameworks.

37. See Kejsi Demaj, *Restorative Justice: The Path to Abolishing the Current Criminal Justice System*, HARV. POL. REV. (Mar. 14, 2022), <https://harvardpolitics.com/restorative-justice-abolition/> (discussing how restorative justice can serve as an expansion of diversion programs because both aim to reduce incarceration and prosecutorial bias).

the United States realize a more equitable vision of justice.³⁸

There are qualifications, to be sure, on the benefits of restorative justice for hate crime. The primary issue is that most empirical restorative justice studies have methodological limitations, and “the study of restorative justice in the hate crimes context is too early and small-scale to permit generalization.”³⁹ For example, despite the growing acceptance of using restorative justice to address hate crime in the United Kingdom, it is by no means the dominant approach.⁴⁰ This has implications for the quantity and quality of data that is available from U.K.-based restorative justice programs and initiatives.⁴¹ In addition, there are well-founded concerns about the possibility of retraumatizing victims.⁴² Furthermore, restorative justice may not be attainable in every local jurisdiction, as it may be difficult to earn community and political approval.⁴³

In light of these considerations, this Comment aims not to provide a surefire solution to the hate crime dilemma in the United States. Rather, it seeks to provide helpful information about other countries’ restorative justice programs (including non-community-based programs that have been deemed successful) that U.S. advocates can utilize to lobby lawmakers to fund restorative justice services for hate crime victims. Given the limited quantity of data,⁴⁴ it would be particularly valuable to obtain funding for pilot programs that increase our collective understanding of the benefits of restorative justice in the hate crime context, strategies for avoiding common implementation obstacles and risks, and more.

Part II of this Comment provides a comprehensive background on restorative justice. Part III focuses on the United States, including its traditional legal approach to hate crime, the implementation of restorative justice, and the current state of restorative justice programs for hate crime. Part IV mirrors Part III by examining existing legal systems and restorative justice programs in England and Wales, Scotland, and Northern Ireland. It also includes case studies on restorative justice applications for hate crime. Finally, Part V provides specific recommendations for anti-hate advocates to pursue.

38. *See id.* (discussing how restorative justice is more equitable in that it includes less bias, is victim-centered, and allows offenders to learn and grow).

39. Sinnar & Colgan, *supra* note 28, at 165–66.

40. *See infra* Part IV.A for a discussion detailing the dominant approach used in the United Kingdom, which includes more retributive criminal justice practices.

41. *See infra* Part IV.B.2 for a discussion of the challenges to data collection on restorative justice programs in the United Kingdom.

42. *See* Sinnar & Colgan, *supra* note 28, at 166–67 (discussing re-traumatization of victims through “coerced compassion,” unremorseful offenders, or victim blaming).

43. *See id.* at 166 (discussing challenges of gaining overall public approval of restorative justice, in part because of its perceived “insufficient condemnation” for hate crimes).

44. *See id.* at 158 (detailing limitations of data regarding hate crimes, including lack of reporting from victims).

II. RESTORATIVE JUSTICE

Restorative justice is an alternative approach to addressing crime that focuses on healing instead of punishment.⁴⁵ While this approach can be traced back to the traditional justice practices of Indigenous communities,⁴⁶ it has only developed in Western countries in the past few decades.⁴⁷ In 1974, the first victim-offender reconciliation program took place in Kitchener, Ontario,⁴⁸ and four years later, the first U.S. program of this kind took place in Elkhart, Indiana.⁴⁹ Restorative justice was introduced into Western criminal justice literature and practice when American psychologist Albert Eglash coined the term around the same time.⁵⁰ According to Eglash, restorative justice “focuses on restoring the harmful effects of [the crime], it is not dependent on the law, and it actively involves all parties in the restoration process.”⁵¹ Part II of this Comment will provide an overview of a common model of restorative justice, restorative justice in practice, benefits of this approach, and implementation obstacles and risks.

A. A Common Model of Restorative Justice

According to Howard Zehr, an American criminologist widely known as “the grandfather of restorative justice” in the West,⁵² “[r]estorative justice is not a particular program or a blueprint.”⁵³ In other words, no ideal model of restorative justice can be easily implemented in every single community.⁵⁴ Nonetheless, the

45. See Mark Austin Walters, *Repairing the Harms of Hate Crime: Towards a Restorative Justice Approach?*, 108 U.N. ASIA & FAR EAST INST. RES. MATERIAL SERIES 56, 62 (2019), https://www.unafei.or.jp/publications/pdf/RS_No108/No108_10_VE_Walters.pdf (defining restorative justice as dialogue in pursuit of restorative agreement that remedies the harm inflicted).

46. See Marsh, *supra* note 25 (remarking restorative justice practices have strong roots in Indigenous peacemaking practices that emphasize community, healing, and empathy).

47. See *Resources: A Brief History of Restorative Justice*, YOUTH RESTORATION PROJECT, <https://yrfpri.org/restorative-justice-resources/history-of-restorative-justice-resources/> (last visited Jan. 16, 2022) (outlining first victim-offender program took place in 1974 in Kitchener, Ontario).

48. *Id.*

49. See Jennifer Weingart, *First U.S. Victim-Offender Reconciliation Program Funding at Risk*, WFYI (May 16, 2017), <https://www.wfyi.org/news/articles/first-us-victim-offender-reconciliation-program-funding-at-risk> (stating how Elkhart program established in 1977 served as precursor to subsequent programs in other states).

50. See Theo Gavrielides, *Contextualizing Restorative Justice for Hate Crime*, 27 J. INTERPERSONAL VIOLENCE 3624, 3624–25 (2012) (stating Albert Eglash coined “restorative justice” in the 1970s, when academic and policy-oriented interests in the topic were becoming widespread).

51. *Id.* at 3625.

52. Howard Zehr, ZEHR INST. FOR RESTORATIVE JUST., <https://zehr-institute.org/staff/howard-zehr/> (last visited Sept. 6, 2022) [hereinafter ZEHR INST.].

53. HOWARD ZEHR, THE LITTLE BOOK OF RESTORATIVE JUSTICE 10 (2002) [hereinafter ZEHR, THE LITTLE BOOK], <https://charterforcompassion.org/images/menus/RestorativeJustice/Restorative-Justice-Book-Zehr.pdf>.

54. See *id.* (explaining restorative justice processes are generally culture-bound, so they

principles of restorative justice are “a compass pointing a direction.”⁵⁵

Restorative justice involves the victim, the offender, and other affected community members.⁵⁶ There are “three pillars of restorative justice”: harms and needs, obligations, and engagement.⁵⁷ First, as a victim-oriented approach to addressing crime, restorative justice focuses on the victim, the harm they experienced, and their needs.⁵⁸ Second, any experienced harm produces obligations for not only the offender, but also the community and society at large.⁵⁹ Finally, restorative justice encourages victims, offenders, and impacted communities—“the key stakeholders in justice”⁶⁰—to engage in the process.⁶¹

A common model of restorative justice includes three phases: preparation, dialogue, and follow-up.⁶² Once the victim and the offender consent to participating in a restorative justice process, they enter a preparation phase where they and other participants, if applicable, meet with a trained facilitator “to discuss expectations and concerns, and assess readiness to participate.”⁶³ If the participants are deemed ready, then the facilitator brings them into a dialogical process that focuses on how to repair the harms of the crime.⁶⁴ This phase reflects the principle that “crime is fundamentally a violation of people and interpersonal relationships.”⁶⁵ The victim is given a chance to share how the crime affected them and to question the offender.⁶⁶ According to the theory of “reintegrative shaming,” the offender will theoretically feel shame for their actions and acknowledge the emotion by apologizing and making amends.⁶⁷

should be built from the bottom-up by communities themselves, who can assess their own needs and resources when developing their frameworks).

55. *See id.* (analogizing restorative justice to a compass, rather than a map, where it points communities in the right direction, but is not necessarily a linear model to be adhered to exactly).

56. *See* Walters, *supra* note 45, at 62 (naming victim, offender, and affected community members as the primary “stakeholders” in dialogical process).

57. ZEHR, *THE LITTLE BOOK*, *supra* note 53, at 22.

58. *See id.* at 22–23 (detailing that focusing on harm primarily centers the restorative justice process on the victim and their needs).

59. *See* HOWARD ZEHR & HARRY MIKA, *FUNDAMENTAL PRINCIPLES OF RESTORATIVE JUSTICE* (1998), *reprinted in* HOWARD ZEHR, *THE LITTLE BOOK OF RESTORATIVE JUSTICE* 64, 65–66 (2002) [hereinafter *FUNDAMENTAL PRINCIPLES OF RESTORATIVE JUSTICE*] (detailing how offenders have obligations to understand their behavior and remedy harm, and community is obligated to victims and supporting its members).

60. *Id.* at 65.

61. *See* *EXPLORING ALTERNATIVE APPROACHES*, *supra* note 24, at 17 (detailing restorative justice process as involving the victim, offender, and other possible community participants); *see also* *FUNDAMENTAL PRINCIPLES OF RESTORATIVE JUSTICE*, *supra* note 59, at 65 (noting process aims to maximize participation of all three parties, emphasizing victims and offenders).

62. *EXPLORING ALTERNATIVE APPROACHES*, *supra* note 24, at 17.

63. *Id.*

64. *See id.* (describing dialogue phase where victims share the harm they experienced, offenders can express remorse, and participants agree on reparative obligations).

65. *FUNDAMENTAL PRINCIPLES OF RESTORATIVE JUSTICE*, *supra* note 59, at 64.

66. *See* *EXPLORING ALTERNATIVE APPROACHES*, *supra* note 24, at 17 (describing how victims’ side of dialogue focuses on asking questions and sharing harm they experienced).

67. *See* John Braithwaite, *Reintegrative Shaming*, in *EXPLAINING CRIMINALS AND CRIME*:

The offender is obligated to “make things right as much as possible” with respect to the victim, which means that the restorative justice process empowers the victim to participate in defining the offender’s obligations.⁶⁸ At the same time, the offender is encouraged to understand how they have caused harm and to decide how to take responsibility.⁶⁹ Thus, in practice, the restorative justice process “maximizes opportunities for [the] exchange of information, participation, dialogue, and mutual consent” between parties.⁷⁰ Meanwhile, the process “belongs to the community,” in that community members actively participate in strengthening the community and promoting changes to prevent the recurrence of similar harm.⁷¹

The typical goal of the dialogical process is the development of a restorative agreement detailing the form(s) of reparation that the offender will perform.⁷² Examples include an apology, the renewal of interpersonal relations, unpaid work in the local community, and the provision of material goods and additional social support.⁷³ Following the preparation phase and the dialogue phase, the third and final phase is dedicated to ensuring that the offender complies with the agreement.⁷⁴

Although the restorative justice process should be relatively informal, the facilitator must be able to effectively manage the dialogue among the parties.⁷⁵ The facilitator should not only fulfill the victim’s needs “for information, validation, vindication, restitution, testimony, safety, and support,” but also address the

ESSAYS IN CONTEMPORARY CRIMINOLOGICAL THEORY 1, 15 (Raymond Paternoster & Ronet Bachman eds., 2000), http://johnbraithwaite.com/wp-content/uploads/2016/05/2000_Reintegrative-Shaming.pdf (discussing underpinnings of reintegrative shame theory in restorative justice processes, namely that offenders will feel more shame and remorse during dialogue with actual victim, as opposed to being denounced by a stranger they do not respect, such as a judge).

68. See FUNDAMENTAL PRINCIPLES OF RESTORATIVE JUSTICE, *supra* note 59, at 67 (discussing how process aims to empower victims to maximize their input and participation by centering framework around their recovery and healing and granting them principal role of establishing obligations).

69. See *id.* at 65 (discussing stage of process where offenders are encouraged to listen and understand harm caused to victim and community, maximized through voluntary participation, rather than through coercion).

70. *Id.* at 67.

71. See *id.* at 68 (discussing role of community in justice process, where it draws from community resources, contributes to its own strengthening, and promotes change that prevents future harm).

72. See Walters, *supra* note 45, at 62 (discussing dialogical process goal of inclusive discussion that settles in reparative agreement, including obligations on offender to remedy harm, while not inflicting further pain on them).

73. See *id.* (providing numerous examples of reparative obligations, including apologies, moral learning, community volunteering, restitution, and further support for offender via social services).

74. See EXPLORING ALTERNATIVE APPROACHES, *supra* note 24, at 17 (detailing third phase, or “follow-up phase,” where compliance is supported and monitored).

75. See Walters, *supra* note 45, at 63 (detailing role of facilitators, where they engage stakeholders in dialogical process, encouraging a conversation that focuses on offenders taking responsibility, rather than emphasizing they are a “bad person”).

offender's needs and competencies⁷⁶ and avoid stigmatizing or punishing them.⁷⁷ To prevent any stakeholder from dominating the process, all decisions that are made during meetings should be based on the values of equality, respect, and inclusion.⁷⁸ Furthermore, the facilitator should reduce the chances of revictimization by, among other things, setting ground rules for language and behavior that are used at meetings, providing support resources for the victim, and encouraging indirect mediation meetings.⁷⁹

B. Restorative Justice in Practice

In practice, restorative justice programs exist on “a continuum of independence.”⁸⁰ “Independent” practices replace penal responses to crime by diverting criminal cases out of the formal process at an early stage.⁸¹ Independent practices include community-based programs that exclude law enforcement, such as community conferencing practices, and programs that divert cases to restorative processes managed by nonprofit organizations or government bodies.⁸²

“Relatively independent” practices supplement prosecution by replacing a portion of the traditional process, typically occurring at the sentencing phase.⁸³ Community sentencing circles, for example, invite groups of stakeholders—which may include victims, family members, and community members—to sentence offenders, typically after they have pled guilty in court.⁸⁴ In addition, alternative sentencing involves the imposition of a sentence other than incarceration, such as community service, education, or participation in a rehabilitation program.⁸⁵

Finally, “dependent” practices operate adjacently to the traditional process

76. See FUNDAMENTAL PRINCIPLES OF RESTORATIVE JUSTICE, *supra* note 59, at 67–68 (describing dual purpose of dialogical process in addressing victims' needs, while also respecting offenders' own harms, needs, and competencies).

77. See Walters, *supra* note 45, at 63 (noting dialogical process aims to ensure “reintegrative” rather than “stigmatic” purpose, where stigmatizing offender would mostly alienate and ostracize).

78. See *id.* at 62, 64 (stating emphasizing equal participation and inclusion in meetings aims to reduce risks of individual voices being dominated by other participants, thereby depriving them of forum and opportunity).

79. See *id.* at 70 (discussing particular challenges in dialogical process in response to hate crimes, including revictimization and power differentials, and critical role of facilitators in limiting these risks through these tactics).

80. See EXPLORING ALTERNATIVE APPROACHES, *supra* note 24, at 18 (referring to continuum that classifies restorative processes by their dependence/independence to traditional criminal legal systems and frameworks).

81. Gavrielides, *supra* note 50, at 3625–26.

82. See EXPLORING ALTERNATIVE APPROACHES, *supra* note 24, at 18 (outlining numerous independent practices that vary in formal involvement, from purely community-based approaches that eliminate formal law enforcement mechanisms, to diversion programs that lightly involve formal agencies).

83. See *id.* at 20 (detailing how “relatively independent” practices supplement, rather than eliminate, traditional channels, and will involve law enforcement, criminal prosecution, and traditional figures such as judges and attorneys).

84. *Id.*

85. *Id.* at 21.

and occur following a criminal trial.⁸⁶ They are mostly used for the most serious crimes or in the context of prison,⁸⁷ such as mediation during incarceration.⁸⁸

C. Benefits and Implementation Obstacles and Risks

Given the relative lack of restorative justice programs in the United States, “it is impossible to draw firm conclusions on the efficacy of restorative justice.”⁸⁹ Despite the limited availability of data, restorative justice, according to Howard Zehr, has the potential to meet the needs of victims, offenders, and communities.⁹⁰ First, restorative justice can help victims of crime heal by satisfying four types of “especially neglected” needs: a need for answers to their questions about the offense (e.g., why it happened); a need for an opportunity to tell the story of what happened to them; a need for a sense of empowerment; and a need for vindication through apologies, restitution, or another method.⁹¹ Restorative justice can also promote “real accountability” by encouraging offenders to understand how their actions affected victims and to make things as right as possible.⁹²

At the same time, restorative justice can, and should, address offenders’ needs.⁹³ It can encourage them to not only experience personal transformation, but also integrate into their communities.⁹⁴ Furthermore, restorative justice can support communities that are impacted by crime by providing a space for them to express concerns and by helping them build a stronger sense of community and accountability.⁹⁵ Zehr’s views on the potential benefits of restorative justice are supported by studies suggesting that certain restorative justice programs can lead to higher victim satisfaction, a greater sense of accountability among offenders, lower recidivism levels, and lower costs.⁹⁶

A few scholars have studied the benefits of using restorative justice to specifically address hate crime.⁹⁷ Carrie Menkel-Meadow, a professor at

86. Gavrielides, *supra* note 50, at 3626.

87. *Id.*

88. See EXPLORING ALTERNATIVE APPROACHES, *supra* note 24, at 18 (depicting diagram where mediation during incarceration is considered a dependent practice).

89. See *id.* at 17 (explaining that in 2021, just over 300 restorative justice programs existed in the United States.).

90. See ZEHR, THE LITTLE BOOK, *supra* note 53, at 13–14 (noting restorative justice expands circle of stakeholders in a criminal case beyond just government and offender to include victims and community members).

91. See *id.* at 14–15 (discussing briefly each of four neglected needs).

92. *Id.* at 16.

93. See *id.* at 17 (identifying needs of offenders as accountability, encouragement toward personal transformation, encouragement toward integration into community, and temporary restraint).

94. *Id.*

95. *Id.* at 17–18.

96. See EXPLORING ALTERNATIVE APPROACHES, *supra* note 24, at 13, 17 (stating imprisonment creates costs in terms of financing prisons and excluding people from society).

97. See *id.* at 24 (suggesting restorative justice in place of traditional legal methods in context of hate crimes); Walters, *supra* note 45, at 71 (suggesting restorative justice approach to repair harms of hate crimes).

Georgetown University Law Center, pointed out that studies from North America, Europe, Australia, and New Zealand have supported the “greatest claims for restorative justice . . . that it 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.”⁹⁸ In addition, Mark Austin Walters, a criminal law and criminology professor at the University of Sussex, conducted a study in the United Kingdom which suggested that restorative justice can improve the emotional well-being of victims and limit the recurrence of hate crime.⁹⁹

However, most empirical restorative justice studies, in general, have “significant methodological limitations, especially the difficulty of comparing across restorative and conventional criminal processes when participants are not randomly assigned to different settings.”¹⁰⁰ The studies referenced by Menkel-Meadow had “methodological difficulties in almost all settings,”¹⁰¹ and Walters’s study had a small sample size.¹⁰² Another issue is that “the study of restorative justice in the hate crimes context is too early and small-scale to permit generalization.”¹⁰³

There are additional obstacles and risks associated with implementing restorative justice to address hate crime. First, because restorative justice should be voluntary, a facilitator must obtain consent from the victim and the offender without placing undue pressure on either party.¹⁰⁴ However, a victim’s limited awareness of restorative justice upon initial contact with the police, as well as a lack of trust in the individuals making the offer of restorative justice, can negatively affect victim take-up rates.¹⁰⁵ For offenders, buy-in can be obstructed by a refusal to acknowledge the harm they created and to admit guilt, along with other issues such as low emotional intelligence, mental health problems, and reliance on drugs and alcohol.¹⁰⁶ Also, since restorative justice “does not happen overnight”¹⁰⁷ and involves multiple phases, it requires a commitment of time and resources by

98. Carrie Menkel-Meadow, *Restorative Justice: What Is It and Does It Work?*, 3 ANN. REV. L. & SOC. SCI. 10.1, 10.14 (2007).

99. Walters, *supra* note 45, at 65–66.

100. Sinnar & Colgan, *supra* note 28, at 165–66.

101. Menkel-Meadow, *supra* note 98, at 10.14.

102. See Walters, *supra* note 45, at 66 (noting only twenty-three participants in survey study).

103. Sinnar & Colgan, *supra* note 28, at 166.

104. See Walters, *supra* note 45, at 69–71 (explaining lower success rates of restorative justice when police officers pressured victim participation and emphasizing importance of facilitator’s ability to prepare all stakeholders for restorative justice practices).

105. See JANET BRIGHT, RESTORATIVE JUST. COUNCIL, IMPROVING VICTIM TAKE-UP OF RESTORATIVE JUSTICE 8–9 (2017) https://restorativejustice.org.uk/sites/default/files/resources/files/RJC_TakeUpReport_web.pdf (explaining take-up rates may be improved if professionals responsible for making victims aware of restorative justice are more informed themselves).

106. *Id.* at 9.

107. *Restorative Justice FAQ*, WHY ME?, <https://why-me.org/what-is-restorative-justice/faqs/> (last visited Sept. 30, 2022).

all participants.¹⁰⁸ A further obstacle is the need for program funding and stable leadership;¹⁰⁹ funding shortages can hinder the ability of providers to adequately train staff and engage in long-term planning.¹¹⁰ This sense of insecurity can, in turn, contribute to high staff turnover and consequently the loss of experienced staff members.¹¹¹

In addition to these obstacles, restorative justice may fail to adequately recognize and address the asymmetries of power among stakeholders, given the subordinated status of hate crime victims and the communities to which they belong.¹¹² This issue is closely related to another phenomenon known as revictimization.¹¹³ Offenders whose biases are shared by a dominant community and/or friends and family who participate in a restorative justice meeting may refuse to take responsibility, blame victims, or provide insincere apologies.¹¹⁴ At the same time, a U.K. study suggested that facilitators can reduce the chances of revictimization by receiving thorough restorative justice training, understanding the dynamics of hate crime victimization, and preparing a victim before exposing them to direct dialogue with the offender.¹¹⁵ Furthermore, there is a risk that victims “might be subject to ‘coerced compassion’—the gendered or racialized social expectation that certain victims forgive perpetrators rather than demand punishment.”¹¹⁶

III. THE UNITED STATES

The past few years have witnessed a significant rise in hate crimes and incidents in the United States. In the week following the 2016 presidential election, the Southern Poverty Law Center reported 437 incidents of intimidation targeting people of color, Muslims, immigrants, LGBTQ people, and women.¹¹⁷ A report

108. See EXPLORING ALTERNATIVE APPROACHES, *supra* note 24, at 18–19 (describing each phase of the process and detailing roles and responsibilities of each participant).

109. See Patrick Gerkin et al., *supra* note 27 at 3 (pointing out that role of strong leadership is a key component of restorative justice success).

110. See *id.* at 2, 6. (describing job of trained mediator and importance of receiving funding for long-term planning).

111. DEP'T OF JUST., DEVELOPMENT OF AN ADULT RESTORATIVE JUSTICE STRATEGY FOR NORTHERN IRELAND: SUMMARY OF CONSULTATION RESPONSES, 2020, at 33 (UK), <https://www.justice-ni.gov.uk/publications/adult-restorative-justice-strategy> [hereinafter *Northern Ireland Restorative Justice Strategy Consultation Responses*].

112. See Sinnar & Colgan, *supra* note 28, at 166 (drawing comparison to women as subordinated victims of domestic or sexual violence).

113. See *id.* at 166–67 (defining revictimization as retraumatizing victims through offender's and offender's support group's unrepentance and victim blaming).

114. *Id.*

115. Mark Austin Walters, *Hate Crime and Restorative Justice: Exploring Causes, Repairing Harms*, INT'L NETWORK FOR HATE STUD. (May 15, 2014), <https://internationalhatestudies.com/hate-crime-restorative-justice-exploring-causes-repairing-harms/>.

116. Sinnar & Colgan, *supra* note 28, at 167.

117. Alexis Okeowo, *Hate on the Rise After Trump's Election*, NEW YORKER (Nov. 17, 2016), <https://www.newyorker.com/news/news-desk/hate-on-the-rise-after-trumps-election>.

later found that hate crimes in nine metropolitan areas rose more than 20% in 2016.¹¹⁸ Two years into Donald Trump's presidency, researchers found that the election was associated with a statistically significant surge in reported hate crimes across the country, even when controlling for alternative explanations; counties that had voted for Trump by the widest margins experienced the largest increases in reported hate crimes.¹¹⁹

Another surge of hate speech occurred in the wake of George Floyd's murder and during the start of Black Lives Matter protests across the country.¹²⁰ On Facebook, derogatory posts about Black Americans quadrupled and remained high until the pace of protests slowed down in September 2020.¹²¹ At the height of the protests in June, Facebook posts with slurs targeting Black people and people from other marginalized groups were removed less frequently than posts with slurs targeting white people.¹²² In the real world, a range of disturbing and violent incidents directed against Black people left many fearing for their safety.¹²³

Early on during the COVID-19 pandemic, racist and xenophobic rhetoric from political leaders blaming China for the pandemic fueled conspiracy theories, which in turn led to a rise in hate crimes and incidents targeting Asians and Asian Americans.¹²⁴ Trump's first tweet about a "Chinese virus" in March 2020 was directly linked to a significant increase in anti-Asian hashtags,¹²⁵ and twelve hours

118. Grant Smith & Daniel Trotta, *U.S. Hate Crimes Up 20 Percent in 2016 Fueled by Election Campaign-Report*, REUTERS (Mar. 13, 2017, 11:23 PM), <https://www.reuters.com/article/us-usa-crime-hate/u-s-hate-crimes-up-20-percent-in-2016-fueled-by-election-campaign-report-idUSKBN16L0BO>.

119. Griffin Edwards & Stephen Rushin, *The Effect of President Trump's Election on Hate Crimes*, SSRN (Jan. 14, 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3102652.

120. See Elliott C. McLaughlin, *How George Floyd's Death Ignited a Racial Reckoning That Shows No Signs of Slowing Down*, CNN (Aug. 9, 2020, 11:31 AM), <https://www.cnn.com/2020/08/09/us/george-floyd-protests-different-why/index.html> (discussing momentum of Black Lives Matter movement following George Floyd's death); see also Larry Buchanan et al., *Black Lives Matter May Be the Largest Movement in U.S. History*, N.Y. TIMES (July 3, 2020), <https://www.nytimes.com/interactive/2020/07/03/us/george-floyd-protests-crowd-size.html> (discussing how Black Lives Matter might be largest movement in U.S. history).

121. MARK KUMLEBEN ET AL., ANTI-DEFAMATION LEAGUE, COMPUTATIONAL PROPAGANDA AND THE 2020 U.S. PRESIDENTIAL ELECTION: ANTISEMITIC AND ANTI-BLACK CONTENT ON FACEBOOK AND TELEGRAM (2020), <https://www.adl.org/resources/reports/computational-propaganda-and-the-2020-election>.

122. Elizabeth Dwoskin et al., *Facebook to Start Policing Anti-Black Hate Speech More Aggressively Than Anti-White Comments, Documents Show*, WASH. POST (Dec. 3, 2020), <https://www.washingtonpost.com/technology/2020/12/03/facebook-hate-speech/>.

123. Wenei Philimon, *Black Americans Report Hate Crimes Violence in Wake of George Floyd Protests and Black Lives Matter Gains*, USA TODAY, <https://www.usatoday.com/story/news/nation/2020/07/07/black-americans-report-hate-crimes-amid-black-lives-matter-gains/3259241001/> (July 17, 2020, 6:53 PM).

124. See Joanne Lu, *Why Pandemics Give Birth to Hate: From Bubonic Plague to COVID-19*, NPR (Mar. 26, 2021, 2:09 PM), <https://www.npr.org/sections/goatsandsoda/2021/03/26/980480882/why-pandemics-give-birth-to-hate-from-black-death-to-covid-19> (describing acts of violence against Asian Americans during COVID-19 pandemic).

125. *Id.*

after news broke that he had contracted COVID-19 in October 2020, anti-Asian sentiment on Twitter increased by 85%.¹²⁶ Furthermore, between March 19, 2020 and June 30, 2021, a coalition of Asian American organizations received 9,081 incident reports, including reports of verbal harassment, shunning, physical assault, civil rights violations, and online harassment.¹²⁷ Part III of this Comment will discuss the way in which hate crime is defined and measured in the United States, the traditional legal approach to hate crime, the deficiencies thereof, and the adoption of restorative justice as an alternative approach.

A. Defining and Measuring Hate Crime in the United States

In the United States, a “hate crime” is generally defined as a crime that is motivated by bias against one or more of the victim’s personal characteristics.¹²⁸ As this Comment will later explain, federal hate crime statutes differ from state hate crime statutes with respect to the number of personal characteristics that they cover.¹²⁹ “Hate incidents,” while related to hate crimes, are acts of prejudice that are not crimes and do not involve violence, threats, or property damage.¹³⁰ Although hate incidents are very troubling, this Comment will focus on the commission of hate crimes.

The Department of Justice administers two statistical programs to measure hate crimes: the FBI’s Uniform Crime Reporting (UCR) Program and the Bureau of Justice Statistics’ National Crime Victimization Survey (NCVS).¹³¹ The programs diverge in terms of their purposes, the methods that they use, and the aspects of crime on which they focus.¹³² While the UCR Program primarily aims to provide reliable criminal justice statistics for law enforcement administration, operation, and management, the NCVS provides previously unavailable information about crime (including crime that is not reported to the police), victims, and offenders.¹³³ In addition, the UCR Program relies on voluntary participation by state, local, and tribal law enforcement,¹³⁴ whereas the NCVS each year gathers data from a nationally representative sample of about 240,000 interviews on criminal victimization.¹³⁵

126. *ADL Report: Anti-Asian Hostility Spikes on Twitter After President Trump’s COVID Diagnosis*, ANTI-DEFAMATION LEAGUE (Oct. 9, 2020), <https://www.adl.org/news/press-releases/adl-report-anti-asian-hostility-spikes-on-twitter-after-president-trumps-covid>.

127. AGGIE J. YELLOW HORSE ET AL., STOP AAPI HATE NATIONAL REPORT 1–2 (2021), <https://stopaapihate.org/stop-aapi-hate-national-report-2/>.

128. *Learn About Hate Crimes*, U.S. DEP’T OF JUST., <https://www.justice.gov/hatecrimes/learn-about-hate-crimes> (last visited Oct. 1, 2022).

129. *Id.* See also *infra* notes 143–46 and accompanying text for a discussion on the distinction between federal and state statutory coverage with respect to personal characteristics.

130. *Learn About Hate Crimes*, *supra* note 128.

131. MICHAEL PLANTY ET AL., BUREAU OF JUST. STAT., U.S. DEP’T OF JUST., *THE NATION’S TWO CRIME MEASURES I* (Vanessa Curto & Jill Thomas eds., 2014).

132. *Id.*

133. *Id.* at 2.

134. *Hate Crime Statistics*, FBI, <https://www.fbi.gov/services/cjis/ucr/hate-crime> (last visited Oct. 1, 2022).

135. *National Crime Victimization Survey (NCVS)*, BUREAU OF JUST. STAT., U.S. DEP’T OF

These distinctions, along with other issues that this Comment will discuss, contribute to significant differences in the data gathered by each program, calling into question the UCR Program's ability to capture the full extent of hate crime in the United States. In 2019, it reported 7,103 single-bias incidents.¹³⁶ Of these incidents, 55.8% were based on race, ethnicity, or ancestry; 21.4% were based on religion; 16.8% were based on sexual orientation; and the remainder were based on gender identity, disability, or gender.¹³⁷ In contrast, between 2015 and 2019, the NCVS captured an annual average of 240,770 hate crime victimizations.¹³⁸ Among the victimizations that involved violence, 59.5% were based on race, ethnicity, or national origin; 24.2% were based on gender; 22.5% were based on association; 20.3% were based on sexual orientation; and the remainder were based on disability, religion, or perception.¹³⁹

B. The Traditional Legal Approach to Hate Crime in the United States

In the United States, the traditional legal approach to addressing hate crime involves creating separate hate crime offenses for bias-motivated crimes or sentencing enhancements that allow prosecutors to demonstrate that a traditional crime was motivated by bias.¹⁴⁰ As this Comment established earlier, hate crime statutes protect against crimes that are motivated by bias against certain personal characteristics,¹⁴¹ which have been described as “either immutable traits and/or those often targeted for discrimination and hate-motivated violence.”¹⁴² At the federal level, protected characteristics include race, color, national origin, religion, sexual orientation, gender, gender identity, and disability.¹⁴³ However, most hate crimes are investigated and prosecuted at the state and local levels.¹⁴⁴ Only sixteen states have statutes that include all of the bias categories covered by federal statutes,¹⁴⁵ resulting in a “patchwork” of laws at the state level.¹⁴⁶

JUST., <https://bjs.ojp.gov/data-collection/ncvs#publications-0> (last visited Oct. 28, 2022).

136. *2019 Hate Crime Statistics: Incidents and Offenses*, FBI: UCR, <https://ucr.fbi.gov/hate-crime/2019/topic-pages/incidents-and-offenses> (last visited Oct. 1, 2022).

137. *Id.*

138. GRACE KENA & ALEXANDRA THOMPSON, BUREAU OF JUST. STAT., U.S. DEP'T OF JUST., *HATE CRIME VICTIMIZATION, 2005–2019*, at 4 (David Fialkoff & Edrienne Su eds., 2021).

139. *Id.* at 5.

140. See EXPLORING ALTERNATIVE APPROACHES, *supra* note 24, at 3–4 (discussing current carceral approach to punishing hate crimes and outlining objections to this approach).

141. *Learn About Hate Crimes*, *supra* note 128.

142. MOVEMENT ADVANCEMENT PROJECT, POLICY SPOTLIGHT: HATE CRIME LAWS 12 (2021), <https://www.lgbtmap.org/file/2021-report-hate-crime-laws.pdf>.

143. *Federal Laws and Statutes*, U.S. DEP'T OF JUST., <https://www.justice.gov/hatecrimes/laws-and-policies> (Oct. 14, 2022).

144. Michael Lieberman, *Hate Crimes, Explained*, S. POVERTY L. CTR. (Oct. 27, 2021), <https://www.splcenter.org/hate-crimes-explained#history>.

145. See *Federal Laws and Statutes*, *supra* note 143 (displaying federal bias categories which are included in each state's laws).

146. Beatrice Jin, *Biden Signed a New Hate Crimes Law – But There's a Big Flaw*, POLITICO (May 20, 2021, 3:43 PM), <https://www.politico.com/interactives/2021/state-hate-crime-laws/>.

Proponents of the traditional legal approach to addressing hate crime have provided numerous justifications for their support.¹⁴⁷ In addition to arguing that hate crime laws and enhanced penalties reflect common theories of punishment,¹⁴⁸ they argue that hate crimes are different from and more severe than other types of crime.¹⁴⁹ Research shows that victims of crimes motivated by bias are more likely to experience post-traumatic stress, safety concerns, depression, anxiety, and anger than victims of other kinds of crime.¹⁵⁰

Hate crime researchers have proposed several factors to explain this difference.¹⁵¹ First, a hate crime is a direct attack against the victim's identity, in that the crime is committed in response to an immutable characteristic.¹⁵² This factor likely exacerbates a victim's sense of vulnerability beyond that of a victim of a crime that was not motivated by hate.¹⁵³ Second, through a "message effect,"¹⁵⁴ a hate crime impacts both the initial victim and potentially the entire community with which the victim identifies.¹⁵⁵ By communicating a message that certain communities are inferior and not worthy of social respect, reports of hate crime signal to members of these communities that they are in danger.¹⁵⁶ This broader impact, which hate crimes scholar Paul Iganski refers to as "waves of harm,"¹⁵⁷ has been illustrated by recent events, such as the 2019 massacre of forty-nine people at a gay nightclub in Orlando.¹⁵⁸ In its aftermath, protests and vigils took place in cities across the world, demonstrating that the harm spread to the

147. See, e.g., Laura Meli, Note, *Hate Crime and Punishment: Why Typical Punishment Does Not Fit the Crime*, 2014 ILL. L. REV. 921, 943 (2014) (describing four justifications for existing hate crime laws).

148. *Id.*

149. Caroline Mellgren et al., *For Whom Does Hate Crime Hurt More? A Comparison of Consequences of Victimization Across Motives and Crime Types*, 36 J. INTERPERSONAL VIOLENCE NP1512, NP1513 (2021), <https://pubmed.ncbi.nlm.nih.gov/29295032/>.

150. *The Psychology of Hate Crimes*, AM. PSYCH. ASS'N (Aug. 2017), <https://www.apa.org/advocacy/interpersonal-violence/hate-crimes>.

151. See Mellgren et al., *supra* note 149, at NP1513 (describing three factors which make hate crimes more harmful than other crimes).

152. *Id.*

153. Walters, *supra* note 45, at 58.

154. Mellgren et al., *supra* note 149, at NP1513.

155. *Id.* Sometimes, however, hate crimes can affect individuals who do not even identify with the characteristic that motivated the offender's conduct. See Meli, *supra* note 147, at 928 (drawing a distinction between the perceived or actual group which victim belongs to). For example, even though U.S. political leaders and conspiracy theorists have blamed China for causing the pandemic, many crimes have targeted people who look Chinese (an issue that stems from longstanding racist stereotypes) but in fact are not Chinese, such as a Filipino woman who was brutally attacked in New York City in March 2021. Nicole Hong et al., *Brutal Attack on Filipino Woman Sparks Outrage: 'Everybody Is on Edge'*, N.Y. TIMES (Apr. 6, 2021), <https://www.nytimes.com/2021/03/30/nyregion/asian-attack-nyc.html>.

156. Walters, *supra* note 45, at 60.

157. *Id.*

158. See Rupert Brown et al., *How Hate Crime Affects a Whole Community*, BBC (Jan. 12, 2018), <https://www.bbc.com/news/uk-42622767> (describing massacre and remarking on its effects on a much broader community).

broader LGBTQ community.¹⁵⁹

Finally, hate crimes simply look different from other types of crime.¹⁶⁰ Hate crime victims experience greater physical harm than victims of other crimes, since hate crimes are four times more likely to involve assault than other crimes, and hate crimes that are assaults are far more likely than other kinds of assault to cause serious bodily injury to the victim.¹⁶¹ Compared to non-hate crime victims, hate crime victims are more likely to experience multiple incidents of hate crime.¹⁶² Furthermore, the emotional trauma they experience can last for longer periods of time, which is likely due to their heightened perception of danger.¹⁶³

C. Deficiencies in the Traditional Legal Approach to Hate Crime

In spite of the justifications for hate crime laws and penalty enhancements, the traditional legal approach to hate crime has numerous deficiencies. Some of these deficiencies are structural problems that limit the effectiveness of punishment, such as (1) the inconsistent definition of hate crimes at the state level, (2) the underreporting of hate crime, (3) inconsistencies in state data collection and reporting, (4) nonexistent or insufficient police training, and (5) disincentives to prosecute hate crime.¹⁶⁴ Other deficiencies—(6) the disproportionate harm to marginalized communities and (7) the failure to heal victims and deter offenders—go to the heart of the issue by challenging the widely held assumption that punishment reforms offenders and benefits victims and their communities.¹⁶⁵

1. Inconsistent Definition of Hate Crime

As this Comment previously discussed, hate crime statutes vary widely at the state level.¹⁶⁶ Only sixteen states have laws encompassing all the protected characteristics covered by federal statutes,¹⁶⁷ and five states—Arkansas, Indiana, North Dakota, South Carolina, and Wyoming—do not even have hate crime statutes.¹⁶⁸ The wide disparities in protections have resulted in unequal protection from similar crimes in different jurisdictions and have stymied the collection of

159. *Id.*

160. See Mellgren et al., *supra* note 149, at NP1513 (documenting that hate crimes have been found to have more severe consequences than other crimes).

161. Meli, *supra* note 147, at 952.

162. Walters, *supra* note 45, at 59.

163. See *id.* (describing lengthy process by which hate crime victims grapple with their experiences).

164. See *infra* Part III.C.1–5 for a discussion of the various deficiencies of the traditional legal approach to hate crimes.

165. See *infra* Part III.C.6–7 for a discussion of the disproportionate harm to marginalized communities and the failure to heal victims and deter offenders.

166. See *supra* notes 145–46 and accompanying text for a discussion on the variation of hate crime laws at the state level.

167. See *Federal Laws and Statutes*, *supra* note 143 (displaying via chart categories which all fifty states include in their statutes).

168. *State Hate Crimes Statutes*, BRENNAN CTR. FOR JUST. (July 2, 2020), <https://www.brennancenter.org/our-work/research-reports/state-hate-crimes-statutes>.

accurate data about these crimes.¹⁶⁹

2. Underreporting of Hate Crime by Crime Victims

Another major structural problem is the underreporting of hate crimes, evidenced by the discrepancies between the UCR and NCVS data.¹⁷⁰ Many communities that are most impacted by hate crime, such as Black and LGBTQ communities, exhibit distrust and a lack of confidence in law enforcement due to a long history of police brutality directed at community members.¹⁷¹

Victims can also be disincentivized to report hate crimes because of factors such as language barriers; cultural differences; fears of deportation or retaliation; and physical, institutional, and social barriers to reporting.¹⁷² Victims from ethnic and immigrant communities who cannot speak English or who have limited English proficiency may feel that they will not be understood if they report.¹⁷³ Police officers may also fail to provide translators or help victims navigate the criminal justice system.¹⁷⁴ In terms of cultural differences, in certain communities, being the victim of a bias-motivated crime creates a stigma for the victim and their family, and the experience of reporting the crime may cause even greater humiliation.¹⁷⁵

In addition, victims who are undocumented may choose not to report out of fear of deportation—a consideration that Latino victims often have as the targeting of Latinos across the country has risen.¹⁷⁶ Victims may also choose not to report out of fear of retaliation by the offenders.¹⁷⁷ For example, in the suburbs of Denver, Colorado, a lesbian woman with a disability called the police after a neighbor tried to run her down with his car, but she asked the officers not to

169. *Id.*

170. See *supra* Part III.A for a discussion of the underreporting of hate crimes as a result of the discrepancies between the UCR and NCVS data.

171. See Frank S. Pezzella et al., *The Dark Figure of Hate Crime Underreporting*, AM. BEHAV. SCIENTIST, Jan. 28, 2019, at 1, 4–5, <https://journals.sagepub.com/doi/full/10.1177/0002764218823844> (discussing history of strained relations between police and groups traditionally victims of hate crimes).

172. *Id.* at 5.

173. Carolina Navarro, *Hate Crime Reporting Barriers: Why Are Victims Reluctant to Report?*, TACKLING HATE, <https://tacklinghate.org/trainingmodule/hate-crime-reporting-barriers-why-victims-of-hate-related-incidents-are-reluctant-to-report2> (last visited Jan. 16, 2022).

174. See Kimmy Yam, *Amid Attacks, School Principals Concerned Over Asian Americans' Return to Class*, NBC NEWS (Feb. 18, 2021, 7:53 PM), <https://www.nbcnews.com/news/asian-america/amid-attacks-principals-concerned-over-asian-americans-returning-class-n1258302> (noting police often do not provide translators or help in navigating complex criminal justice system).

175. See Pezzella et. al, *supra* note 171, at 5 (mentioning stigma associated with label of being a bias-motivated crime victim that hinders reporting in many Asian cultures).

176. Brendan Campbell et al., *Rising Hate Drives Latinos and Immigrants into Silence*, HATE IN AM. (Aug. 15, 2018), <https://hateinamerica.news21.com/rising-hate-drives-latinos-immigrants-into-silence>.

177. Ken Schwencke, *Confusion, Fear, Cynicism: Why People Don't Report Hate Incidents*, PROPUBLICA (July 31, 2017, 3:31 PM), <https://www.propublica.org/article/confusion-fear-cynicism-why-people-dont-report-hate-incidents>.

confront the man out of fear of retaliation for filing a report.¹⁷⁸ Furthermore, in the case of a hate crime victim with a disability, they may not realize that they have been victimized, since hate crimes are unfortunately a normative experience in their lives.¹⁷⁹ Even if they do have that realization, they may encounter physical, institutional, and social barriers that challenge their ability to report the crime.¹⁸⁰

3. Inconsistencies in State Data Collection and Reporting

In addition to the underreporting of hate crimes, the severe lack of state data collection and reporting hinders the federal government's ability to take measures and enact policies that combat hate crime.¹⁸¹ Twenty states and five territories do not require state-based data collection about hate crimes committed in their states.¹⁸² Twenty-six states require law enforcement agencies to report data to centralized state repositories or state agencies, which are then typically only required to analyze the data and report back to law enforcement, elected officials, or the general public.¹⁸³ Four other states and Washington, D.C. require state-based data collection and analysis but do not require law enforcement agencies to report the data.¹⁸⁴ Only one state, New Mexico, requires law enforcement agencies to report incidents directly to the FBI, but does not require state-based data collection or analysis.¹⁸⁵ In the remainder of the states, reporting of data to the FBI is voluntary, which helps to explain why in 2019, only 12% of the approximately 18,000 law enforcement agencies across the country reported hate crimes to the FBI.¹⁸⁶

4. Nonexistent or Insufficient Police Training

An issue related to inconsistencies in data collection and reporting is barriers to investigating, charging, and proving hate crimes.¹⁸⁷ Police officers may be incapable of identifying conduct as a hate crime.¹⁸⁸ As of 2017, only twelve states have statutes requiring that police academies provide instruction on hate crime.¹⁸⁹ In at least seven other states, recruits are not required to learn about hate crimes at

178. *Id.*

179. Pezzella et al., *supra* note 171, at 5.

180. *Id.*

181. See MOVEMENT ADVANCEMENT PROJECT, *supra* note 142, at 27 (discussing flaws in data collection and reporting that include underreporting).

182. *Id.* at 23–24.

183. *Id.* at 23.

184. *Id.*

185. *Id.*

186. *Id.*

187. See EXPLORING ALTERNATIVE APPROACHES, *supra* note 24, at 11 (discussing how impediments to investigating, charging, and proving hate crimes undermine hate crime laws).

188. See *id.* at 9 (mentioning police officers' failure to recognize indicators of hate crimes).

189. A.C. Thompson et al., *Hate Crime Training for Police Is Often Inadequate, Sometimes Nonexistent*, PROPUBLICA (Nov. 29, 2017, 8:00 AM), <https://www.propublica.org/article/hate-crime-training-for-police-is-often-inadequate-sometimes-nonexistent>.

all.¹⁹⁰ While some states that require hate crime training combine instruction with cultural sensitivity instruction, a review of some materials on the subtleties of dealing with specific ethnic or religious communities showed that they were “either hopelessly out of date or downright inflammatory.”¹⁹¹

5. Disincentives to Prosecute Hate Crime

Even when police are able to identify a possible bias motive, prosecutors, who have sole discretion over whether to charge a case as a hate crime, often decide not to.¹⁹² Prosecutors prefer not to bring charges when they doubt that they can secure a conviction, believing that proving an actor’s motive is “immensely difficult.”¹⁹³ When the defendant already faces a long prison sentence, some prosecutors do not believe that a hate crime conviction would have any practical effect.¹⁹⁴ Some prosecutors are concerned that including hate crime charges may complicate the issues of the case before a jury, while others decline to do so due to the political landscape of their jurisdiction.¹⁹⁵ Furthermore, in jurisdictions that require a showing that the crime would not have occurred “but for” the victim’s identity, prosecutors may struggle to establish evidence to meet the high standard of proof.¹⁹⁶

6. Disproportionate Harm to Marginalized Communities

The traditional legal approach to hate crime disparately impacts marginalized communities by “reinforcing and deepening existing pathologies.”¹⁹⁷ As was illustrated by the introduction to this Comment, there is a tension between hate crime statutes and a recognized need to not further expand a system that disproportionately polices and incarcerates Black and Brown people.¹⁹⁸ While the majority of all hate crimes are committed by white people,¹⁹⁹ hate crimes recorded by law enforcement disproportionately list Black offenders.²⁰⁰ For example, in

190. *Id.*

191. *Id.*

192. Avlana Eisenberg, *Hate-Crime Laws Don’t Work as Their Supporters Intended*, ATLANTIC (June 22, 2021), <https://www.theatlantic.com/ideas/archive/2021/06/hate-crimes-not-used-prosecutors/619179>.

193. *Id.*

194. *Id.*

195. See Avlana Eisenberg, *Expressive Enforcement*, 61 UCLA L. REV. 858, 893–94 (2014) (discussing concerns about jury reaction).

196. EXPLORING ALTERNATIVE APPROACHES, *supra* note 24, at 12.

197. MICHAEL GERMAN & EMMANUEL MAULEÓN, FIGHTING FAR-RIGHT VIOLENCE AND HATE CRIMES, BRENNAN CTR. FOR JUST. 14 (2019) https://www.brennancenter.org/sites/default/files/2019-08/Report_Far_Right_Violence.pdf.

198. See Wiggins, *supra* note 8 (discussing potential discriminatory impact of hate crime penalty enhancement against nonwhite people).

199. *Table 9: Known Offenders*, FED. BUREAU OF INVESTIGATIONS: UNIF. CRIME REPORTING, <https://ucr.fbi.gov/hate-crime/2019/tables/table-9.xls> (last visited Jan. 16, 2022) [hereinafter *Table 9*].

200. MOVEMENT ADVANCEMENT PROJECT, *supra* note 142, at 32.

2019, the UCR listed Black offenders as nearly 24% of all offenders,²⁰¹ even though only about 14% of the national population that year identified as Black.²⁰² Meanwhile, Black communities are heavily affected by hate crime—in 2019, over 48% of single-bias incidents based on race, ethnicity, or ancestry were motivated by anti-Black bias.²⁰³

7. Failure to Heal Victims and Deter Offenders

The traditional legal approach has also been criticized for its perceived failure to heal victims and deter perpetrators. According to hate crimes legal scholar Jeannine Bell, “[e]ven when such acts are prosecuted, civil rights law, irrespective of the statute used, may not be a magic bullet for victims. It does not make them whole, even when they ‘win.’”²⁰⁴ Penalty enhancements may only serve to reinforce a victim’s attachment to negative emotions, such as hate, anger, malice, and revenge.²⁰⁵ Furthermore, penalty enhancements may not deter offenders, especially in situations where an offender already faces a long sentence,²⁰⁶ and the labeling of an offender as a “racist” does little, if anything, to challenge the underlying causes of hate.²⁰⁷

D. Restorative Justice as an Alternative Approach in the United States

Restorative justice emerged in the United States as a response to growing concerns with mass incarceration and other problems with the criminal legal system, as well as to skepticism about the effectiveness of punishment in deterring crime and rehabilitating offenders.²⁰⁸ It became more mainstream when the American Bar Association (ABA) endorsed victim-offender mediation in 1994, and even more so when the ABA began offering grants in 2008 to develop restorative justice initiatives in criminal law settings.²⁰⁹ Today, there are a little

201. See Table 9, *supra* note 199 (stating 1,532 of 6,406 known offenders were Black or African American).

202. Christine Tamir, *The Growing Diversity of Black America*, PEW RSCH. CTR. (Mar. 25, 2021), <https://www.pewresearch.org/social-trends/2021/03/25/the-growing-diversity-of-black-america>.

203. See Table 1: *Incidents, Offenses, Victims, and Known Offenders*, FED. BUREAU OF INVESTIGATION: UNIF. CRIME REPORTING, <https://ucr.fbi.gov/hate-crime/2019/tables/table-1.xls> (last visited Jan. 16, 2022) (reporting 1,930 of 7,103 single-bias incidents were against Blacks or African Americans).

204. EXPLORING ALTERNATIVE APPROACHES, *supra* note 24, at 14.

205. Walters, *supra* note 45, at 57.

206. See EXPLORING ALTERNATIVE APPROACHES, *supra* note 24, at 12 (discussing inconclusive deterrent effects of penalty enhancements).

207. See Walters, *supra* note 45, at 57 (questioning whether labeling an individual as racist challenges underlying causes of prejudice and hostility in society).

208. EXPLORING ALTERNATIVE APPROACHES, *supra* note 24, at 17.

209. See Marilyn Armour, *Restorative Justice: Some Facts and History*, CHARTER FOR COMPASSION, <https://charterforcompassion.org/restorative-justice/restorative-justice-some-facts-and-history> (last visited Jan. 16, 2022) (discussing history and development of restorative justice movement).

over 300 restorative justice programs operating in forty-five states.²¹⁰

The application of restorative justice to hate crime is relatively uncommon.²¹¹ As noted by researchers from Stanford Law School, restorative justice programs in the United States “typically do not focus on hate crimes, but address hate crimes among many other types of crimes.”²¹² In addition, only twelve states have hate crime statutes that include provisions explicitly allowing courts to recommend or require convicted individuals to complete community service or anti-bias education, and these options can be offered only in addition to traditional forms of punishment.²¹³

Against this backdrop, a growing number of anti-hate advocates are vocalizing their support of noncarceral approaches to hate crime, focusing specifically on community-based restorative justice. Following the passage of the COVID-19 Hate Crimes Act, which, among other things, offers training to police on how to respond to hate crime,²¹⁴ over eighty-five organizations, including dozens of Asian American and LGBTQ groups, called “for a shift in resources from law enforcement to community-based solutions including interventions and noncarceral alternatives.”²¹⁵ Additionally, the NYC Against Hate Coalition’s policy framework includes a call for investment in a “restorative community-based approach” and, more specifically, for the creation of a restorative justice pilot program for minors who committed incidents of hate violence that do not meet the hate crimes standard.²¹⁶

Given the infrequent application of restorative justice practices to hate crime, there are few documented examples of community-led restorative justice.²¹⁷ One of them took place in 2014, when the Sikh Coalition and the victim of an anti-Sikh hate crime asked the offender to serve out a seventy-two-hour community service sentence with the group.²¹⁸ Over the course of four months, the offender learned about “the severity of hate crimes, profiling, discrimination, and school bullying that the American Sikh community faces every day.”²¹⁹ “Moved” by the Sikh Coalition’s commitment, professionalism, and kindness, the offender credited this experience with helping him to stop drinking, hold a steady job, and continue

210. EXPLORING ALTERNATIVE APPROACHES, *supra* note 24, at 17.

211. *See id.* at 24 (stating that current application of restorative justice to hate crimes is limited).

212. EXPLORING ALTERNATIVE APPROACHES, *supra* note 24, at 21.

213. *See* MOVEMENT ADVANCEMENT PROJECT, *supra* note 142, at 18 (discussing noncarceral sentencing).

214. Li Zhou, *The House Passes Bill to Combat Anti-Asian Hate Crimes*, VOX (May 18, 2021, 4:45 PM), <https://www.vox.com/2021/4/22/22385461/senate-anti-asian-hate-crimes-bill>.

215. Yam, *supra* note 21.

216. *NYC Against Hate Coalition Policy Framework: Investing in a Restorative Community-Based Approach*, NYC AGAINST HATE, https://www.jfrej.org/assets/uploads/NYCAH_Mission_C02.pdf (last visited Jan. 16, 2022).

217. *See* EXPLORING ALTERNATIVE APPROACHES, *supra* note 24, at 24 (stating current application of restorative justice to hate crimes is limited).

218. EXPLORING ALTERNATIVE APPROACHES, *supra* note 24, at 21.

219. *My Life Changed After I Assaulted a Sikh Man*, THE SIKH COAL. (Dec. 18, 2014), <https://www.sikhcoalition.org/blog/2014/my-life-changed-after-i-assaulted-a-sikh-man>.

volunteering for the organization.²²⁰

In another example of community-led restorative justice, in April 2021, a victim of an anti-Asian hate crime in Oregon asked the judge in his case for a resolution that did not include additional jail time for the offender, who had pleaded guilty.²²¹ The judge required the offender to write a letter of apology to the victim and engage in restorative justice dialogue facilitated by the Oregon Chinese Coalition with the support of the Multnomah County Department of Community Justice.²²²

There have been other examples of restorative justice which, on the “continuum of independence,”²²³ lean more closely to the dependent side. In June 2020, the San Francisco District Attorney’s office formed the San Francisco Restorative Justice Collaborative together with community and government partners.²²⁴ Among other things, this collaborative seeks to use restorative justice practices to improve the relationship between African American and Asian American communities in the city.²²⁵ In October 2021, the Los Angeles County District Attorney’s Office launched a two-year, postconviction pilot project focused on preventing hate crime and addressing xenophobia.²²⁶ For individuals on probation, this project will provide counseling, anti-bias education, and victim reconciliation in a controlled setting.²²⁷ In the long-term, the project aims to develop a permanent restorative justice probationary model based on proven clinical methodology.²²⁸

Despite the rare application of restorative justice for hate crimes,²²⁹ U.S. advocates must not lose hope. Instead, they should look for inspiration in other parts of the world that have also been grappling with hate crime—specifically, the United Kingdom.

220. *Id.*

221. Jaimie Ding, *Attacker in Asian American Bias Crime Sentenced to Restorative Justice, Not More Jail Time*, OR. LIVE (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>.

222. *Id.*

223. See *supra* Part II.B for an explanation and examples of restorative justice’s “continuum of independence.”

224. *Restorative Justice Collaborative*, S.F. DIST. ATT’Y, <https://sfdistrictattorney.org/restorative-justice-collaborative> (last visited Sept. 7, 2022).

225. *Id.*

226. *Hate Crimes Unit to Launch Restorative Justice Project*, L.A. DIST. ATT’Y’S OFF. (Oct. 6, 2021), <https://da.lacounty.gov/about/inside-lada/hate-crimes-grant>.

227. *Id.*

228. *Id.*

229. See *Access to Justice: Delivering Restorative Justice for Hate Crime*, WHY ME?, <https://why-me.org/access-to-justice-delivering-restorative-justice-for-hate-crime/> (last visited Dec. 2, 2022) (describing lack of access to restorative justice for those affected by hate crimes).

IV. THE UNITED KINGDOM

Similar to the United States, the United Kingdom has witnessed a rise in hate crimes against marginalized communities in the past few years.²³⁰ Since at least 2015, crimes based on sexual orientation and gender identity have increased almost every year in England, Wales, and Scotland.²³¹ In March 2019, during the week following the killing of worshippers at two mosques in Christchurch, New Zealand, anti-Muslim hate crimes reported throughout the United Kingdom increased by 593% and ranged from verbal abuse and threats²³² to sledgehammer attacks on mosques.²³³ Furthermore, between October 2020 and September 2021, race and sectarian hate crimes in Northern Ireland increased by over 46% and 27%, respectively.²³⁴

Many of the major hate crime trends in the United States discussed previously in this Comment²³⁵ were also observed in the United Kingdom. In June 2020, the number of racially or religiously aggravated hate crimes in England and Wales was 34% higher than in the previous year—an increase that was likely related to Black Lives Matter protests and far-right counter-protests taking place during that time period.²³⁶ Additionally, between 2019 and 2020, hate crimes against East and Southeast Asian communities in the United Kingdom increased by 27%.²³⁷ News reports have identified two main factors: the convergence of worldwide headlines claiming that the virus responsible for COVID-19 originated in China and Donald Trump's claims that China caused the pandemic.²³⁸

The following section will outline the traditional legal approach to hate crime in the United Kingdom and illustrate the development and scope of restorative

230. See Michael Goodier, *Racist Hate Crimes Pass 100,000 in England and Wales for First Time*, GUARDIAN (Oct. 6, 2022), <https://www.theguardian.com/uk-news/2022/oct/06/racist-hate-crimes-pass-100000-in-england-and-wales-for-first-time> (reporting hate crimes have risen steadily from 2011 to 2022).

231. Kuhr, *supra* note 16.

232. Vikram Dodd, *Anti-Muslim Hate Crimes Soar in UK After Christchurch Shootings*, GUARDIAN (Mar. 22, 2019, 11:05 AM), <https://www.theguardian.com/society/2019/mar/22/anti-muslim-hate-crimes-soar-in-uk-after-christchurch-shootings>.

233. See Seth Jacobson, *Windows Smashed at Five Mosques in Birmingham*, GUARDIAN (Mar. 21, 2019, 6:49 AM), <https://www.theguardian.com/uk-news/2019/mar/21/windows-smashed-at-four-mosques-in-birmingham> (reporting incident where man broke windows of mosque with sledgehammer).

234. Suzanne McGonagle, *Race Hate Crimes and Incidents in NI Soar by More Than 40 Per Cent*, IRISH NEWS (Nov. 26, 2021, 1:00 AM), <https://www.irishnews.com/news/northernirelandnews/2021/11/26/news/race-hate-crimes-and-incidents-in-ni-soar-by-almost-50-per-cent-2519552>.

235. See *infra* Part III for an analysis of hate crime trends in the United States.

236. *Hate Crime, England and Wales, 2019 to 2020*, HOME OFFICE (Oct. 28, 2020), <https://www.gov.uk/government/statistics/hate-crime-england-and-wales-2019-to-2020/hate-crime-england-and-wales-2019-to-2020> [hereinafter *2019–2020 Hate Crime Statistics*].

237. *Hate Crime Data*, END VIOLENCE & RACISM AGAINST E. & SE. ASIAN CMTYS. (Aug. 2022), <https://evresea.com/data>.

238. Aina Khan, *'I Don't Feel Safe': Asians in the UK Reflect on a Year of Hatred*, AL JAZEERA (Mar. 23, 2021), <https://www.aljazeera.com/news/2021/3/23/i-dont-feel-safe-asians-in-the-uk-reflect-on-a-year-of-hatred>.

justice, as well as the challenges facing restorative justice programs. This section will also highlight programs that specifically address, or once addressed, hate crime.

A. Traditional Legal Approaches to Hate Crime in the United Kingdom

Similar to the United States, the countries comprising the United Kingdom—England, Wales, Scotland, and Northern Ireland—have traditionally addressed hate crime by defining what it is,²³⁹ investigating hate crime reports, and prosecuting offenders pursuant to a set of laws.²⁴⁰ These countries also encounter similar issues that undermine the effectiveness of this general approach, including victim underreporting and significant discrepancies between the number of hate crime reports and the number of prosecutions.²⁴¹

Within the United Kingdom, each country has a different conception of protected social groups,²⁴² but all countries consider the victim's or any other person's perception to be crucial for determining whether a hate crime took place.²⁴³ In other words, a crime will be treated as a hate crime if it was perceived by the victim or another person to have been motivated by prejudice towards the victim's protected characteristic.²⁴⁴

239. There is no legal definition for hate crime in Northern Ireland, but it is generally accepted as any incident constituting a criminal offence that is perceived by the victim, or any other person, to be motivated by prejudice or hate towards the victim's personal characteristic. *Hate Crime*, PUB. PROSECUTION SERV. N. IR., <https://www.ppsni.gov.uk/hate-crime> (last visited Jan. 19, 2022) [hereinafter PUB. PROSECUTION SERV.].

240. See *supra* Part IV.A for an explanation of hate crime investigations and prosecutions in the three countries.

241. *Id.*

242. In England and Wales, the five centrally monitored strands of hate crime are race or ethnicity, religion or beliefs, sexual orientation, disability, and transgender identity. *Hate Crime, England and Wales, 2017/18*, HOME OFF. (Oct. 16, 2018), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/748598/hate-crime-1718-hosb2018.pdf#page=8 [hereinafter *2017/18 Hate Crime Statistics*]. In Scotland, the characteristics that define protected social groups include disability, race, religion, sexual orientation, and transgender identity. *Characteristics of Police Recorded Hate Crime in Scotland: Study*, SCOTTISH GOV'T (Feb. 23, 2021), <https://www.gov.scot/publications/study-characteristics-police-recorded-hate-crime-scotland/pages/2> [hereinafter *Hate Crime in Scotland*]. In Northern Ireland, protected characteristics include race, religion (including sectarianism), sexual orientation, transgender identity, and disability. PUB. PROSECUTION SERV., *supra* note 239.

243. See *Hate Crime, England and Wales, 2020 to 2021*, HOME OFF. (Oct. 12, 2021), <https://www.gov.uk/government/statistics/hate-crime-england-and-wales-2020-to-2021/hate-crime-england-and-wales-2020-to-2021> [hereinafter *2020–2021 Hate Crime Statistics*] (explaining agreed upon definition of hate crime by government agencies includes a perception by victim or another party that crime was motivated based on a personal characteristic); see also *Hate Crime in Scotland*, *supra* note 242 (explaining definition of hate crime by government includes perception by victim or another party that crime was motivated by malice towards a social group); see also PUB. PROSECUTION SERV., *supra* note 239 (explaining definition of hate crime by government includes perception by victim or another party that crime was motivated by a social characteristic).

244. *2020–2021 Hate Crime Statistics*, *supra* note 243; *Hate Crime in Scotland*, *supra* note

Like the system in the United States, victims in the United Kingdom are encouraged to submit hate crime reports to designated sources—in England and Wales, the police and the Crime Survey of England and Wales;²⁴⁵ in Scotland, Police Scotland;²⁴⁶ and in Northern Ireland, the Police Service of Northern Ireland.²⁴⁷ However, as in the United States, victim underreporting is a major obstacle to gaining an accurate understanding of the characteristics and extent of hate crime in the United Kingdom. Despite institutional improvements in victim reporting in England and Wales over the last few years,²⁴⁸ advocates argue that underreporting is still an issue.²⁴⁹

Reporting mechanisms have also improved in Northern Ireland, but hate crime is still “significantly under-reported,” which is likely due in part to low community trust in authority and policing.²⁵⁰ In Scotland, an independent review pointed to various underlying issues that contribute to underreporting there: a lack of understanding and awareness of hate crime and reporting mechanisms, past negative experiences with and lack of confidence in the police and the criminal legal system, and acceptance that certain types of abuse are a part of everyday life.²⁵¹

242; PUB. PROSECUTION SERV., *supra* note 239.

245. GRAHAME ALLEN & YAGO ZAYED, HATE CRIME STATISTICS 7 (2021), <https://researchbriefings.files.parliament.uk/documents/CBP-8537/CBP-8537.pdf>.

246. *Reporting Hate Crime*, POLICE SCOT., <https://www.scotland.police.uk/contact-us/reporting-hate-crime/> (last visited Feb. 11, 2022).

247. POLICE SERV. OF N. IR., INCIDENTS AND CRIMES WITH A HATE MOTIVATION RECORDED BY THE POLICE IN NORTHERN IRELAND 2 (2021), https://www.psn.police.uk/globalassets/inside-the-psni/our-statistics/hate-motivation-statistics/2021-22/q2/hate-motivations-bulletin-sep_21.pdf [hereinafter NORTHERN IRELAND POLICE RECORDED HATE INCIDENTS AND CRIMES].

248. Authorities believe that the rise in hate crimes in England and Wales over the last few years can be partly attributed to government and third sector investment in increasing public awareness, as well as to changes in the law expanding the definition of hate crime so that almost any verbal or physical assault can be categorized as a hate crime if the victim perceives the assault to have been one. See Jane Hutt, *Written Statement: National Hate Crime Awareness Week 2021*, WELSH GOV'T (Oct. 12, 2021), <https://gov.wales/written-statement-national-hate-crime-awareness-week-2021> (detailing how government projects have raised awareness and increased recording of hate crimes from previous year); see also *About 17-24-30 NationalHCAW*, NAT'L HATE CRIME AWARENESS WK., <https://nationalhcaw.uk> (last visited Jan. 16, 2022) (describing National Hate Crime Awareness Week); see also Kimiko de Freytas-Tamura, *U.K. Reports Big Rise in Hate Crime, Citing Brexit and Terrorist Attacks*, N.Y. TIMES (Oct. 17, 2017), <https://www.nytimes.com/2017/10/17/world/europe/uk-hate-crime-brexit-attacks.html> (attributing rise to increased public awareness and broadening of hate crime definition).

249. *Stop Hate UK – Response to Home Office Hate Crime Statistics 2020–21*, STOP HATE UK (Nov. 22, 2021), <https://www.stophateuk.org/2021/11/22/stop-hate-uk-response-to-home-office-hate-crime-statistics-2020-21>.

250. HATE CRIME REV. TEAM, EXECUTIVE SUMMARY OF HATE CRIME LEGISLATION IN NORTHERN IRELAND: INDEPENDENT REVIEW 48 (2020), <https://www.justice-ni.gov.uk/sites/default/files/publications/justice/hate-crime-review.pdf>.

251. SCOTTISH GOV'T, INDEPENDENT REVIEW OF HATE CRIME LEGISLATION IN SCOTLAND: FINAL REPORT 109 (2018), <https://www.gov.scot/binaries/content/documents/govscot/publications/progress-report/2018/05/independent-review-hate-crime-legislation-scotland-final>

Similar to the United States, each U.K. nation possesses laws that can be used in response to hate crime. England and Wales rely on laws that establish an enhanced sentencing regime, which requires an increase in penalty within the existing maximum for the base offense, and an aggravated offense regime, which allows for a higher maximum sentence for each underlying offense.²⁵² Scotland has an aggravated offense scheme and a scheme that addresses the “stirring up” of hatred on the basis of a protected characteristic.²⁵³ Unlike these countries, Northern Ireland lacks specific hate crime laws,²⁵⁴ instead relying on legislation that allows for sentence enhancement for offenses aggravated by hostility.²⁵⁵

Following initial hate crime investigations, each country’s prosecutorial agency may then carry out prosecution pursuant to these laws—the Crown Prosecution Service in England and Wales;²⁵⁶ the Crown Office and Procurator Fiscal Service in Scotland;²⁵⁷ and the Public Prosecution Service in Northern Ireland.²⁵⁸ A concerning trend has been observed in each of these countries: following each stage of the traditional legal approach, the number of recorded hate crimes—which is already unreliable due to victim underreporting—is diminished to the point that very few victims actually experience resolution.²⁵⁹ For example, in England and Wales, about 92% of cases in 2017–2018 either dropped out of the criminal legal system or resulted in a conviction without the application of hate crime laws.²⁶⁰ In Scotland, the police recorded 6,448 hate crimes in 2019–2020,²⁶¹ but only 5,219 charges contained at least an element of hate crime.²⁶² And in

report/documents/00535892-pdf/00535892-pdf/govscot%3Adocument/00535892.pdf.

252. See L. COMM’N, HATE CRIME LAWS 372 (2020), <https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2020/10/Hate-crime-final-report.pdf> (listing current law for aggravated offenses in England and Wales).

253. OFFENCES RELATING TO STIRRING UP HATRED, SCOTTISH GOV’T 1, <https://www.gov.scot/binaries/content/documents/govscot/publications/factsheet/2020/04/hate-crime-bill-what-it-will-do/documents/hate-crime-bill-stirring-up-hatred-offences/hate-crime-bill-stirring-up-hatred-offences/govscot%3Adocument/Hate%2BCrime%2BBill%2B-%2BInformation%2BNote%2BPdf%2B-%2BStirring%2BUp%2BHatred%2BOffences%2B-%2BRevised%2BAugust%2B2020.pdf> (last visited Jan. 19, 2022).

254. Julian O’Neill, *Current Laws ‘Not Working’ to Tackle Northern Ireland Hate Crime*, BBC (Jan. 8, 2020), <https://www.bbc.com/news/uk-northern-ireland-51026144>.

255. PUB. PROSECUTION SERV., *supra* note 239. There is also legislation that creates offences for behavior intended or likely to stir up hatred or arouse fear among a group, and legislation that creates an offence for chanting at certain sporting matches which is of a sectarian nature or is insulting to a person by reason of that person’s color, race, nationality (including citizenship), ethnic or national origins, religious belief, sexual orientation, or disability. *Id.*

256. *The Crown Prosecution Service*, CROWN PROSECUTION SERV., <https://www.cps.gov.uk/> (last visited Jan. 16, 2022).

257. CROWN OFF. & PROCURATOR FISCAL SERV., HATE CRIME IN SCOTLAND, 2019-20, at 3 (2020).

258. N. IR. STAT. & RSCH. AGENCY & PUB. PROSECUTION SERV., STATISTICAL BULLETIN: HATE CRIME 2020/21 (2021).

259. See Walters, *supra* note 45, at 58 (illustrating justice gap).

260. *Id.*

261. JUST. ANALYTICAL SERVS., SCOT. GOV’T, A STUDY INTO THE CHARACTERISTICS OF POLICE RECORDED HATE CRIME IN SCOTLAND 3 (2021).

262. PUB. PROSECUTION SERV., *supra* note 239, at 14.

Northern Ireland, although the police recorded 2,099 hate crimes in 2020–2021, the prosecution service only issued prosecutorial decisions for 360 individuals;²⁶³ of that number, only 59.7% received a decision entailing prosecution or diversion from the court system.²⁶⁴

B. Restorative Justice Approaches to Hate Crime in the United Kingdom

The following section of this Comment discusses restorative justice practices throughout the United Kingdom in general, as well as restorative justice applications for hate crime.

1. General Restorative Justice Practices and Programs in the United Kingdom

a. England and Wales

Restorative justice practices have existed since the 1980s in England and Wales,²⁶⁵ though some scholars argue that restorative justice “has a long antecedence” given the numerous examples of nontraditional forms of justice that were applied in England.²⁶⁶ Today, various types of restorative justice processes operate in England and Wales, including direct or indirect restorative justice processes, community conferencing, referral order panels, and mediation.²⁶⁷

Numerous government bodies have provided guidance on the use of restorative justice for hate crime, reflecting the fact that restorative justice is considered an appropriate intervention for hate crime and is sometimes enthusiastically encouraged.²⁶⁸ Services are provided by national organizations and

263. PUB. PROSECUTION SERV. FOR N. IR., STATISTICAL BULLETIN: CASES INVOLVING HATE CRIME 1 APRIL 2021 TO 31 MARCH 2022, at 4 (2022).

264. *Id.* at 8.

265. Les Davey, *The Development of Restorative Justice in the UK: A Personal Perspective*, INT’L INST. FOR RESTORATIVE PRACTICES (Mar. 4, 2005), <https://www.iirp.edu/news/the-development-of-restorative-justice-in-the-uk-a-personal-perspective>.

266. Yasmin Devi-McGleish & David J. Cox, *From Wergild to a Way Forward? English Restorative Justice in its Historical Context*, 1 WOLVERHAMPTON L.J. 21, 21-22 (2018) (U.K.).

267. *Restorative Justice*, CROWN PROSECUTION SERV., <https://www.cps.gov.uk/legal-guidance/restorative-justice> (Sept. 24, 2019). In a direct or indirect restorative justice process, a facilitator guides the victim and offender in communicating with each other. *Id.* The communication can occur directly through a face-to-face meeting or indirectly with the facilitator acting as a “go-between.” *Id.* Possible outcomes from this process include an agreement on how to repair the harm caused and an agreed-upon rehabilitative program. *Id.* Community conferencing can involve a large number of participants, including victims, offenders, and local community members. *Id.* Under this approach, the community represents the victim. *Id.* Referral order panels are panel meetings that a court may require a young person to attend in order to discuss their offense and its contributing factors. *Id.* The panel includes Youth Offending Team staff, community members, and potentially the victim or their representative. *Id.* Finally, during a mediation, an impartial third party helps the victim and offender come to an agreement; while the mediator sets ground rules and runs the meeting, the parties are the ones who work out the agreement. *Id.*

268. BEN ANDREW, MAKING RESTORATIVE JUSTICE HAPPEN FOR HATE CRIME ACROSS THE COUNTRY 7-9 (2019).

charities, independent restorative justice providers, and Police and Crime Commissioners (PCCs).²⁶⁹ PCCs, which represent every police force area in England and Wales except for Greater Manchester, West Yorkshire, and London,²⁷⁰ have been described as the “key commissioners of restorative justice.”²⁷¹

Between 2013 and 2016, the Ministry of Justice allocated 23 million pounds in funding to PCCs to establish and develop restorative justice services,²⁷² enabling them to build services with an aim to deliver “victim-initiated” restorative justice.²⁷³ Nonetheless, third sector organizations carry out most restorative justice work.²⁷⁴ While PCCs can provide referrals to crime victims, and victims can self-refer,²⁷⁵ restorative justice providers do not always have the authority to contact victims directly without a referral.²⁷⁶

Restorative justice researchers and practitioners have identified numerous challenges that affect the delivery of restorative justice services in England and Wales, including: (1) inconsistent funding for restorative justice services, (2) insufficient awareness of the benefits of restorative justice, (3) inadequate training, and (4) the need to improve restorative justice partnerships. To address the first challenge, the Ministry of Justice began in 2016 to include annual funding for restorative justice services in the overall “victims fund” allocation to PCCs.²⁷⁷ Given that the funding was unrestricted, each PCC could decide how much of their victims fund to spend on restorative justice.²⁷⁸ This resulted in a “postcode lottery”

269. VICTIMS’ COMM’R, A QUESTION OF QUALITY: A REVIEW OF RESTORATIVE JUSTICE PART 1-SERVICE PROVIDERS 6 (2016) [hereinafter VICTIMS’ COMM’R].

270. Kelly Shuttleworth, *Police and Crime Commissioners*, INST. FOR GOV’T, <https://www.instituteforgovernment.org.uk/explainers/police-crime-commissioners> (May 17, 2022).

271. PETER KEELING, CRIM. JUSTICE ALL., ‘A JOURNEY OF LEARNING, GROWTH AND CHANGE’: A ROADMAP FOR INCREASING RESTORATIVE JUSTICE ACROSS ENGLAND AND WALES 14 (2019).

272. TREVOR WATSON, WHY ME?, VALUING VICTIMS: A REVIEW OF POLICE AND CRIME COMMISSIONERS’ DELIVERY OF RESTORATIVE JUSTICE 2018/19, at 4 (2020).

273. VICTIMS’ COMM’R, *supra* note 269, at 7.

274. KEELING, *supra* note 271, at 14; see *What are Third Sector Organizations and Their Benefits to Commissioners?*, NAT’L AUDIT OFF., <https://www.nao.org.uk/successful-commissioning/introduction/what-are-civil-society-organisations-and-their-benefits-for-commissioners/> (last visited Oct. 2, 2022) (describing third sector organizations as neither public nor public sector organizations that consist mainly of voluntarily and community organizations, social enterprises, mutuals, and cooperatives).

275. *Restorative Justice*, POLICE & CRIME COMM’R FOR NORFOLK, <https://www.norfolk-pcc.gov.uk/services-we-provide/supporting-victims-and-protecting-the-vulnerable/restorative-justice/> (last visited Jan. 19, 2022); *Restorative Solutions: West Yorkshire PCC Service*, RESTORATIVE JUST. COUNCIL, <https://restorativejustice.org.uk/service-providers/27345> (last visited Jan. 19, 2022).

276. See VICTIMS’ COMM’R, *supra* note 269, at 14 (explaining in some PCC areas the only way a victim can access restorative justice processes is if they self-refer).

277. WATSON, *supra* note 272, at 4.

278. *Id.*

for crime victims whose access to services may depend on where they live.²⁷⁹ Funding inconsistencies across police force areas contribute to, and are exacerbated by, insufficient awareness of the benefits of restorative justice services.²⁸⁰ Numerous civil society organizations working to promote the use of restorative justice in England and Wales have identified the need to raise awareness among victims,²⁸¹ PCCs, and the general public.²⁸² Even though the Victims' Code entitles crime victims to receive information about restorative justice,²⁸³ within the criminal legal system, there is inconsistency in the delivery of this information to victims,²⁸⁴ as well as low referral rates from police forces to organizations.²⁸⁵ According to the 2020 Crime Survey, only 5.5% of victims with a known offender remember being offered restorative justice options.²⁸⁶ The low referral rate, in turn, hampers the restorative justice process.²⁸⁷

Even where there is an awareness of the benefits of restorative justice, successful implementation depends in part on adequate training. Restorative justice advocates agree that trained individuals are not needed at every stage of the process (e.g., case extraction can be conducted by untrained staff or volunteers where necessary²⁸⁸), but certain responsibilities must be entrusted with a properly trained individual.²⁸⁹ However, that is not always the case.²⁹⁰ Some out of court disposals, which deal with people who have committed a crime without using prosecution,²⁹¹ are referred to an external organization by a referring officer who has decided that restorative justice is suitable despite not being a trained facilitator or having done any preparation work with the parties.²⁹² Unfortunately, this could lead to referrals of cases unsuitable for restorative justice.²⁹³

Another challenge is related to stakeholder partnerships. In a survey of thirty-four police force areas across England and Wales, over two-thirds of respondents stated that third sector organizations in their police force area provided restorative

279. KEELING, *supra* note 271, at 2.

280. *See id.* at 2–3 (showing interconnected challenges of funding and raising awareness of restorative justice).

281. BRIGHT, *supra* note 105, at 8–9.

282. KEELING, *supra* note 271, at 10.

283. WHY ME?, VALUING VICTIMS: A REVIEW OF POLICE AND CRIME COMMISSIONERS' DELIVERY OF RESTORATIVE JUSTICE 2019/20, at 2 (2021) [hereinafter 2019/20 REVIEW OF PCC RESTORATIVE JUSTICE DELIVERY].

284. BRIGHT, *supra* note 105, at 8.

285. KEELING, *supra* note 271, at 2.

286. 2019/20 REVIEW OF PCC RESTORATIVE JUSTICE DELIVERY, *supra* note 283, at 2.

287. BRIGHT, *supra* note 105, at 7.

288. *Id.* at 13.

289. *See id.* at 15 (describing various steps better handled by trained individual).

290. *See Restorative Justice for Out of Court Disposals—A Rapid Review*, WHY ME?, <https://why-me.org/restorative-justice-for-out-of-court-disposals-a-rapid-review/> (last visited Jan. 19, 2022) (providing examples of out of court disposals such as cautions, penalty notices, or community resolution).

291. *Id.*

292. BRIGHT, *supra* note 105, at 10.

293. *Id.*

justice; the remaining respondents stated that restorative justice was delivered by the PCC's office or wider victims' services.²⁹⁴ In police force areas where the PCC's office has developed strong relationships with partners, the use of information sharing agreements and protocols formalized processes and seemed to help the organizations ensure a consistent approach for all cases.²⁹⁵ However, while many respondents signaled that there was a degree of collaboration and partnership among agencies, respondents indicated that limited information sharing was hampering the effectiveness of their services and/or that they faced resistance from the police.²⁹⁶

b. Scotland

In the late 1980s, mediation and reparation programs—later rebranded as restorative justice programs in the 1990s—gained popularity in Scotland, offering victims and offenders an opportunity to participate in facilitated dialogues with the aim to repair the harms caused by crimes.²⁹⁷ While similar programs in England, Wales, and Northern Ireland eventually became established services supported by ad hoc policy, such services in Scotland have expanded much more slowly and have had a very limited impact on the criminal legal system.²⁹⁸ As of November 2020, restorative justice is only provided by thirteen providers within twelve out of the thirty-two total local authorities in Scotland.²⁹⁹ These services are administered by organizations or the authorities themselves and mostly focus on offenders between the ages of eight and seventeen as part of local youth justice services. Only two services serve both young people and adults, and only two services solely serve adults.³⁰⁰ In addition, many existing services, particularly those provided by local authorities, receive few referrals.³⁰¹

Opportunities for using restorative justice to address hate crime are even more limited. Only one of the two adult-focused providers focuses on hate crime.³⁰² As of 2019, the Edinburgh-based provider has not had a single referral to its service, even though it does specifically take referrals from the police of people convicted of hate crimes.³⁰³

From the perspective of relevant stakeholders, there are four key challenges hindering the expansion and efficacy of services.³⁰⁴ The first challenge is training.

294. KEELING, *supra* note 271, at 14.

295. VICTIMS' COMM'R, *supra* note 269, at 21.

296. KEELING, *supra* note 271, at 14.

297. Giuseppe Maglione et al., *The Local Provision of Restorative Justice in Scotland: An Exploratory Empirical Study*, EUR. J. ON CRIM. POL'Y & RSCH. (2020), <https://doi.org/10.1007/s10610-020-09470-3>.

298. *Id.* at 3.

299. *Id.* at 6.

300. JAMIE BUCHAN ET AL., *THE LOCAL PROVISION OF RESTORATIVE JUSTICE IN SCOTLAND: A REPORT FOR STAKEHOLDERS AND PRACTITIONERS* 9 (2020).

301. *Id.* at 11.

302. *See id.* at 9 (noting one of two providers, Mothwell, had closed).

303. *Id.*

304. SCOT. GOV'T, *RESTORATIVE JUSTICE ACTION PLAN* 8 (2019).

While some training is available through a third sector provider, there is not a widely available and standardized training provision.³⁰⁵ Information sharing is another challenge. A lack of understanding and expertise in data protection legislation has impacted the ability of restorative justice services to share information on offenders and victims, thus impacting the ability to offer restorative justice services.³⁰⁶ The third challenge is public awareness. Individuals and communities are not aware of restorative justice as an option or how to access it, which might be in part due to the low number of restorative justice providers.³⁰⁷ Police and prosecutors also view restorative justice as appropriate mainly for young people who have committed minor or first-time offenses, rather than also for people with long histories with the criminal legal system.³⁰⁸ The fourth challenge is limited resources. The lack of specifically identified funding streams for restorative justice limits the provision of restorative justice in the face of competing pressures.³⁰⁹

Despite these challenges, the Scottish government has signaled a desire to expand restorative justice across the country.³¹⁰ In 2019, it released a “Restorative Justice Action Plan,” containing action items necessary to ensure that consistent and high-quality services are available by 2023.³¹¹

c. Northern Ireland

Restorative justice developed in Northern Ireland in the 1990s as a response to widespread “punishment violence” carried out by paramilitary groups, as well as pervasive distrust of the police.³¹² The Northern Ireland Association for the Care and Resettlement of Offenders (NIACRO) and other civil society organizations conducted outreach to the paramilitary groups to promote peaceful alternatives rooted in mediation and restorative justice.³¹³ Their efforts contributed to the later establishment of peace³¹⁴ and led to the establishment of the Youth Justice Agency, an executive agency of the Department of Justice that works with children between the ages of ten and seventeen who have offended or are at serious risk of offending.³¹⁵ Numerous reports have found the implementation of youth conferences effective, making “a highly positive contribution to the delivery of

305. *Id.*

306. *Id.*

307. *Id.*

308. BUCHAN ET AL., *supra* note 300, at 11.

309. SCOT. GOV'T, *supra* note 304, at 8.

310. *Id.*

311. *Id.* at 9.

312. CONOR MURRAY & NICOLA CARR, *THE OXFORD TEXTBOOK ON CRIMINOLOGY* 13 (Steve Case et al. eds., 2d ed. 2021).

313. Brian Gormally, *From Punishment Violence to Restorative Justice in Northern Ireland*, ACCORD INSIGHT 2, May 2015, at 28, 28 (U.K.) <https://www.c-r.org/accord/engaging-armed-groups-insight/northern-ireland-punishment-restorative-justice-northern>.

314. *Id.*

315. *About the Youth Justice Agency*, DEP'T OF JUST., <https://www.justice-ni.gov.uk/articles/about-youth-justice-agency> (last visited Jan. 20, 2022).

youth justice across Northern Ireland.”³¹⁶

While youth justice represents “the most extensive, formal application of restorative justice” to date, criminal justice organizations and community and voluntary sector groups have also developed and implemented restorative models and approaches in the community.³¹⁷ A 2010 study measuring the breadth of restorative practices used in the country compiled a list of eighteen organizations, including community initiatives, statutory bodies, youth justice initiatives, schools, and “cared for children” programs.³¹⁸ Among the participating groups, the most commonly used restorative practices were restorative conferences, mediation, restitution (or reparation), circles, and family group conferences.³¹⁹

Despite their longstanding implementation of restorative justice across multiple sectors, organizations have acknowledged that “the work to date has been rather piecemeal, often dependent on the local environment and available funding, which has tended to be short-term in nature.”³²⁰ The short-term nature of funding is viewed as a barrier to long-term planning, producing uncertainty that can lead to high staff turnover with the loss of experienced staff members and consequently the financial or temporal investment that was spent on their training.³²¹ The general availability of funding also affects the organizations’ ability to adequately train staff in the first place, with one organization commenting that it “found it impossible to access funding for training.”³²² Aside from funding challenges, organizations have identified a need to develop restorative justice opportunities that are initiated and led by victims, as opposed to opportunities that are driven by the criminal legal system.³²³

In recent years, the Northern Ireland government has signaled a stronger intention to expand restorative justice to more victim and offender groups.³²⁴ In

316. See BRIAN PAYNE ET AL., QUEEN’S UNIV. BELFAST, RESTORATIVE PRACTICES IN NORTHERN IRELAND: A MAPPING EXERCISE 16 (2010) (describing 2005 report noting high level of satisfaction with conference process among young offenders and 2009 report finding use of Youth Conference Service contributed to overall decline in use of custody for young offenders and to an increased rate of diversion out of criminal justice process for young people); see also BRUNILDA PALI ET AL., PRACTICAL GUIDE IMPLEMENTING RESTORATIVE JUSTICE WITH CHILDREN 64 (Int’l Juv. Just. Observatory ed. 2018) (explaining 2017 report finding 94% satisfaction rate among 172 direct victims).

317. DEP’T OF JUST., DEVELOPMENT OF AN ADULT RESTORATIVE JUSTICE STRATEGY FOR NORTHERN IRELAND 1 (2020) [hereinafter NORTHERN IRELAND ADULT RESTORATIVE JUSTICE STRATEGY].

318. PAYNE ET AL., *supra* note 316, at 12.

319. *Id.* at 28.

320. NORTHERN IRELAND ADULT RESTORATIVE JUSTICE STRATEGY, *supra* note 317, at 7.

321. DEP’T OF JUST., DEVELOPMENT OF AN ADULT RESTORATIVE JUSTICE STRATEGY FOR NORTHERN IRELAND: SUMMARY OF CONSULTATION RESPONSES, 2021, at 33 [hereinafter NORTHERN IRELAND RESTORATIVE JUSTICE STRATEGY CONSULTATION RESPONSES].

322. *Id.* at 34.

323. *Id.* at 39.

324. See NORTHERN IRELAND ADULT RESTORATIVE JUSTICE STRATEGY, *supra* note 317, at 1 (stating in 2013, Northern Ireland government acknowledged value of restorative justice and expressed desire to expand it).

2019, inspired by the success of youth conferencing and community-based programs,³²⁵ the Department of Justice invited the public to inform the development of a strategic approach for utilizing restorative practices at all stages of the adult criminal legal system.³²⁶ In particular, the Department of Justice identified hate crime as a potential application for restorative justice—a sentiment shared by respondents, some of whom viewed restorative justice as an opportunity to both deliver better outcomes for hate crime victims and improve relationships among communities.³²⁷ In addition, in 2021, an independent review of hate crime legislation recommended the creation of a new statutory scheme for adult-centered restorative justice that is led by a statutory agency similar to the Youth Justice Agency and supported by restorative justice groups.³²⁸

2. Restorative Justice Applications for Hate Crime in the United Kingdom

Although the presence of restorative justice in the United Kingdom has grown, it is still not commonly applied to hate crime.³²⁹ This has translated into a “paucity of data” regarding its effectiveness in the hate crime context.³³⁰ However, the reported successes of several programs and initiatives in the United Kingdom suggest that restorative justice, if properly planned and executed, has the capacity to meaningfully impact hate crime victims, offenders, and the larger community.³³¹ Even though there is insufficient data to permit generalization and most programs have methodological limitations (e.g., small sample size, anecdotes rather than formal evaluations, successes reported by facilitators rather than victims),³³² the reported successes can serve as helpful examples for U.S. advocates seeking to expand the use of restorative justice for hate crimes.

Because of the dearth of data, this Subsection’s analysis will feature U.K. programs that span the continuum of independence,³³³ including programs that are relatively more dependent on the criminal legal systems already in place. Such programs may still offer helpful insights, especially for U.S. advocates in areas that

325. *See id.* at 3 (describing success of youth conferencing and community-based programs in integrating restorative justice into preexisting legal structures).

326. *See id.* at 17 (describing how public was consulted before release of report and recommendations).

327. NORTHERN IRELAND RESTORATIVE JUSTICE STRATEGY CONSULTATION RESPONSES, *supra* note 321, at 44.

328. N. IR. ASSEMBLY COMM. FOR JUST., REVIEW OF HATE CRIME LEGISLATION IN NORTHERN IRELAND, 2021, at 4 (2021).

329. MARK A. WALTERS ET AL., PREVENTING HATE CRIME: EMERGING PRACTICES AND RECOMMENDATIONS FOR THE IMPROVED MANAGEMENT OF CRIMINAL JUSTICE INTERVENTIONS 21 (2016).

330. *Id.* at 22.

331. *See id.* at 22–23 (explaining impact that at least one well run program had on both individuals and community).

332. *See Sinnar & Colgan, supra* note 28, at 165–66 (describing methodological limitations challenging restorative justice studies).

333. *See EXPLORING ALTERNATIVE APPROACHES, supra* note 24, at 18 (discussing wide range of theories, processes, and outcomes within restorative justice).

are less receptive to the implementation of restorative justice.

a. The Capacity to Heal Victims

The positive outcomes of several U.K. programs and initiatives suggest that restorative justice has the capacity to heal hate crime victims.³³⁴ Additionally, the failures of a restorative disposal in Devon and Cornwall in England illustrate the importance of adhering to the principles of restorative justice outlined in Part I of this Comment.³³⁵

The Hate Crime Project in London offers a restorative process that addresses hate crimes and incidents, but it is not considered fully restorative because it does not typically involve people who have been charged with a criminal offense (though many have been accused of committing one).³³⁶ The mediation process involves the victim, the offender, and an impartial mediator, and can occur either face-to-face or indirectly through written communication.³³⁷ The typical outcome is a written and signed agreement that sometimes includes an apology from the offender and often includes the offender's commitment to stop performing certain activities (e.g., hate speech) and to avoid aggressive behavior if they are similarly provoked in the future.³³⁸

A 2008–2011 evaluation of the Hate Crime Project found that in seventeen out of twenty-three cases, victims stated that the mediation process had directly improved their emotional well-being.³³⁹ The most common factors cited by victims for improving their emotional well-being were the ability to explain how they felt to the offender and the opportunity to explain how the incident had affected their life.³⁴⁰ In addition, most of the twenty-three participants indicated that their participation in the program directly led to decreases in their levels of anger, anxiety, and fear.³⁴¹ Furthermore, the researchers highlighted several factors that reduced the risk of revictimization: thoroughly preparing participants before any direct dialogue occurred, setting ground rules at the beginning of meetings to clarify expected language and behavior, allowing family and community members (who could support the participant) to participate, and using indirect mediation to allow participants to reach an agreement without having to meet directly.³⁴²

While some restorative justice advocates in the United Kingdom prefer community-oriented solutions,³⁴³ over the last decade, the Greater Manchester

334. See WATSON, *supra* note 272, at 5 (stating that 57% of victims reported improved health after going through restorative justice process).

335. See *supra* Part I.A for an outline of restorative justice principles.

336. Walters, *supra* note 45, at 65–66.

337. See *id.* at 64 (defining restorative process in more detail).

338. *Id.* at 65.

339. *Id.* at 66.

340. Mark Austin Walters & Carolyn Hoyle, *Exploring the Everyday World of Hate Victimization Through Community Mediation*, 18 INT'L REV. VICTIMOLOGY 7, 19 (2011).

341. WALTERS ET AL., *supra* note 329, at 22–23.

342. Walters, *supra* note 45, at 70.

343. See ANDREW, *supra* note 268, at 10 (offering recommendations to various governmental bodies on how to facilitate partnership with community restorative justice services).

Police (GMP) in England has taken steps to formalize and expand the use of restorative justice for all crime categories, including hate crime.³⁴⁴ In 2015, the GMP used a restorative out-of-court disposal in 23% of all solved crimes in 2015, though it is unclear how many of these disposals were used for hate crimes.³⁴⁵ That same year, the GMP became the first police force in the United Kingdom to hold a Restorative Service Quality Mark (RSQM).³⁴⁶ In 2019, the GMP and the Greater Manchester Combined Authority commissioned the Greater Manchester Restorative Justice Service, which is administered by an external restorative justice facilitator.³⁴⁷ The facilitator established a restorative justice hub to expedite referrals across all crime categories, and developed education and intervention packages for addressing offender behavior and motivation that are specifically relevant to hate crime offenses.³⁴⁸

Furthermore, the GMP has launched restorative justice partnerships with organizations such as Community Security Trust (CST), a U.K. charity working to combat anti-Semitism.³⁴⁹ This partnership has led to numerous restorative justice meetings that CST has deemed successful,³⁵⁰ including one particular meeting co-facilitated by trained GMP officers in 2016 that involved two victims who had experienced anti-Semitic abuse.³⁵¹ They presented each victim with options—

for hate crime victims).

344. *See First Police Force Achieves RSQM*, RESTORATIVE JUST. COUNCIL (May 20, 2015) [hereinafter *First Police RSQM*], <https://restorativejustice.org.uk/news/first-police-force-achieves-rsqm> (detailing how GMP's restorative justice program was implemented at many levels and in cooperation with restorative justice assessors);

see also Greater Manchester Restorative Justice Service, GREATER MANCHESTER VICTIMS' SERVS., <https://www.gmvictims.org.uk/restorative-justice#when-can-restorative-justice-be-used?> (last visited Oct. 27, 2022) (noting no crimes are excluded from restorative justice opportunities).

345. *How Can More Victims Access Restorative Justice?*, RESTORATIVE JUST. COUNCIL, <https://restorativejustice.org.uk/blog/how-can-more-victims-access-restorative-justice> (last visited Jan. 20, 2022).

346. *First Police RSQM*, *supra* note 344. An RSQM indicates that the restorative service meets minimum requirements set by the Restorative Justice Council for providing a safe and effective restorative service. RESTORATIVE JUST. COUNCIL, THE RESTORATIVE SERVICE QUALITY MARK: FAQs 2 (2015) [hereinafter RSQM FAQs].

347. *See James Mutch, Police Launch Restorative Justice Pilot Scheme in Domestic Abuse Cases*, OLDHAM TIMES (June 2, 2021), <https://www.theoldhamtimes.co.uk/news/19345786.police-launch-restorative-justice-pilot-scheme-domestic-abuse-cases/> (acknowledging Remedi as service provider for Greater Manchester Restorative Justice Service).

348. *See id.* (noting restorative justice facilitator provides a centralized resource for restorative justice resources); *see also Greater Manchester Restorative Justice Service*, *supra* note 344 (providing contact information for victims seeking restorative justice, noting that no crimes are excluded, and detailing restorative justice practices available).

349. *Restorative Justice: Giving a Voice to Those Affected by Antisemitism*, CMTY. SEC. TRUST (Jan. 17, 2019) [hereinafter *Giving a Voice*], <https://cst.org.uk/news/blog/2019/01/17/restorative-justice-giving-a-voice-to-those-affected-by-antisemitism>.

350. *See id.* (detailing how partnership between GMP and CST in CST's northern regional office has led to several successful examples of restorative justice in Manchester).

351. *See id.* (noting how GMP traced offenders, convened, and supervised a restorative

either go to court or engage in an out-of-court disposal—and explained what restorative justice was and what it could offer in their situation.³⁵² Both individuals received advice from external parties, including friends, family members, and CST.³⁵³ One of the victims recalled being “fully prepared” by the officers leading up to the meeting, and both felt supported by the officers and CST representatives during the meeting.³⁵⁴

While one of the victims found the experience to be “wholly positive” and explained that “it really meant a lot” to see how seriously the officers treated the matter, the other victim was hopeful that the mediation had an impact on the offenders but thought that “[t]he true results [would] be seen over time.”³⁵⁵ Although the CST–GMP partnership has not been formally evaluated to measure its effectiveness for helping victims heal from hate crime,³⁵⁶ the 2016 mediation highlights a promising connection between the mediation and the victims’ largely positive experiences.³⁵⁷

In 2015, the city of Brighton and Hove in England announced its commitment to “becom[e] ‘a restorative city,’” meaning that residents harmed by crime and conflict, including hate crimes and incidents, would be offered and have access to restorative practices.³⁵⁸ Working from the principles of restorative justice, the Community Safety Partnership established a restorative champions’ network comprised of trained facilitators and other interested parties.³⁵⁹ It later received an RSQM for youth offending, community safety, and community mediation.³⁶⁰

In the wake of the 2016 European Union referendum,³⁶¹ the number of

justice meeting between victims and perpetrators).

352. *Anti-Semitic Hate Crime and Restorative Justice*, RESTORATIVE JUST. COUNCIL (2016) [hereinafter *Anti-Semitic Hate Crime*], <https://restorativejustice.org.uk/sites/default/files/resources/files/Anti-Semitic%20hate%20crime%20-%20Prestwich.pdf>.

353. *Id.*

354. *See id.* (noting restorative justice process inspired confidence in police).

355. *Id.*

356. *See* RSQM FAQs, *supra* note 346, at 2 (emphasizing Restorative Justice Council, which oversees RSQM, is voluntary professional body).

357. *See Anti-Semitic Hate Crime*, *supra* note 352 (highlighting positive experiences of victims, officers, and community members when participating in restorative justice process for hate crime).

358. *Restorative Practice: Our Restorative City*, BRIGHTON & HOVE SAFE IN THE CITY P’SHIP, <http://www.safeinthecity.info/restorative-practice> (last visited Jan. 21, 2022).

359. *See* Tim Read & Chris Straker, *Brighton and Hove: Developing a Culture of Doing ‘With’ as Prevention Rather Than Cure*, 2 INT’L J. RESTORATIVE JUST. 293, 294–95 (2019), https://www.elevenjournals.com/tijdschrift/TIJRJ/2019/2/IJRJ_2589-0891_2019_002_002_007.pdf (explaining process through which restorative champions were recruited and trained to facilitate a restorative justice network).

360. *Id.* at 295.

361. THE ELECTORAL COMMISSION, THE 2016 EU REFERENDUM: REPORT ON THE 23 JUNE 2016 REFERENDUM ON THE UK’S MEMBERSHIP OF THE EUROPEAN UNION 5–6 (2016), https://www.electoralcommission.org.uk/sites/default/files/pdf_file/2016-EU-referendum-report.pdf (providing summary of 2016 referendum in which majority of U.K. voters chose to leave European Union).

reported hate crimes and incidents in Brighton and Hove increased significantly, particularly impacting ethnic and religious minority communities.³⁶² The Community Safety Partnership reacted to the rise in hate by providing numerous interventions which led to “an increased understanding of how impactful restorative circles can be for people harmed by hate incidents or hate crime.”³⁶³ It also piloted the use of restorative circles, facilitated by skilled and experienced practitioners, for victims who did not wish to communicate directly with the offender or whose offender could not be identified.³⁶⁴ According to an assessment of the RSQM services by the Restorative Justice Council,³⁶⁵ all leaders of the Brighton and Hove City Council who were interviewed “were clear about their commitment to restorative practice and its role in wider city strategies and objectives.”³⁶⁶

Between 2017 and 2021, the Northern Ireland Association for the Care and Resettlement of Offenders (NIACRO) operated Get Real, a project supporting individuals over eighteen years old who were involved in hate crimes as either victims or offenders.³⁶⁷ Under the first strand of the project (“Strand 1”), trained staff members managed restorative interventions between the parties.³⁶⁸ Between 2017 and late 2020, Strand 1 helped forty-five individuals, with twenty resulting from referrals by the Probation Board for Northern Ireland and the remainder resulting from self-referrals and referrals by community organizations and other NIACRO projects.³⁶⁹ Having used numerous measures to gauge Strand 1’s effectiveness for victims, such as direct feedback and the completion of a pre- and post-measurement tool, NIACRO concluded that Strand 1 had successfully enabled hate crime victims to “find their voice and a safe space to ask questions and share their experiences of the incident(s)” and to “have a clearer understanding of the crime or incident, enabling them to regain a sense of safety and control over their

362. See Nick Hines, *Brighton and Hove Stand up to Racism Unity Statement*, IPETITIONS, <https://www.ipetitions.com/petition/bton-and-hove-SUTR-Unity-statement> (last visited Jan. 21, 2022) (noting Brighton and Hove experienced 2.5-fold increase in racist and religiously motivated hate crime in 2015–2016).

363. Read & Straker, *supra* note 359, at 295.

364. *Id.*

365. The Restorative Justice Council is “the independent third sector membership body for the field of restorative justice.” *About the RJC*, RESTORATIVE JUST. COUNCIL, <https://restorativejustice.org.uk/about-rjc> (last visited Oct. 1, 2022).

366. Read & Straker, *supra* note 359, at 296.

367. Sarah Scott, *Project to Challenge Hate Crime in NI by Holding Those Responsible to Account*, BELFAST NEWS (June 1, 2018), <https://www.belfastlive.co.uk/news/belfast-news/project-challenge-hate-crime-ni-14687077>.

368. *Get Real*, NIACRO, <https://web.archive.org/web/20220621072420/https://www.niacro.co.uk/get-real> (last visited Jan. 21, 2022).

369. N. IR. ASS’N FOR THE CARE AND RESETTLEMENT OF OFFENDERS, NIACRO RESPONSE TO DEVELOPMENT OF AN ADULT RESTORATIVE JUSTICE STRATEGY FOR NORTHERN IRELAND 5 (2020) [hereinafter NIACRO RESPONSE] <https://www.niacro.co.uk/sites/default/files/consultations/FinalNIACRO%20Adult%20Resorative%20Justice%20Strategy.pdf>.

lives.”³⁷⁰

The Devon and Cornwall Police Service’s (DCPS) “restorative” disposals stand in contrast to the aforementioned programs.³⁷¹ In 2008, the DCPS trained its officers to use a restorative disposal for low-level offenses in situations where the victim agreed to participate in a street-level encounter, direct or indirect mediation, or restorative conference.³⁷² A later case study, focusing on the experiences of fourteen victims who had participated in a restorative disposal, highlighted numerous problems that called into question the restorative nature of the disposals.³⁷³

First, most of the offenders had participated in “‘Level One’ restorative interventions,” which are street-level encounters that commonly occur at the crime scene, do not include any preparation meetings, and are unlikely to occur in a neutral setting.³⁷⁴ Second, only one of the fourteen victims had an opportunity to speak directly with the offender about the offense and how they could repair the harms they had caused.³⁷⁵ Third, several victims reported feeling pressured by officers to participate in the disposals.³⁷⁶ Fourth, of the eleven victims who had received an apology from the offender, the majority perceived the apologies to be insincere.³⁷⁷ In a few of those cases, the offender had written the apology on a notepad without explaining why they had committed the crime, leaving at least one of the victims feeling harmed by the disposal.³⁷⁸ These factors very likely contributed to one of the study’s major outcomes—while seven victims were satisfied with the outcomes of their cases and another seven victims felt that they were given an opportunity to explain how the crime had affected them, only four victims reported feeling that the disposals had helped to repair the harms caused by the crimes.³⁷⁹

b. The Capacity to Heal Community Members

The outcomes of two U.K. projects suggest that restorative justice has the capacity to heal members of the victim’s community. In a 2018 longitudinal study, the Sussex Hate Crime Project examined LGBT and Muslim participants’ emotional and behavioral responses to learning about hate crimes in their local

370. *Id.*

371. *See* Walters, *supra* note 45, at 69 (distinguishing DCPS’s police-led restorative disposals from restorative practices that specialize in hate crimes).

372. *Id.*

373. *See id.* at 69–70 (detailing several reasons majority of participants indicated lower levels of emotional recovery including police officer pressure and disingenuous apologies by hate crime perpetrators).

374. *Id.* at 70.

375. *Id.*

376. *Id.*

377. *Id.*

378. *See id.* (noting interviewee was upset by apology and would have been happier without it).

379. *Id.* at 69.

communities and beyond.³⁸⁰ After reading an article about hate crime, participants who had prior direct and indirect experiences with hate crime generally showed the strongest responses, and there were statistically significant differences between participants who only had prior indirect experiences with hate crime and those who had no prior experiences at all.³⁸¹

In the same study, the Sussex Hate Crime Project found that 61% of LGBT and Muslim participants preferred restorative justice as a response to hate crime over an enhanced prison sentence.³⁸² In particular, LGBT participants who had read about a restorative justice intervention for a hate crime perceived restorative justice to be more beneficial than a short prison sentence, for not only victims and offenders, but also the LGBT community and society at large.³⁸³ Although this study did not focus on the efficacy of restorative justice interventions on LGBT and Muslim victims of hate crime,³⁸⁴ the researchers used the above outcomes to extrapolate that community-based interventions—specifically alternative community measures such as restorative justice—are “likely to be best suited to reducing community-based anxieties and the inter-group tensions that they give rise to.”³⁸⁵

This conclusion appears to be shared by community members regarding the aforementioned 2016 restorative justice mediation that the GMP co-managed for two victims of anti-Semitic abuse.³⁸⁶ According to one of the police officers co-facilitating the mediation, many residents of Prestwich, an area of Manchester with a large Jewish community, had direct experiences with hate crime, specifically verbal abuse.³⁸⁷ In light of this fact and the size of the Jewish community, it is likely that many community members also had indirect experiences that potentially magnified their sense of vulnerability.³⁸⁸ While the police officers co-facilitated the mediation, individuals from CST represented the Jewish community by contributing to the outcome agreement.³⁸⁹ From the perspective of one of the police officers, “the process inspired confidence in the community that the police really do care and will act in such cases.”³⁹⁰ Though a one-sided account, it suggests that the mediation addressed, to an extent, the community’s overall

380. JENNY PATERSON ET AL., THE SUSSEX HATE CRIME PROJECT 8 (2018).

381. *Id.* at 19–20.

382. *Id.* at 2.

383. *Id.* at 36–38.

384. *See id.* at 1 (summarizing that study focuses on impact of hate crimes on LGBT and Muslim communities).

385. *Id.* at 44.

386. *See Anti-Semitic Hate Crime*, *supra* note 352 (detailing how victims, community members, and police officers felt restorative justice was beneficial to address hate crime).

387. *Id.*

388. *See id.* (noting hate crimes have greater impact on victims than other crimes, and noting both victims mentioned preventing future attacks on other community members as motivation for pursuing restorative justice).

389. *Id.*

390. *Id.*

vulnerability.³⁹¹

The Sussex Hate Crime Project's findings, while limited to Muslim and LGBT communities, suggest that other marginalized communities that regularly experience hate crime could also be receptive to community-based restorative justice solutions.³⁹² Furthermore, community members' positive response to the CST–GMP restorative justice mediation³⁹³ suggest that even if a restorative process is not wholly community-based (for example, the police are involved), robust training and preparation can still produce effective facilitation—increasing the community's confidence in the process and counteracting the “message effect” of the hate crime.³⁹⁴

c. The Capacity to Reform Offenders

Finally, the outcomes of several U.K. programs suggest that restorative justice has the capacity to challenge the underlying causes of hate, thereby reforming offenders and preventing hate crime from recurring. In addition, the Devon and Cornwall restorative disposal's failures³⁹⁵ illustrate the importance of adhering to restorative justice principles for the purpose of reforming offenders.

A 2003 evaluation of the London-based Hate Crime Project found that the program reduced incidents of repeat victimization from one in four to one in twelve.³⁹⁶ In addition, the aforementioned 2008–2011 evaluation found that eleven out of nineteen cases were resolved following direct or indirect mediation, and six additional cases were resolved after the mediator included other local agency professionals at subsequent mediation meetings.³⁹⁷ The latter evaluation interviewed victims but not offenders, although the researchers still asked victims about their perception of whether the other party developed a better understanding of the victims' identity and experience of the hate crime.³⁹⁸ One victim thought that the mediation process caused the offender to reconsider his prejudices against gay men, stating that “whilst [the offender is] not going to change his opinion totally, I

391. See *id.* (detailing several positive outcomes including positive victim experiences, confidence in police and restorative justice facilitators, and engagement by offenders and third parties).

392. See PATERSON ET. AL, *supra* note 380, at 44 (“[c]ommunity-based interventions are likely to be best suited to reducing community-based anxieties”).

393. See *supra* notes 386–91 and accompanying text for a discussion of the positive experience of community members who participated in the restorative justice process.

394. See Mellgren et al., *supra* note 149, at NP1513 (noting hate crime can send message to entire minority community increasing that community's vulnerability).

395. See *supra* notes 371–79 and the accompanying text discussing the negative outcomes of the Devon and Cornwall street-level encounters.

396. See Theo Gavrielides, *Restoring Relationships: Addressing Hate Crime Through Restorative Justice*, RACE ON THE AGENDA (June 2007), https://www.rota.org.uk/sites/default/files/webfm/rota_report_on_hate_crime_rj_july_2007_-_final.pdf. (noting decrease in incidents of repeat victimization, despite source's accidental reversal of statistics, writing reduction as one in twelve to one in four rather than one in four to one twelve).

397. Walters, *supra* note 45, at 68.

398. Walters & Hoyle, *supra* note 340, at 20.

think [the mediation] led to him realising that everything was not as black or white.”³⁹⁹

In 2018, CST and the GMP organized a mediation in relation to a 2018 incident during which passengers of a car shouted anti-Semitic abuse and displayed a swastika to a group of Jewish people.⁴⁰⁰ The victims and offenders agreed to participate in the mediation, where trained police officers and CST staff were present.⁴⁰¹ During the meeting, the offenders learned about the significance of the Holocaust and the reason why the use of a swastika is so offensive to Jews.⁴⁰² One of the victims described his time in the British Army to explain the importance of tolerance and “what he had to face during his time in service so that we can live the lives we do today.”⁴⁰³ Furthermore, the offenders were asked about why they carried out the abuse.⁴⁰⁴ Ultimately, all of them apologized for their actions, though it is unclear how these apologies were perceived by the victims.⁴⁰⁵

During Get Real’s several years of operation, NIACRO concluded that Strand 1 successfully created a safe space for offenders to “explore the reasons behind their actions,” and “to move forward positively, to reintegrate[,] and make amends appropriate to their actions.”⁴⁰⁶ As an example of this outcome, from 2018 to 2019, Get Real worked with a man who had been referred by the Probation Board for Northern Ireland in relation to a suspended sentence for assaulting police and disorderly behavior involving language that was sectarian in nature.⁴⁰⁷ Once the offender agreed to participate in a restorative conference, Get Real worked with him extensively, focusing in part on how he would react if he was challenged or provoked by a police officer during the conference.⁴⁰⁸ The conference itself included the offender, his probation officer, Get Real staff members, and a police officer who had spoken in advance with the affected officers in order to provide their feedback at the conference.⁴⁰⁹ The representative described the officers’ perspective of the incident in question, including how the offender had interfered with their ability to devote time and resources to emergency calls, and explained that one of the officers who had been assaulted had left the police service shortly after the incident.⁴¹⁰

At one point during the conference, the offender said that he felt “disgusted”

399. *Id.*

400. *Giving a Voice*, *supra* note 349.

401. *Id.*

402. *Id.*

403. *Id.*

404. *Id.*

405. *See id.* (noting all offenders apologized but not discussing effect or perception of apologies by victims).

406. NIACRO RESPONSE, *supra* note 369, at 5.

407. *Get Real: Restoratively Challenging Hate Crime*, NIACRO, <https://www.niacro.co.uk/sites/default/files/Get%20Real%20EZine%20Issue%201%20%286%29.pdf> (last visited Jan. 21, 2022).

408. *Id.*

409. *Id.*

410. *Id.*

with his behavior, and NIACRO observed that “he was able to see the wider community impact and personal impact resulting from his actions.”⁴¹¹ This was a dramatic change given that before the conference, he did not accept responsibility for his actions.⁴¹² When he was later contacted by Get Real independent evaluators, he stated that he “[saw] the bigger picture now” and had “learned to be responsible for [his] own actions and not [blame] others.”⁴¹³ NIACRO stated that he had not re-offended.⁴¹⁴

In the study of the Devon and Cornwall Police Service’s “restorative” disposals, most of the offenders had participated in street-level restorative interventions that lacked preparation and a sense of neutrality, and participants often felt “cajoled into accepting the intervention.”⁴¹⁵ These characteristics are in conflict with restorative justice experts’ beliefs that preparation and neutrality are key⁴¹⁶ and that the process must be fully voluntary.⁴¹⁷ Moreover, only one victim had the opportunity to speak directly with the offender about the impact of the crime and how they could repair the harm caused.⁴¹⁸ In light of these factors, it makes sense why most of the victims who had received apologies from the offender perceived them to be insincere.⁴¹⁹

V. CONCLUSION AND RECOMMENDATIONS

As Parts III and IV of this Comment illustrate, there are differences in how the United States and the countries comprising the United Kingdom address hate crime.⁴²⁰ One of the more prominent distinctions pertains to data collection. Whereas the United States has a patchwork of over forty state hate crime statutes that each define hate crime differently,⁴²¹ the countries that make up the United Kingdom have relatively similar definitions of hate crime, although these countries differ in the protected characteristics that their laws cover.⁴²²

411. *Id.*

412. *Id.*

413. *Id.*

414. *Id.*

415. See Walters, *supra* note 45, at 71 (extrapolating, from Devon and Cornwall experiences where victims felt pressured by police to engage in mediation, that street-level encounters are often not adequate restorative practices).

416. See RESTORATIVE JUST. COUNCIL, BEST PRACTICE GUIDANCE FOR RESTORATIVE PRACTICE (2011), <https://restorativejustice.org.uk/sites/default/files/resources/files/Best%20practice%20guidance%20for%20restorative%20practice%202011.pdf> (noting neutrality as a core skill and devoting significant discussion to preparation for restorative processes).

417. EXPLORING ALTERNATIVE APPROACHES, *supra* note 24, at 19.

418. Walters, *supra* note 45, at 70.

419. See *id.* (noting several written apologies from offenders provided no explanation to victims).

420. See *supra* Part III for an analysis of current U.S. hate crime law. See also *supra* Part IV for an analysis of current U.K. hate crime law.

421. See Jin, *supra* note 146. See also *supra* Section III.B for a discussion of the variations in U.S. hate crime law.

422. See *supra* Section IV.A for a discussion of traditional legal approaches in the United

Despite such differences, the United States and the United Kingdom share a few key similarities. Both the United States and the United Kingdom approach hate crime under a punishment framework by prosecuting hate crimes pursuant to a set of laws.⁴²³ In addition, they experience many of the same underlying problems that undermine the effectiveness of a punishment framework.⁴²⁴ Some of these issues—data collection and reporting inconsistencies, a lack of awareness of restorative justice, and incentives not to prosecute hate crime⁴²⁵—may be able to be resolved through significant reform efforts. However, other issues have systemic causes that are more difficult to remedy—such as the underreporting of hate crime, which is frequently fueled by impacted communities' longstanding distrust of police and general lack of confidence in the criminal legal system.⁴²⁶

In the United Kingdom, restorative justice is by no means the dominant framework for addressing hate crime.⁴²⁷ This has resulted in limited data and the existence of methodological issues, such as small sample size.⁴²⁸ Nonetheless, the programs and initiatives highlighted in Part IV suggest that restorative justice is capable of healing hate crime victims, strengthening communities, and reforming offenders.⁴²⁹ The following recommendations should be considered by U.S. advocates seeking to expand the use of restorative justice for hate crimes.

A. Recommendation 1: Anti-hate advocates should use data points and anecdotes from the U.K. studies and programs to communicate the potential benefits of restorative justice in the hate crime context.

Anti-hate advocates should use data points and anecdotes from the U.K. studies and programs to communicate the potential benefits of restorative justice in the hate crime context. Data that is “clearly presented and appropriately interpreted” can be “a powerful tool to educate decision makers about issues and empower them to enact good policy.”⁴³⁰ With this in mind, advocates and lobbyists across the country should bolster their legislative strategies by using data ranging from metrics on the number of meetings they are taking to economic impact data

Kingdom and variations across countries.

423. See *supra* Section IV.A for a discussion of similarities between U.S. and U.K. hate crime laws.

424. See *supra* Section III.C for an outline of the deficiencies of hate crime law in the United States. See also *supra* Section IV.A for a discussion of the details U.K. hate crime laws.

425. See *supra* Section III.C for an outline of the deficiencies of hate crime law in the United States. See also *supra* Section IV.A for a discussion of the details U.K. hate crime laws.

426. See *supra* Section III.C. See also *supra* notes 245–51 and the accompanying text discussing issues arising from the U.K. traditional legal approach in addressing hate crime.

427. See *supra* Section IV.A for a description of the U.K. traditional legal approach, which is the dominant approach for hate crime.

428. See *supra* notes 329–32 and the accompanying text discussing issues arising from the U.K. application of restorative justice to hate crime.

429. See *supra* Section IV.B.2 for a discussion on the benefits of U.K. restorative justice programs for hate crime.

430. VOICES FOR VIRGINIA'S CHILDREN, A GUIDE TO UNDERSTANDING AND USING DATA FOR EFFECTIVE ADVOCACY 2 (2011), <https://vakids.org/wp-content/uploads/2015/11/Voices-Data-Guide-FINAL-2011.pdf>.

on how a particular bill affects their organizations.⁴³¹ Stories can have even greater impact than data as a means of illustrating social issues and possible solutions.⁴³² Studies show that personal stories of individuals increase comprehension and elicit empathy more effectively than facts and statistics; stories may also lower audience resistance to new ideas and discourage counterarguments.⁴³³

Given the power of data and stories, anti-hate advocates should draw from the U.K. studies and programs outlined in Part IV.⁴³⁴ In particular, the findings of the 2003 evaluation and the 2008–2011 Hate Crime Project evaluation⁴³⁵ can be used to emphasize the potential of restorative justice to reform offenders and heal victims while acknowledging the methodological limitations of evaluations that involved only, respectively, nineteen and twenty-three cases. Advocates should also discuss the results of Strand 1 of Get Real between 2017–2021, which suggest that restorative justice can allow hate crime victims to share their experiences with hate crime, develop a clearer understanding of what happened to them, and regain a sense of safety and control over their lives.⁴³⁶ Advocates should similarly acknowledge that Get Real’s report is methodologically limited because the successful results were reported by the organization rather than the victims themselves.⁴³⁷

B. Recommendation 2: In U.S. jurisdictions that are hesitant to embrace restorative justice, anti-hate advocates should consider discussing the partnership between Community Security Trust and the Greater Manchester Police.

In U.S. jurisdictions that are hesitant to embrace restorative justice as either a replacement or supplement to the traditional legal system, anti-hate advocates should consider discussing the partnership between CST and the GMP.⁴³⁸ While some advocates may object to the idea of collaborating with law enforcement in any capacity, others may want to keep this option open in order to promote greater

431. See *Using Your Advocacy Data to Boost Lobbying Strategy*, QUORUM, <https://www.quorum.us/blog/advocacy-data-lobbying-strategy/> (last visited Oct. 1, 2022) (detailing various ways in which advocates can use data points to advance lobbying efforts).

432. See JESSIE AUSTIN & EMMA CONNELL, *EVALUATING PERSONAL NARRATIVE STORYTELLING FOR ADVOCACY* 4–5 (Wilder Rsch. ed. 2019) https://www.wilder.org/sites/default/files/imports/LivingProofAdvocacy_LiteratureReview_11-19.pdf (detailing how storytelling can elicit more emotion than statistics and illustrate existing social problems and solutions).

433. *Id.* at 2.

434. See *supra* Part IV.B.2.c and accompanying text discussing how restorative justice programs reduce repeat victimization and benefit offenders.

435. See *supra* notes 339–42, 396–99, and accompanying text summarizing the 2003 and 2008–2011 evaluation findings for the Hate Crime Project.

436. See *supra* notes 367–70 and accompanying text detailing how Strand 1 supported hate crime victims in through the restorative justice process.

437. See NIACRO RESPONSE, *supra* note 369, at 5 (noting victim experiences are used to support program as a successful restorative process).

438. See *supra* notes 349–50 and accompanying text for an overview of the CST and GMP partnership.

awareness and acceptance of restorative justice within their communities. Advocates in the second group should highlight the 2016 and 2018 mediations co-led by CST and the GMP⁴³⁹ to propose the creation of restorative justice programs that facilitate robust and transparent partnerships between organizations and police forces.

Because it is essential that participating law enforcement partners are dedicated to faithfully delivering restorative justice, advocates should also propose the establishment of an award similar to the RSQM that the GMP holds.⁴⁴⁰ A similar award—based on a set of standards and subject to rigorous testing to measure efficacy—can help ensure that officers are capable of co-facilitating meetings between hate crime victims and offenders, as well as potentially reduce some of the skepticism and distrust that organizations, participants, and other restorative justice stakeholders may harbor. To drive home the point that training is essential, advocates should warn lawmakers that if jurisdictions allow for partnerships to form between organizations and police forces in the absence of reliable accreditation or training systems, the outcomes could mirror those of the Devon and Cornwall Police Service's overwhelmingly ineffective out-of-court disposals.⁴⁴¹

C. Recommendation 3: Regardless of what stance anti-hate advocates take on partnering with law enforcement, all advocates should prioritize obtaining funding for pilot programs.

Regardless of what stance anti-hate advocates take on partnering with law enforcement, all advocates should prioritize obtaining funding for pilot programs. Pilot programs are an important tool allowing government agencies and providers to test the effectiveness of a planned solution on a smaller scale.⁴⁴² Given the methodological limitations that have been pointed out regarding existing studies on restorative justice in the hate crimes context,⁴⁴³ advocates should push for the creation of pilot programs with ample funding for careful program design. Moreover, due to the particularly sensitive nature of hate crime, such pilot programs should explore and test strategies for addressing asymmetries of power among stakeholders as well as preventing revictimization and coerced compassion.⁴⁴⁴

In conclusion, anti-hate advocates in the United States should adopt the

439. See *supra* notes 351–55 and accompanying text highlighting the 2016 mediation. See *supra* notes 400–05 and accompanying text highlighting the 2018 mediation.

440. See *supra* note 346 and accompanying text discussing the formation of restorative justice programs that qualified for RSQM certification.

441. See *supra* notes 371–79, 415–19 and the accompanying text discussing the shortcomings of the Devon and Cornwall restorative process and the negative impact on victims who participated.

442. Matthew Milone, *The Benefit of Pilot Programs to the Federal Government*, COMPLETE DISCOVERY SOURCE (Jan. 22, 2021), <https://cdslegal.com/insights/insights-federal/the-benefit-of-pilot-programs-to-the-federal-government/>.

443. See *supra* notes 100–03.

444. See *supra* notes 112–16.

aforementioned recommendations to guide their advocacy efforts. Because restorative justice is not a “particular program or a blueprint,”⁴⁴⁵ advocates should work with community organizers and members to determine what type(s) of restorative justice⁴⁴⁶ make(s) the most sense for their needs in the hate crimes context. With the stories and data points from the U.K. restorative justice studies and programs, they can more persuasively request their state and local governments to fund pilot programs that specifically address hate crimes. The resulting data may be instrumental for building a base of practical knowledge, which in turn could help advocates improve and expand the provision of restorative justice across the country. In the end, it may be possible for more victims of hate crime to be made whole, for more individuals who inflicted harm upon the victims to reform themselves, and for our communities to become safer and more accepting.

445. See *supra* Part II.A for an overview of common characteristics of restorative justice programs.

446. See *supra* Part II.B for examples of restorative justice practices along the “continuum of independence.”