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## Essay

### Reconciling Ideals: Restorative Justice as an Alternative to Sentencing Enhancements for Hate Crimes

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#### INTRODUCTION

In 1998, Matthew Shepard was brutally murdered because of his sexuality.<sup>1</sup> His murderers were given life sentences.<sup>2</sup> The effect of their crime transcended that tragic moment in Laramie, Wyoming. It, along with other hate crimes against the LGBTQ community, made people feel powerless—they could be the next target. Matthew’s murderers are disempowered in a different way. Our criminal justice system is designed to strip perpetrators of hate crimes of their power by imprisoning them and limiting their free will. I find little solace in this hot-potato of disempowerment. My satisfaction felt upon learning that Matthew Shepard’s murderers were still behind bars twenty years later was muted by my fundamental discontent with mass incarceration. There is a dissonance between my desire to punish those who commit hate crimes against my community, and my commitment to decarceration and criminal justice reform. This Essay seeks to

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1. For an overview of Matthew Shepard’s murder, see James Brooke, *Gay Man Beaten and Left for Dead; Two Are Charged*, N.Y. TIMES (Oct. 10, 1998), <https://www.nytimes.com/1998/10/10/us/gay-man-beaten-and-left-for-dead-2-are-charged.html> [<https://perma.cc/7GQT-3LD6>] (“Although Wyoming often bills itself as the ‘equality state,’ the state Legislature has repeatedly voted down hate crime legislation on the ground that it would give homosexuals special rights.”).

2. See Jude Sheerin, *Matthew Shepard: The Murder that Changed America*, BBC (Oct. 26, 2018), <https://www.bbc.com/news/world-us-canada-45968606> [<https://perma.cc/UDR6-5KHJ>] (describing how Matthew’s murderers, Aaron McKinney and Russell Henderson, were given consecutive life sentences for kidnapping and murder).

reconcile these two ideals by proposing restorative justice as an alternative to legislatively enacted sentence enhancements for hate crimes. It argues that the common goal of violence prevention can be attained by departing from the structural violence of our incarceration system.

This Essay proceeds by describing how hate crime laws fall short of their goal: deterring hate crimes. Though there are numerous definitions of hate crimes, for the purposes of this Essay, they will be defined as they are in the Matthew Shepard Act, which is “offenses [committed] . . . because of the actual or perceived religion, national origin, gender, sexual orientation, gender identity, or disability of any person.”<sup>3</sup> While this definition separates identities, many victims of hate crimes often have intersecting identities.<sup>4</sup> For example, ninety-one percent of murders of transgender people in 2019 were of Black women.<sup>5</sup> This is an intersection of femicide, racism, and transphobia. Despite having national legislation against hate crimes toward LGBTQ people for a decade, hate crime rates have not changed.<sup>6</sup> After providing an overview of national hate crime legislation, this Essay will explore restorative justice as an alternative to incarceration and will highlight a Minnesota restorative justice law. It will then argue that restorative justice presents an alternative form of addressing hate crimes toward LGBTQ people. Hate crime laws do not need to be replaced. Restorative justice programs can supplement them, where

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3. Matthew Shepard and James Byrd, Jr. Hate Crimes Prevent Act, 18 U.S.C. § 249(a)(2)(A).

4. In 1997, a Black man had racist and homophobic slurs spray-painted on his car. At the time of the crime, only the racist slurs were considered a hate crime because sexual orientation was not yet included in hate crime legislation. Elizabeth P. Cramer, *Hate Crime Laws and Sexual Orientation*, 26 J. SOCIO. & SOC. WELFARE 5, 21 (1999).

5. *A National Epidemic: Fatal Anti-Transgender Violence in the United States in 2019*, HUM. RTS. CAMPAIGN, <https://www.hrc.org/resources/a-national-epidemic-fatal-anti-trans-violence-in-the-united-states-in-2019> [<https://perma.cc/6DFW-84ZM>]. This Essay focuses on LGBTQ issues but also discusses hate crimes toward other minority groups, which is appropriate given the intersecting identities of many hate crime victims.

6. *Compare* FED. BUREAU OF INVESTIGATION, 2008 HATE CRIME STATISTICS (Nov. 2009), <https://ucr.fbi.gov/hate-crime/2008> [<https://perma.cc/R9RU-8DDV>] (reporting that 16.7 percent of the 7,780 single-bias hate crime incident reported in 2008 stemmed from sexual orientation bias), *with* FED. BUREAU OF INVESTIGATION, 2013 HATE CRIME STATISTICS (Dec. 2014), [https://ucr.fbi.gov/hate-crime/2013/topic-pages/incidents-and-offenses/incidentsandoffenses\\_final](https://ucr.fbi.gov/hate-crime/2013/topic-pages/incidents-and-offenses/incidentsandoffenses_final) [<https://perma.cc/5ELY-KFKG>] (reporting that 20.8 percent of the 5,722 single-bias hate crime incidents reported in 2013 stemmed from sexual orientation bias), *and* FED. BUREAU OF INVESTIGATION, 2019 HATE CRIME STATISTICS (Nov. 2020), <https://ucr.fbi.gov/hate-crime/2019/topic-pages/incidents-and-offenses> [<https://perma.cc/NDN7-DXCE>] (reporting that 16.8 percent of the 7,103 single-bias hate crime incidents reported in 2018 stemmed from sexual orientation bias).

appropriate. Providing an alternative to severe sentencing practices may help to prevent violence against LGBTQ people, alleviate some of the fear shared between victims and offenders, and heal communities.<sup>7</sup>

#### I. HATE CRIME LAWS CONTRIBUTE TO MASS INCARCERATION WITHOUT HEALING COMMUNITIES OR PREVENTING VIOLENCE

Over the past several decades, hate crime laws have evolved in scope to cover more groups and enhance the severity of punishment for offenders. Hate crime laws play two roles in the societal fold: (1) they are meant to deter bias-motivated crimes by enhancing punishments, and (2) they make a statement that crimes against specific groups of people will not be tolerated.<sup>8</sup> Through hate crime laws, prosecutors see it as their job to punish offenders,<sup>9</sup> and legislators take on the role of condemning attacks.<sup>10</sup> These approaches, while well-intentioned, neglect to consider the trauma and fear that ripples through marginalized communities after one of their members is subjected to an act of violent hate.<sup>11</sup> Putting an offender in jail may eliminate that specific threat to a community, but the offender's message of hate and the fear it induces remains. A community is left on edge waiting for the next attack. As is the case with much of the sentencing system, having strict punishments for hate crimes does not necessarily prevent them from happening.<sup>12</sup> This Section will give a brief overview of hate crime legislation in the United States and conclude by arguing that the laws, as they stand, fail to achieve their purpose of deterrence.

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7. While this Essay was inspired by Matthew Shepard's story and focuses on LGBTQ people, its analysis and solutions extend to all groups impacted by hate crimes.

8. See 57 Am. Jur. Proof of Facts 3d 1, § 2 (2000).

9. See, e.g., *Hate Crimes and the Threat of Domestic Extremism: Hearing Before the Subcomm. on the Const., Civ. Rts. & Hum. Rts. of the S. Comm. on the Judiciary*, 112th Cong. (2012) [hereinafter *Hearing*] (statement of Roy L. Austin, Jr., Deputy Assistant Att'y Gen., Civil Rights Division, U.S. Dep't of Justice) ("While we as a Nation have made significant progress addressing hate crimes, [mass shootings remind] us all too vividly that our work is not done.").

10. See generally *id.* (responding to the white supremacist shooting at a Sikh gurdwara in Oak Creek, Wisconsin).

11. See KATHERINE WHITLOCK, AM. FRIENDS SERV. COMM., IN A TIME OF BROKEN BONES: A CALL TO DIALOGUE ON HATE VIOLENCE AND THE LIMITATIONS OF HATE CRIME LEGISLATION 10 (2001), <https://www.afsc.org/sites/default/files/documents/In%20a%20time%20of%20broken%20bones.pdf> [<https://perma.cc/G58Y-FFEP>].

12. ALTERNET, *Do Hate Crimes Do Any Good?* (Aug. 4, 2009), [https://www.alternet.org/2009/08/do\\_hate\\_crime\\_laws\\_do\\_any\\_good/](https://www.alternet.org/2009/08/do_hate_crime_laws_do_any_good/) [<https://perma.cc/JA6M-CEDB>].

## A. HISTORY OF HATE CRIME LEGISLATION

The Civil Rights Act of 1968 serves as a benchmark for modern hate crime legislation.<sup>13</sup> It protects special classes of people based on race, color, religion, and national origin.<sup>14</sup> In doing so, it acknowledges the specific dangers people in minority groups were facing when it passed in Congress, such as intimidation at polls and restrictions from services.<sup>15</sup> Despite providing new protections for those facing discrimination,<sup>16</sup> the Civil Rights Act has a linguistic failing. It shies away from defining the acts it forbade as what they were: hate crimes.

More than a decade passed before hate crimes were explicitly addressed in federal and state legislation.<sup>17</sup> Since 1985, hate crime legislation has been debated over its necessity, scope, and content.<sup>18</sup> On a policy level, hate crimes are defined as “criminal acts which are motivated by prejudice or bias towards an individual based on race, religion, gender, ethnicity, sexual orientation, national origin, old age, or disability (mental or physical).”<sup>19</sup> There is disagreement as to what degree of prejudice toward a certain group needs to be present as the motivating factor of a crime for it to be considered a “hate crime.”<sup>20</sup> Some states require a crime to have been committed “because of” the victim’s group identity for it to be a “hate crime.”<sup>21</sup> Others have a broader conception of the *mens rea* required for hate crimes, expanding it to “encompass offences where no specific prejudice or bias is demonstrated by the offender.”<sup>22</sup> One theorist has defined hate crimes as:

[A]cts of violence and intimidation, usually directed towards already stigmatized and marginalized groups. As such, it is a mechanism of power and

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13. David A. Hall, *Ten Years Fighting Hate*, 10 U. MIAMI RACE & SOC. JUST. L. REV. 79, 85 (2020); see Civil Rights Act of 1968 § 101, 18 U.S.C. § 245.

14. 18 U.S.C. § 245(b)(2).

15. *Id.* at (b).

16. *Id.* (establishing minimum sentences for violations of the Act’s provisions).

17. MICHAEL SHIVELY, STUDY OF LITERATURE AND LEGISLATION ON HATE CRIME IN AMERICA 2 (2005), [www.ncjrs.gov/pdffiles1/nij/grants/210300.pdf](http://www.ncjrs.gov/pdffiles1/nij/grants/210300.pdf) [<https://perma.cc/93VM-WA3T>].

18. See *id.* at 32–33. For a description of the political process that led to present-day hate crime legislation, see Hall, *supra* note 13, at 83–88.

19. Mohamad Al-Hakim, *Making Room for Hate Crime Legislation in Liberal Societies*, 4 CRIM. L. & PHIL. 341, 343 (2010).

20. See MARK AUSTIN WALTERS, HATE CRIME AND RESTORATIVE JUSTICE 10 (2014).

21. *Id.* at 12–13 (using Maine as an example of a state that employs “because of” language).

22. *Id.* at 13 (describing how an offender who robs a Jewish person based on the belief that Jewish people have more money, and not because of any malice toward Jewish people generally, may still have committed a hate crime).

oppression, intended to reaffirm the precarious hierarchies that characterize a given social order. It attempts to re-create simultaneously the threatened (real or imagined) hegemony of the perpetrator's group and the "appropriate" subordinate identity of the victim's group.<sup>23</sup>

This conception of hate crimes acknowledges the social position of victims and oppressive societal power structures.<sup>24</sup> Federal legislation, most recently in the Matthew Shepard and James Byrd, Jr. Hate Crimes Act of 2009, attempts to address the dichotomy between victimhood and social otherness by creating heightened punishments for hate crimes.<sup>25</sup> Sentencing enhancements give the impression that society will not tolerate crimes directed toward certain groups.

Sentencing enhancements are designed to send a message that crimes motivated by bias—whether based on race, religion, sexual orientation, or gender—are particularly heinous.<sup>26</sup> Enhancements mean that if someone commits a bias-motivated crime, their minimum sentence will exceed what sentencing guidelines would ordinarily allow for the same or similar crime.<sup>27</sup> When a crime is committed against someone because of their physical or social qualities, those who share those qualities experience fear.<sup>28</sup> The rippling of fear through an entire community gives hate crimes a "terroristic" quality that goes beyond crimes between individuals.<sup>29</sup> For example, the August 2012 mass shooting of a Sikh gurdwara in Oak Creek, Wisconsin by a white supremacist was labeled an act of domestic terrorism.<sup>30</sup> The Sikh temple is now equipped with security guards and bulletproof windows which both protects against a second attack and serves as a constant reminder of the first.<sup>31</sup> That crime did more than just leave six people dead, it created lasting fear within the community. Hate crime laws address domestic terrorism like the crime in Wisconsin

23. BARBARA PERRY, *IN THE NAME OF HATE: UNDERSTANDING HATE CRIMES* 10 (2001).

24. WALTERS, *supra* note 20, at 18.

25. Matthew Shepard and James Byrd, Jr. Hate Crimes Act of 2009, 18 U.S.C. § 249.

26. See Beth Schwartzapfel, *When is a Crime a Hate Crime?*, MARSHALL PROJECT (June 19, 2015, 2:49 PM), <https://www.themarshallproject.org/2015/06/19/when-is-a-crime-a-hate-crime> [<https://perma.cc/FT5N-F3G5>].

27. See 18 U.S.C. § 249 (increasing sentences by ten years or requiring mandatory life for hate crimes).

28. Schwartzapfel, *supra* note 26.

29. *Id.*

30. Matthew Williams, *Wisconsin Sikh Temple Shooting: Six Killed in Act of 'Domestic Terrorism'*, GUARDIAN (Aug. 5, 2012), <https://www.theguardian.com/world/2012/aug/05/wisconsin-sikh-temple-domestic-terrorism> [<https://perma.cc/A7YT-EY4J>].

31. Deepa Iyer, *Six Years Later, the Sikh Gurdwara in Oak Creek is a National Site of Conscience* MEDIUM (Aug. 4, 2018), <https://medium.com/@dviyer/six-years-later-the-sikh-gurdwara-in-oak-creek-is-a-national-site-of-conscience-1a8cda34650e> [<https://perma.cc/FKN6-52U7>].

through penalty enhancements under the justification that the government should be able to “fight terrorism; terrorism means acting violently to intimidate or coerce; intimidation and coercion are at the heart of bias-motivated crime; [and] government fights crime via legislation.”<sup>32</sup>

The Matthew Shepard and James Byrd, Jr. Hate Crimes Act of 2009 is the most significant recent hate crimes legislation that uses sentencing enhancements.<sup>33</sup> The Act is named after James Byrd Jr., a man who was dragged behind a truck then decapitated because he was Black, and Matthew Shepard, who was tied to a fence and beaten to death because he was gay.<sup>34</sup> By naming the Act after the victims of these bias-motivated crimes, legislators acknowledged that people should not be targeted for their identities. This Act expanded previous hate crimes legislation to include biases against sexual orientation, gender identity, and actual or perceived race.<sup>35</sup> In addition to creating a wider class of victims, the Act “provides funding and technical assistance to state, local, and tribal jurisdictions to help them to more effectively investigate and prosecute hate crimes.”<sup>36</sup> President Obama said that “through this law, we will strengthen the protections against crimes based on the color of your skin, the faith in your heart, or the place of your birth.”<sup>37</sup> Obama also highlighted the new tools prosecutors would have to punish hate crime offenders.<sup>38</sup> Obama’s speech recognizes the two pillars of hate crime legislation: recognition and action. More people are recognized as protected groups and more power is given to the government to incarcerate offenders.

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32. Hall, *supra* note 13, at 91.

33. 18 U.S.C. § 249; see Hall, *supra* note 13, at 86, 86 n. 24.

34. Hall, *supra* note 13, at 83–84.

35. *Id.* at 104.

36. *The Matthew Shepard and James Byrd, Jr., Hate Crimes Prevention Act Of 2009*, U.S. DEP’T. OF JUST. (Oct. 18, 2018), <https://www.justice.gov/crt/matthew-shepard-and-james-byrd-jr-hate-crimes-prevention-act-2009-0> [<https://perma.cc/RW2A-W6C7>].

37. Barack Obama, *Remarks by the President at Reception Commemorating the Enactment of the Hate Crimes Prevention Act*, WHITE HOUSE (Oct. 28, 2009), <https://obamawhitehouse.archives.gov/photos-and-video/video/president-obama-commemorates-enactment-hate-crimes-prevention-act#transcript> [<https://perma.cc/5EH4-E5DQ>].

38. *Id.*

B. HATE CRIME RATES HAVE NOT GONE DOWN DESPITE SENTENCING ENHANCEMENTS

Despite the new tools given to prosecutors through the Matthew Shepard Act, hate crimes continue to happen.<sup>39</sup> Perhaps that is because hate crime laws use an individualized deterrence approach as opposed to addressing the systematic issues that produce the very biases and fear that lead people to commit hate crimes. For that reason, hate crime legislation as it stands is largely symbolic.<sup>40</sup> Hate crime rates have remained steady despite the introduction of sentencing enhancements.<sup>41</sup> The statistics that we do see might not give us a full picture of how many hate crimes are being committed, as there is inconsistency between Department of Justice and Federal Bureau of Investigation reports.<sup>42</sup> By some records, even as hate crimes overall have dropped, those directed toward gay, lesbian, or transgender people have increased.<sup>43</sup> It is clear, however, that sentencing enhancements do not dramatically lower the number of hate crimes committed. Arguments that push against sentencing enhancements are explored below.

There are several root causes of hate crimes, from “thrill-seeking” youth who are looking for power or excitement, to attacks organized by hate groups, and “defensive” attacks on perceived outsiders.<sup>44</sup> Most perpetrators of the crimes are white cisgender males who are unknown to the victims and acting alone, though perhaps affiliated with a larger hate-group.<sup>45</sup> One such group that was recently given a national platform is the “Proud Boys.”<sup>46</sup> The Proud Boys do not limit

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39. See *Hearing, supra* note 9 (statement of Roy L. Austin, Jr., Deputy Assistant Att’y Gen., Civil Rights Division, U.S. Dep’t of Justice) (“While we as a Nation have made significant progress addressing hate crimes, [mass shootings remind] us all too vividly that our work is not done.”).

40. Evan Vipond, *Trans Rights Will Not Protect Us: The Limits of Equal Rights Discourse, Antidiscrimination Laws, and Hate Crime Legislation*, 6 W. J. LEGAL STUD. 1, 17–19 (2015).

41. See *supra* note 6 (comparing hate crime statistics from before and after the Matthew Shepard Act was enacted).

42. *Hearing, supra* note 9 (written statement of the American Civil Liberties Union) (explaining that hate crimes statistics reported by the FBI are significantly lower than those reported by the Department of Justice).

43. Brief for the United States as Amicus Curiae Supporting Petitioners at 6, *Obergefell v. Hodges*, 576 U.S. 644 (2015) (No. 14-556).

44. Cramer, *supra* note 4, at 16.

45. See *id.*

46. See Neil MacFarquhar, Alan Feuer, Mike Baker & Sheera Frankel, *Far-Right Group That Trades in Political Violence Gets a Boost*, N.Y. TIMES (Sept. 30, 2020), <https://www.nytimes.com/2020/09/30/us/proud-boys-trump.html> [<https://perma.cc/>

their hatred to one group, but “have espoused misogynistic, Islamophobic, anti-Semitic and anti-immigrant views while making allies with white supremacists . . .”<sup>47</sup> Because hate crimes—and those who perpetrate them—have so many different causes, one solution, namely sentencing enhancements, might not be equally effective for all offenders.

The violent nature of hate crimes may mean that there is no chance to apply laws governing them to the most heinous offenders. The white supremacist who attacked the Sikh temple in Wisconsin killed himself before police could detain him.<sup>48</sup> The man who massacred forty-nine people and terrorized countless others at Pulse nightclub died in a shootout with the police before an arrest could take place.<sup>49</sup> These offenders were not impacted by hate crime laws because they died before arrest. Those who are most impacted by the laws are not “neo-Nazis committing vicious, ideological driven acts of violence” but more average people whose prejudice bursts out in momentary acts.<sup>50</sup>

It is not clear cut what hate crime laws are punishing. Some consider it a punishment of someone’s immutable characteristics, rather than their actions.<sup>51</sup> In other words, hate crimes stem from biased dispositions developed over time that reflect someone’s character.<sup>52</sup> The crime itself is only a momentary manifestation of what is already a deep-seeded belief, so punishing the crime is doing little to change the belief. Hate crime laws provide tougher sentencing for certain offender prejudices, which creates a hierarchy of crimes and victimhood.<sup>53</sup> If hate crime laws are based on the idea that some crimes are worse than others because of the intent behind them, and intent is a representation of character, then the laws are really just punishing one’s character.<sup>54</sup> Under this theory, hate crime laws are a

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7X6V-WWRE] (describing how President Trump answered a question about whether he would condemn white supremacists with “Proud Boys, stand back and stand by.”).

47. *Id.*

48. Iyer, *supra* note 31.

49. Ariel Zambelich & Alyson Hurt, *3 Hours in Orlando: Piecing Together an Attack and its Aftermath*, NAT’L PUB. RADIO (June 26, 2016, 5:09 PM), <https://www.npr.org/2016/06/16/482322488/orlando-shooting-what-happened-update> [<https://perma.cc/59AD-UWA6>] (“[The suspect] began firing at police, and they fired back.”).

50. See Cramer, *supra* note 4, at 19.

51. See, e.g., Heidi M. Hurd, *Why Liberals Should Hate “Hate Crime Legislation,”* 20 L. & PHIL. 215, 222–24 (2001).

52. *Id.* at 222.

53. Cramer, *supra* note 4, at 19.

54. Hurd, *supra* note 51, at 219–24.

governmentally-defined reinforcement of a good versus bad binary, without doing any work to tackle the root causes.

Some critics of hate crime sentencing enhancements suggest that imprisonment may actually make offenders become more prejudiced.<sup>55</sup> Putting someone “in prison for more years is not going to address the root causes of racism — and, given the racial gangs and alliances in prisons, [incarceration] perhaps might make it worse.”<sup>56</sup> Hatred toward LGBTQ people is also likely to grow the longer an offender is in prison, considering the rampant homophobia and transphobia that exists in prisons.<sup>57</sup> LGBTQ people in prison experience “humiliation, physical and sexual abuse, and fear that it will get worse if [they] complain.”<sup>58</sup> Mistreatment by staff and inmates, along with a fear of being labeled as homosexual, perpetuates biases against queer people in prison.<sup>59</sup> Queer prisoners are often put in solitary confinement for their own safety,<sup>60</sup> which serves as both a form of punishment and a reassertion of otherness from the general population. Prison reinforces biases against queer people through violence and otherness, without doing work to bridge gaps of understanding and experience.<sup>61</sup>

The punitive component of hate crime laws perpetuates inequalities in our justice system by utilizing oppressive tools and divesting from rehabilitative techniques. Penalty enhancements outside of the hate crime context have historically been “applied in an unjust and disproportionate way against people of color and poor people.”<sup>62</sup> For instance, “[b]oth sentencing enhancements and mandatory terms mandate increased punishments for traits that Black people are more

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55. Cramer, *supra* note 4, at 19.

56. Schwartzapfel, *supra* note 26.

57. Cramer, *supra* note 4, at 19 (“Those imprisoned for hate graffiti and vandalism may actually learn to become more prejudiced while in prison. Determining which expressions are hate crime graffiti versus ordinary graffiti is difficult, and punishing hate crime graffiti more than ordinary graffiti creates a sentencing system based upon a subjective hierarchy of the vileness of terms and symbols.” (quotation omitted)). See *generally LGBTQ People Behind Bars*, NAT’L CTR. FOR TRANSGENDER EQUALITY, <https://transequality.org/sites/default/files/docs/resources/TransgenderPeopleBehindBars.pdf> [<https://perma.cc/CFC2-98TB>].

58. *LGBTQ People Behind Bars*, *supra* note 57, at 4.

59. See *id.* at 6.

60. *Id.* at 13–14.

61. A lot can be written about incarcerated LGBTQ folks experiences in prison— they are horrific. It is mentioned here to highlight how the treatment of queer people in prison does not just impact them, but also emboldens others to hate.

62. WHITLOCK, *supra* note 11.

likely to have (like being in public housing) . . .”<sup>63</sup> White people “are least likely to have mandatory terms or sentencing enhancements applied and most likely to benefit from downward departures.”<sup>64</sup> It is ironic that a tool used to “protect” marginalized groups from hate crimes is also one that undermines the calls for criminal justice reform that those groups are making. These laws attempt to address “hate violence in ways that reinforce the structural violence of [the punitive] system . . .”<sup>65</sup> Intersectional queer organizations like the Sylvia Rivera Law Project have spoken out against the Matthew Shepard Act in particular by calling it “a counterproductive response to violence faced by LGBT people” and inconsistent with racial and economic justice.<sup>66</sup> Hate crime laws give more power to federal and local law enforcement, which then may use that power to further incarcerate marginalized people.<sup>67</sup>

### C. HATE CRIMES IMPACT ENTIRE COMMUNITIES

Hate crimes create fear and distrust in whole communities in a way other crimes do not.<sup>68</sup> The community-effect of hate crimes was addressed in a 1993 case, *Wisconsin v. Mitchell*.<sup>69</sup> In *Mitchell*, the respondent challenged a sentence enhancement he received for selecting the victim of his aggravated crime on account of the victim’s race.<sup>70</sup> The Supreme Court denied Mitchell’s First Amendment argument, asserting that hate crime laws do not stifle free speech.<sup>71</sup> The Court

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63. Traci Schlesinger, *The Failure of Race Neutral Policies: How Mandatory Terms and Sentencing Enhancements Contribute to Mass Racialized Incarceration*, 57 *CRIME & DELINQUENCY* 56, 58 (2011).

64. *Id.* at 60.

65. WHITLOCK, *supra* note 11, at 8 (“[H]ate violence must be understood within a larger context of social and economic changes, uncertainties, and anxieties. Key features of this larger context include the shift of public spending away from investment in human needs and civic infrastructure to prisons, policing, and militarization; the increasing transfer of public resources into the hands of private interests with little or no accountability to the communities they serve; and the increasing institutionalization of social and economic inequality.”).

66. *SLRP On Hate Crime Laws*, SYLVIA RIVERA L. PROJECT, <https://srlp.org/action/hate-crimes/> [<https://perma.cc/FRK7-BD8Q>].

67. WHITLOCK, *supra* note 11, at 8.

68. *The Psychology of Hate Crimes*, AM. PSYCH. ASS’N, <https://www.apa.org/advocacy/interpersonal-violence/hate-crimes> [<https://perma.cc/B2CS-4LD3>] (“Hate crimes send messages to members of the victim’s group that they are unwelcome and unsafe in the community, victimizing the entire group and decreasing feelings of safety and security.”).

69. *Wisconsin v. Mitchell*, 508 U.S. 476 (1993).

70. *Id.* at 479.

71. *Id.* at 488.

argued in favor of the laws, stating that bias crimes “inflict greater individual and societal harm . . . [and] are more likely to provoke retaliatory crimes, inflict distinct emotional harms on their victims, and incite community unrest.”<sup>72</sup> Crimes directed at individuals because of their identity or personal characteristics disrupt the sense of safety and security for those who share those identities and characteristics.<sup>73</sup>

*Mitchell* demonstrates how historical prejudice can lead to generational community fear and trauma. The respondent in *Mitchell* was a young Black man who chose to beat up a white man after having watched “Mississippi Burning,” a film where a white man beat up a young Black boy.<sup>74</sup> Mitchell’s action was spurred by the sense of fear and injustice he and his friends experienced when they watched the film. Almost ironically, Mitchell’s crime was the “provoke[d] retaliatory crime” the *Mitchell* Court warned against in its opinion.<sup>75</sup> Mitchell’s sentence showcases how antidiscrimination laws can be used to punish the very people they were designed to protect.<sup>76</sup>

It is possible sentencing enhancements for hate crimes “will only fuel the cycle of violence, hatred, and polarization.”<sup>77</sup> Still, it is important to recognize certain groups are vulnerable to hate crimes and need to be protected. The trick is to hold on to the recognition aspect of hate crime laws while changing the present “actions” or solutions, namely sentencing enhancements. The next Section looks at restorative justice as an alternative to traditional incarceration and related sentencing enhancements.

## II. RESTORATIVE JUSTICE AS AN ALTERNATIVE FORM OF PUNISHMENT

Restorative justice is informed by the belief that our criminal justice system does little to heal offenders, victims, or communities.<sup>78</sup>

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72. *Id.*

73. Brief for the United States as Amicus Curiae Supporting Petitioner, at 14, *Wisconsin v. Mitchell*, 508 U.S. 476 (1993) (No. 92-515) (“The selection of one group member for crime because of his group identity threatens the personal safety and security of other members of that group, solely because of their shared characteristic.”).

74. *Mitchell*, 508 U.S. at 479–80.

75. *See id.* at 488.

76. An amicus brief written on behalf of the State of Wisconsin tied hate crime laws to the civil rights movement. Brief for the United States as Amicus Curiae Supporting Petitioner, at 7, *Wisconsin v. Mitchell*, 508 U.S. 476 (1993) (No. 92-515).

77. WHITLOCK, *supra* note 11, at 8.

78. *See* Howard Zehr, *Restorative Justice, Restorative Justice*, in *A RESTORATIVE JUSTICE READER* 23, 23 (Gerry Johnstone ed., 2d ed. 2013) (“We know that the system

Putting people in jail for their crimes does not establish accountability—it reasserts systematic power structures.<sup>79</sup> Those who commit hate crimes are asserting power over their victims, and our criminal justice system is asserting power over the offenders; both offenders and victims are left powerless.<sup>80</sup> Instead of defining offender accountability as sending people to jail, restorative justice seeks to give offenders the tools needed to right their wrongs. Restorative justice departs from sole dependence on the government to remedy crimes (for example, through legislators and prosecutors) and involves victims and communities in identifying problems and finding solutions.<sup>81</sup> Government officials are not left out of restorative justice conversations, but have a seat at the table as opposed to controlling the whole room. This Section presents the goals, methods, and outcomes of restorative justice methodology to showcase how it can empower victims of hate crimes and their communities.

#### A. RESTORATIVE JUSTICE GOALS

The contemporary restorative justice movement has been traced to the Minnesota Restitution Center (MRC), founded in 1972 by two University of Minnesota graduate students with experience working in the criminal justice system.<sup>82</sup> MRC aimed to provide an alternative to incarceration and provide roles for victims in the justice process.<sup>83</sup> In doing so, it reframed crimes as being against victims rather than against the state. Victims were able to seek restitution for crimes done unto them and play a role in sharing information about restorative justice to the wider community. Though the MRC program did not last long, it became a model for subsequent restorative justice programs.<sup>84</sup>

Restorative justice seeks to empower victims of crimes and prevent overincarceration by facilitating dialogue between impacted parties. This dialogue is designed so “all voices are heard with no stakeholder silenced by domination.”<sup>85</sup> Allowing both parties to participate helps to generate empathy, which in turn encourages offenders to

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we call ‘criminal justice’ does not work. Certainly, at least, it does not work for victims.”).

79. *See id.* at 24.

80. *Id.*

81. *Id.* at 34.

82. Joe Hudson, *Contemporary Origins of Restorative Justice Programming: The Minnesota Restitution Center*, FED. PROBATION, Sept. 2012, at 49, 50 (2012).

83. *Id.* at 49.

84. *Id.* at 53.

85. WALTERS, *supra* note 20, at 34.

understand the impact of their actions.<sup>86</sup> Margaret Urban Walker described six reoccurring restorative justice values as:

1. Restorative justice aims above all to repair the harm caused by wrong, crime and violence.
2. Restorative justice makes central the experiences and needs (material, emotional, and moral) of victims.
3. Restorative justice insists on genuine accountability and responsibility taking from those who are responsible for harm, ideally directly to those who have suffered the harm.
4. Restorative justice seeks to return ownership of the resolution of wrong, crime, and harm to those primarily affected and those who can in turn effect meaningful repair: to those who have done wrong or are responsible for harm, to victims, to immediate communities of care of victims and offenders, and to larger affected or interested communities.
5. Restorative justice aims at offering those responsible for wrong and harm the opportunity through accountability and repair to earn self-respect and to be reintegrated without stigma into their communities.
6. Restorative justice seeks to build and strengthen individuals' and communities' capacities to do justice actively, and not to surrender the role of doing justice to experts, professionals, or "the state," which should play facilitating roles.<sup>87</sup>

A common thread in these goals is the establishment of productive relationships between victims, offenders, and their mutual communities.<sup>88</sup>

Restorative justice focuses on how the victims of crimes are hurt, what led up to the occurrence of the crime, and ways the crime can be remedied.<sup>89</sup> This reconceptualization of justice does not exonerate offenders from their crimes, but rather presents an alternative "to restore what [the offender] has harmed to the extent possible."<sup>90</sup> Offenders are given the opportunity to confront the crime and take positive action to help rebuild trust in the larger community.<sup>91</sup> By focusing on

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86. *Id.*

87. Margaret Urban Walker, *Restorative Justice and Reparations*, in A RESTORATIVE JUSTICE READER, *supra* note 78, at 178, 179.

88. *See id.*

89. Francis J. Schweigert, *Learning the Common Good: Principles of Community-Based Moral Education in Restorative Justice*, 28 J. MORAL EDUC. 163, 168 (1999) ("Restorative justice is most simply defined as repairing the harm done to all who are harmed by offensive behaviour. This understanding of justice entails five key reforms: a redefinition of crime, a refocus on victims, a redirection of offender accountability, a reinvestment in community social control and a redesign of the judicial process.").

90. *Id.* at 169.

91. *Id.*

social structures as opposed to policing and courts, restorative justice can address roots of crimes and prevent them from occurring.<sup>92</sup>

#### B. RESTORATIVE JUSTICE METHODS & LEGISLATION

There are two primary methods of restorative justice: individual and community-based. Both methods employ some combination of the following techniques: “victim restitution, community policing, community prosecution, sentence to service, community probation, victim offender mediation and various forms of victim offender conferencing.”<sup>93</sup> Individual restorative justice begins with the people who are most immediately impacted by the crime.<sup>94</sup> Community-based methods bring in a wider swath of people for macro-level conversations.<sup>95</sup> Wider reaching conversations can help reestablish a sense of common good and empathy.<sup>96</sup> This commonality is reinforced by looking at communities as being multilayered, with members “bonded with each other in a multitude of ways, some chosen and some given.”<sup>97</sup> In that sense, someone who identifies as LGBTQ is bonded with the LGBTQ community but also with the broader community.

The two restorative justice methods manifest in different approaches to reform,<sup>98</sup> all of which possess the same goal: utilize community engagement as an alternative to “courtroom” responses to crime.<sup>99</sup> The “encounter” approach to restorative justice focuses on the exchange between a victim and an offender, putting power back into the hands of the victim rather than the criminal justice system.<sup>100</sup> Mediation is one of the most common forms of “encounter,” but victims and offenders may also exchange letters or videos as a form of indirect communication.<sup>101</sup> A “reparative” conception of restorative

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92. *Id.* (citing the Minnesota Department of Corrections as admitting the police and courts can only respond to crimes after they happen).

93. *Id.*

94. Robert B. Coates, Mark S. Umbreit & Betty Vos, *Responding to Hate Crimes Through Restorative Justice Dialogue*, in *A RESTORATIVE JUSTICE READER*, *supra* note 78 at 161, 168.

95. *Id.*

96. *See generally* Schweigert, *supra* note 89 (describing benefits of restorative justice as moral education for communities).

97. *Id.* at 167.

98. For a brief breakdown of different conceptions of restorative justice, see Gerry Johnstone & Daniel W. Van Ness, *The Meaning of Restorative Justice*, in *A RESTORATIVE JUSTICE READER*, *supra* note 78 at 12, 12–22.

99. *Id.*

100. *Id.* at 14.

101. *Encounter*, CTR. FOR JUST. & RECONCILIATION, <http://restorativejustice.org/restorative-justice/about-restorative-justice/tutorial-intro-to-restorative-justice/>

justice starkly departs from any notion of punishment or pain against the offender and instead seeks to develop lasting change through repairing any harm that was caused.<sup>102</sup> For instance, an offender who stole property could return the property or repay its value as an expression of remorse.<sup>103</sup> Others take a more macro “transformative” approach to restorative justice, with the goal of “transform[ing] the way in which we understand ourselves and relate to others in our everyday lives.”<sup>104</sup>

Restorative justice is not entirely separated from the court system; defendants can be sent to restorative justice programs as part of plea deals with the court.<sup>105</sup> Sentencing circles are individual restorative justice methods that invite victims and charging parties (i.e. the prosecutors) to attend meetings geared toward finding an equitable sentencing recommendation for the crime at hand.<sup>106</sup> For example, the defendant in *State v. Pearson* was charged with two felony theft counts for lying about her income to receive food stamps and government assistance.<sup>107</sup> The district court assigned her case to a sentencing circle as part of her plea deal.<sup>108</sup> The defendant attended fourteen hours of “circle” meetings that resulted in a recommendation that she “receive a stay of adjudication, pay restitution, obtain credit counseling, perform community service, participate in support/follow up circles,” and a general prohibition from committing same or similar crimes.<sup>109</sup> The recommendations that came from Pearson’s circle were upheld in district court then affirmed on appeal by the Minnesota Supreme

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lesson-1-what-is-restorative-justice/encounter/ [https://perma.cc/PE8T-WMQQ].

For a description of mediation techniques, see FREDERIC G. REAMER, HEINOUS CRIME: CASES, CAUSES, AND CONSEQUENCES 217–20 (2005).

102. See Johnstone & Van Ness, *supra* note 98, at 16.

103. REAMER, *supra* note 100, at 214–15 (describing how repairing harms done onto victims can enhance an offender’s “own sense of dignity and reduce their sense of shame.”).

104. Johnstone & Van Ness, *supra* note 98, at 19. Some authors have argued that the word “justice” prevents societal transformation because of its entanglement with “historical actions, systems, and narratives that have codified and exacerbated marginalization, oppression, and exclusion.” *E.g.*, Mara Schiff & David Anderson Hooker, *Neither Boat Nor Barbeque: In Search of New Language to Unleash the Transformative Possibility of Restorative Justice*, 22 CONTEMP. JUST. REV. 219, 221 (2019).

105. See, *e.g.*, *State v. Pearson*, 637 N.W.2d 845, 846 (Minn. 2002) (“Appellant and the state negotiated a plea agreement, under which the case would be referred to a sentencing circle prior to sentencing by the court.”).

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.*

Court.<sup>110</sup> As the Court described, “[t]he work of a circle is often arduous, emotional and time-consuming,” so resultant outcomes should not be limited after-the-fact.<sup>111</sup>

There is legislative endorsement in Minnesota for restorative justice practices. Pearson’s sentencing circle was sanctioned by section 611A.775 of the Minnesota Statutes, which provides that:

A community-based organization, in collaboration with a local governmental unit, may establish a restorative justice program. A restorative justice program is a program that provides forums where certain individuals charged with or petitioned for having committed an offense meet with the victim, if appropriate; the victim’s family members or other supportive persons, if appropriate; the offender’s family members or other supportive persons, if appropriate; a law enforcement official or prosecutor when appropriate; other criminal justice system professionals when appropriate; and members of the community, in order to:

- (1) discuss the impact of the offense on the victim and the community;
- (2) provide support to the victim and methods for reintegrating the victim into community life;
- (3) assign an appropriate sanction to the offender; and
- (4) provide methods for reintegrating the offender into community life.<sup>112</sup>

This statute “explicitly gives restorative justice programs the authority to assign appropriate sanctions to an offender.”<sup>113</sup> Despite having seemingly broad authority, the statute is limited by not providing guidelines for how eligible cases would be selected.<sup>114</sup> Additionally, while all parties to a case need to agree to participate in a restorative justice program, they are not required to attend meetings.<sup>115</sup> If parties who agreed to restorative justice fail to show up, the process is moot. These ambiguities in the Minnesota Statute could prevent some of the potential positive outcomes of restorative justice, such as renewed conversation and trust in a community.

### C. RESTORATIVE JUSTICE OUTCOMES

Restorative justice has been shown to “reduce recidivism, provide restitution to victims . . . reduce fear of crime and satisfy clients.”<sup>116</sup> One of the primary educative goals of restorative justice is to “reduc[e] future offences by healing the community, lessening the amount of fear felt by residents and reaffirming the community’s

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110. *Id.*

111. *Id.* at 848–49.

112. Minn. Stat. § 611A.775 (2019).

113. *Pearson*, 637 N.W.2d at 847.

114. 9 MINN. PRAC. *Restorative Justice* § 36:67 (4th ed.).

115. *Pearson*, 637 N.W.2d at 848 n. 2.

116. Schweigert, *supra* note 89, at 172.

standards of behaviour.”<sup>117</sup> Offenders are also able to learn about the consequences of their actions in a proactive way as opposed to being thrown in jail.<sup>118</sup> Allowing victims and offenders to collaborate on repairing harm from crimes can translate into broader community moral development.<sup>119</sup> For example, sentencing circles as a form of restorative justice have helped repair community connections in Minnesota.<sup>120</sup> Once empathy, communication, and problem solving are established between opposing parties, those skills are recreated in the community. As a member of the White Earth Nation described restorative justice practices, “[t]his is about: Do we love ourselves? Do we love our community? Are we going to take care of each other?”<sup>121</sup>

### III. APPLYING RESTORATIVE JUSTICE PRINCIPLES TO PREVENT HATE CRIMES AGAINST LGBTQ PEOPLE

Mass incarceration and hate crimes have many similarities; the two concepts both rely on binary systems of “us vs. them,” and “right vs. wrong.”<sup>122</sup> A binary structure makes it easier to justify sending people to prison for long periods of time by placing those people into a category of “bad” or “evil.”<sup>123</sup> Binary structures (good versus bad) are rigid and do not allow for flexibility of beliefs or latitude for

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117. *Id.*

118. *Id.*

119. *See id.* at 178.

120. Kay Pranis, *Restoring Community: The Process of Circle Sentencing, Presentation at Justice Without Violence: Views from Peacemaking Criminology and Restorative Justice* (June 6, 1997), available at <http://mn.gov/law-library-stat/archive/urlarchive/c9992021-1.pdf> [<https://perma.cc/6XNS-U5XB>] (citing numerous positive community outcomes to restorative justice).

121. *Id.* (describing different outcomes of restorative justice sentencing circles on the Mille Lacs Indian Reservation in central Minnesota).

122. *See e.g.*, The New Yorker: Politics & More, *What Would a World Without Prisons be Like?*, THE NEW YORKER (Jan. 27, 2020), <https://www.newyorker.com/podcast/political-scene/what-would-a-world-without-prisons-be-like> [<https://perma.cc/MR49-WCDT>] (“Abolition is not just about ending prisons, it’s about ending binary processes that pit us as ‘us / them’, ‘right / wrong’, somebody has to be lying, somebody is telling the truth; that is not the way that we get to healing.”).

123. Larry Krasner, Philadelphia’s progressive District Attorney, described something similar at a talk he gave to Minnesota Law students in March 2020. Kramer said that it is easier to lock people up when we think of them as “bad” and ourselves as “good.” Larry Krasner, Dist. Att’y, City of Phila., *The Role of Progressive Prosecutors in Promoting Meaningful Criminal Justice Reform*, Address to University of Minnesota Criminal Justice League (Mar. 4, 2020). Part of his work is meant to break that binary and instead approach people as having stories and circumstances that led them to commit certain offenses. *Cf. Larry Krasner Is Trying To Transform Criminal Justice In Philadelphia* (HBO), YOUTUBE (Mar. 15, 2018, at 4:44), <https://youtu.be/yuKdByZwuAo> (describing how people are imprisoned for poverty, not inherent criminality).

offenders to change.<sup>124</sup> Despite what our system of mass incarceration would imply, nobody is all good or all evil. Unmoving conceptions of otherness fuel the fear that may lead people to commit hate crimes.<sup>125</sup> Just like lengthy incarceration has been proven ineffective in turning a “bad” person into a “good” person,<sup>126</sup> hate crime laws have not reduced rates of bias-motivated acts of violence.<sup>127</sup> This binary begins to be broken down when policies stop treating people as possessing inherent goodness or badness and instead start seeing them as capable of change and part of a common community.

Hate crimes are acts of violence that stem from biases against certain groups, such as LGBTQ-identifying people. Structured dialogue between parties at conflict with one another can be an effective response to hate crimes.<sup>128</sup> Responses, however, fall short of preventing hate crimes from happening. This Section argues that restorative justice can be used as a preventative measure against hate crimes toward LGBTQ people. It does so by analyzing hate crimes as fear-based and fear-inducing phenomena then presenting restorative justice as a fear-reduction tool.

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124. This critique of rigid dualisms is inspired by Karen Warren, a philosopher at Macalester College. Warren proposes that we break from ethical dualisms of “right” and “wrong,” and instead think of ethics as a changing thing. See Kelly A. Burns, *Warren’s Ecofeminist Ethics and Merleau-Ponty’s Body-Subject: Intersections*, ETHICS & ENVIRO., Fall 2008, at 101, 103 (2008). She uses the Names Project Quilt as an example of this theory, explaining that there is a common thread that all squares on the quilt relate to someone who has died from AIDS. *Id.* Aside from that commonality, each square is different and creates an overall design in progress. *Id.* Warren’s dismissal of ethics as static and pre-ordained, *see id.* at 104, is reminiscent of the theory of a “living Constitution.” A discussion about that parallel is beyond the scope of this project.

125. See generally WALTERS, *supra* note 20 (giving an overview of where hate crimes originate).

126. Jonathan Lippman, *Give Judges More Leeway to Use Incarceration Alternatives for Violent Criminals*, USA TODAY (Jan. 24, 2019), <https://www.usatoday.com/story/opinion/policing/2019/01/24/violent-crime-mass-incarceration-alternatives-policing-the-usa-prison-jail/2483698002/> [https://perma.cc/N6MY-75U8] (“In many cases, lengthy prison terms do little to deter negative behavior and instead only make it more difficult for individuals to reintegrate back into our society.”).

127. The number of hate crimes toward LGBTQ people in particular have not changed with any statistical significance since the introduction of the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act in 2009. See *supra* note 6 (presenting statistics on hate crimes).

128. See Coates et al., *supra* note 94, at 161.

A. THE COMMON TRAIT OF “FEAR” CAN BRIDGE A GAP OF UNDERSTANDING BETWEEN VICTIMS AND OFFENDERS

Hate crimes against LGBTQ victims stand out amidst other hate crime victims. LGBTQ victims are less likely to make reports to police because they “fear . . . hostility or mistreatment by law enforcement officials, and fear of public disclosure of their sexual orientation.”<sup>129</sup> They also experience psychosocial effects of crimes such as “lowered self-esteem; feelings of guilt, shame, anxiety, and depression; symptoms resembling posttraumatic stress disorder; anger; withdrawal from the community; fear of injury and crime; less willingness to believe in the general benevolence of people; and . . . secondary victimization.”<sup>130</sup> Motives for hate crimes against LGBTQ people fall into categories of self-defense, ideology, thrill-seeking and peer dynamics.<sup>131</sup> Fear is common in each of these categories: fear of otherness, fear of religious immorality, fear of being labeled as queer, and fear of one’s own queerness.

Fear can be stamped out by tapping into commonality. Restorative justice methods thrive on rebuilding gaps between victims and offenders. While traditional punishment for crimes done onto marginalized groups is appropriate in some cases, it does not repair fissures. Existing federal law is calling out for an approach to conflict resolution that creates opportunity for growth over retribution.

B. RESTORATIVE JUSTICE AS A NEW LEGISLATIVE SOLUTION

Hate crimes represent a lack of understanding between communities and can be addressed through a reestablishment of empathy and commonality. As President Obama expressed in his celebration of the Matthew Shephard Act, hate crimes begin “the moment we fail to see in another our common humanity – the very moment when we fail to recognize in a person the same fears and hopes, the same passions and imperfections, the same dreams we all share.”<sup>132</sup> In describing a sentencing enhancing statute, President Obama was, perhaps

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129. Cramer, *supra* note 4, at 9 (citation omitted). The historic tension between LGBTQ people and police was most famously demonstrated in the Stonewall riots in June 1969. For a brief history on the Stonewall Riots, see *The Stonewall Riots Begin in NYC’s Greenwich Village*, HISTORY (June 25, 2020), <https://www.history.com/this-day-in-history/the-stonewall-riot> [<https://perma.cc/K4PZ-4A72>].

130. Cramer, *supra* note 4, at 15–16 (defining secondary victimization as “when others respond negatively to a crime victim because of her or his sexual orientation”).

131. *Id.* at 17.

132. Obama, *supra* note 37.

inadvertently, promoting restorative justice ideals.<sup>133</sup> While our hate crime laws are based on anti-discrimination, our system of incarceration does not recognize common humanity and instead operates within a worldview of “us and them.”<sup>134</sup> Incorporating restorative justice into preexisting hate crime laws can provide a means to break down that binary and prevent violence.

Restorative justice is a voluntary process, which makes sense because it requires both parties (and at times, their communities) to engage in the conversation to achieve outcomes. Oftentimes, restorative justice circles are offered as part of plea deals, requiring both the prosecutor and defendant to agree that they will participate.<sup>135</sup> Because it must be voluntary, restorative justice should not be the only option for punishing hate crime offenders. Just as Minnesota’s restorative justice statute supplements traditional criminal statutes, so too must a federal restorative justice statute. This can be accomplished by introducing language into the Matthew Shepard Act that gives victims and offenders an option to pursue restorative justice methods instead of mandatory sentencing enhancements. Below is the current language of the Matthew Shepard Act with the suggested amended language in bold:

(a) In general.

(1) Offenses involving actual or perceived race, color, religion, or national origin. Whoever, whether or not acting under color of law, willfully causes bodily injury to any person or, through the use of fire, a firearm, a dangerous weapon, or an explosive or incendiary device, attempts to cause bodily injury to any person, because of the actual or perceived race, color, religion, or national origin of any person—

(A) shall be imprisoned not more than 10 years, fined in accordance with this title, or both; OR

(B) shall be imprisoned for any term of years or for life, fined in accordance with this title, or both, if—

(i) death results from the offense; or

(ii) the offense includes kidnapping or an attempt to kidnap, aggravated sexual abuse or an attempt to commit aggravated sexual abuse, or an attempt to kill.; **OR**

**(C) upon agreement of victim, their families, prosecutors, and the offender, participate in a restorative justice program that provides forums where certain individuals charged with or**

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133. *Id.* (“Through conflict and tumult, through the morass of hatred and prejudice, through periods of division and discord we have endured and grown stronger and fairer and freer. And at every turn, we’ve made progress not only by changing laws but by changing hearts, by our willingness to walk in another’s shoes, by our capacity to love and accept even in the face of rage and bigotry.”).

134. WHITLOCK, *supra* note 11, at 23.

135. *See supra* note 105 and accompanying text.

petitioned for having committed an offense meet with the victim, if appropriate; the victim's family members or other supportive persons, if appropriate; the offender's family members or other supportive persons, if appropriate; a law enforcement official or prosecutor when appropriate; other criminal justice system professionals when appropriate; and members of the community, in order to:

(i) discuss the impact of the offense on the victim and the community;

(ii) provide support to the victim and methods for reintegrating the victim into community life;

(iii) assign an appropriate sanction to the offender; and

(iv) provide methods for reintegrating the offender into community life;

(D) parties who participate in a restorative justice program must:

(i) attend all agreed upon meetings;

(ii) provide a good faith effort to resolving the conflict through conversation, reparation, or other non-carceral methods.

(E) if any participating parties are in disagreement about or contest to the results of the restorative justice process, the matter reverts back to (a)(1)(A) or (a)(1)(B) for sentencing.

(2) Offenses involving actual or perceived religion, national origin, gender, sexual orientation, gender identity, or disability.

(A) In general. Whoever, whether or not acting under color of law, in any circumstance described in subparagraph (B) or paragraph (3), willfully causes bodily injury to any person or, through the use of fire, a firearm, a dangerous weapon, or an explosive or incendiary device, attempts to cause bodily injury to any person, because of the actual or perceived religion, national origin, gender, sexual orientation, gender identity, or disability of any person—

(i) shall be imprisoned not more than 10 years, fined in accordance with this title, or both; **OR**

(ii) shall be imprisoned for any term of years or for life, fined in accordance with this title, or both, if—

(I) death results from the offense; or

(II) the offense includes kidnapping or an attempt to kidnap, aggravated sexual abuse or an attempt to commit aggravated sexual abuse, or an attempt to kill; **OR**

(iii) upon agreement of victim, their families, prosecutors, and the offender, participate in a restorative justice program that provides forums where certain individuals charged with or petitioned for having committed an offense meet with the victim, if appropriate; the victim's family members or other supportive persons, if appropriate; the offender's family members or other supportive persons, if appropriate; a law enforcement official or prosecutor when appropriate; other criminal justice system

professionals when appropriate; and members of the community, in order to:

(I) discuss the impact of the offense on the victim and the community;

(II) provide support to the victim and methods for reintegrating the victim into community life;

(III) assign an appropriate sanction to the offender; and

(IV) provide methods for reintegrating the offender into community life.”

(iv) parties who participate in a restorative justice program must:

(I) attend all agreed upon meetings;

(II) provide a good faith effort to resolving the conflict through conversation, reparation, or other non-carceral methods.

(v) if any participating parties are in disagreement about or contest to the results of the restorative justice process, the matter reverts back to (a)(2)(A)(i), (ii) for sentencing.<sup>136</sup>

The proposed amended language is drawn from the Minnesota restorative justice statute.<sup>137</sup> Parts (a)(1)(D) and (a)(2)(A)(iv) were drafted to address the ambiguity in the Minnesota statute that sometimes results in a party not showing up to sentencing circles.<sup>138</sup> Parts (a)(1)(E) and (a)(2)(A)(v) create a contingency plan to revert back to the original sentencing scheme if the restorative justice process fails.

The standard of judicial review in the revised Matthew Shepherd Act should be clearer than the Minnesota standard. Indeed, the Minnesota restorative justice statute fails to indicate if “the legislature intended that courts abdicate their sentencing authority.”<sup>139</sup> A revised federal statute should maintain the judiciary’s rule in adjudicating and sentencing but establish deference to the resolution reached in the restorative justice process. Just as a judge may depart from a plea agreement that is unsuitable, so too may a judge depart from recommendations from the victims and offenders. However, unlike a standard plea

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136. 18 U.S.C. § 249 amended with language from Minn. Stat. § 611A.775 (2019). Sections (a)(1) and (a)(2) are similar in terms of their sentencing structure. Section (a)(2) extends to gender, sexual orientation, gender identity, and disability. The substantive difference between these sections is (a)(2)(B), which couches the protections of these new classes of people in the Constitution’s Commerce Clause. *See* 18 U.S.C. § 249(a)(2)(B).

137. *See* Minn. Stat. § 611A.755 (2019).

138. *See supra* Part II.B.

139. *State v. Pearson*, 627 N.W.2d 845, 848 (Minn. 2002) (leaving “for another day” whether a court will be bound by any conditions imposed on the restorative justice program by the parties).

agreement or reference to sentencing guidelines, the restorative justice process requires much more time and personal investment on behalf of the parties.<sup>140</sup> When a restorative justice group reaches a consensus and communicates it to the court, the court should defer to that consensus. “To [adjudicate] otherwise would render meaningless the hours of effort and discussion aimed at reintegrating offenders and victims into community life . . . .”<sup>141</sup>

Amending hate crime legislation to include restorative justice does not impose alternative punishment but an option other than a sentence enhancement. This approach makes it more likely that restorative justice will work because the participating parties are choosing it. In doing so, it centers the perspective of victims and brings them into the justice process if they so choose. Prosecutors are included in the proposed amendment because currently they are tasked with representing the will of the public. As communities move away from mass incarceration and punitive punishment, and more toward collective healing efforts, the prosecutors’ role in the conversation should diminish.

#### CONCLUSION

Queer people are aware they could be the targets of homophobic acts of violence. Inciteful dog whistles to hate groups by political leaders increase that awareness. We are aware of the potential for attacks when we hold hands with our partners in rural towns or attend queer dance parties. Hate crime laws provide some solace because they serve as governmental recognition that Matthew Shepard should not have been killed for being gay<sup>142</sup> and that the lives of the Pulse victims mattered. But there is no evidence that the laws will prevent the crimes. Hate crime legislation comes from an admirable place. It is designed to recognize harmed groups and punish offenders in the way lawmakers are familiar with—incarceration. Unfortunately, the laws are both ineffective at deterring crime and contribute to our system of mass incarceration which historically harms the very groups hate crimes seek to protect. Restorative justice creates an alternative to sentencing enhancements in hate crime laws while maintaining the

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140. *See id.* at 850 (Page, J., concurring) (arguing that it would be an absurd misinterpretation of legislative intent to think that sentencing circle participants would invest many hours into a process only to be confined by sentencing guidelines).

141. *Id.*

142. *Hearing, supra* note 9 (statement of Roy L. Austin, Jr., Deputy Assistant Att’y Gen., Civil Rights Division, U.S. Dep’t of Justice) (“Our work is about a gay man who was kidnapped and assaulted in Kentucky because he is gay.”).

group-recognition social benefits that hate crime laws provide. Incorporating an option for restorative justice into already existing hate crime laws helps reconcile the need to recognize the impact of hate crimes with criminal justice reform goals.