

Written Statement of

Shirin Sinnar
Professor of Law
Stanford Law School

Submitted to the U.S. House Committee on the Judiciary
Subcommittee
on the Constitution, Civil Rights, and Civil Liberties

For a Hearing on
“Discrimination and Violence against Asian Americans”

March 18, 2021

Discrimination and Violence against Asian Americans

Written Statement of Professor Shirin Sinnar, Stanford Law School

I thank Chairman Nadler and Ranking Member Jordan of the U.S. House Committee on the Judiciary and Chairman Cohen and Ranking Member Johnson of the Subcommittee on the Constitution, Civil Rights and Civil Liberties, for the opportunity to testify at this hearing. I am a law professor at Stanford University. I research and teach on national security law, civil rights and liberties, and civil procedure. My scholarly work addresses the legal treatment of political violence, including terrorism and hate crimes, and national security oversight through courts and executive agencies.¹ Prior to my initial appointment at Stanford Law School in 2009, I served as a civil rights lawyer for the Asian Law Caucus and the Lawyers' Committee for Civil Rights in San Francisco. For the past year, I have been working with a team of Stanford Law students and the Brennan Center for Justice on a policy research project assessing the criminal legal response to hate crimes and other mechanisms for addressing and preventing hate crimes. My testimony today draws in part on that research but represents my perspective alone.

I. Recent Anti-Asian Hate Violence

Asian American communities over the past year have experienced fear and stigma from a wave of harassment and hate violence. During the first six months of the pandemic alone, the coalition Stop AAPI Hate logged over 2,500 anti-Asian hate incidents across the nation, including verbal harassment and physical assaults.² The Center for the Study of Hate and Extremism at California State University-San Bernardino reports that anti-Asian hate crimes in 2020 in 16 of the largest U.S. cities, as reported to police departments, surged to 149% of the previous annual total.³

As hate crime scholars have documented, hate violence inflicts psychological and citizenship harm on both direct victims and the larger communities that share the victims' identities, in addition to society at large.⁴ The recent spate of anti-Asian violence has left elderly people afraid to leave their homes and parents reluctant to send their children to in-person school out of

¹ For examples, please see Shirin Sinnar & Beth A. Colgan, *Revisiting Hate Crimes Enhancements in the Shadow of Mass Incarceration*, 95 N.Y.U. L. REV. ONLINE 149 (2020); Shirin Sinnar, *Separate and Unequal: The Law of "Domestic" and "International" Terrorism*, 117 MICH. L. REV. 1333 (2019); Shirin Sinnar, *Procedural Experimentation and National Security in the Courts*, 106 CAL. L. REV. 991 (2018); Shirin Sinnar, *Rule of Law Tropes in National Security*, 129 HARV. L. REV. 1566 (2016); and Shirin Sinnar, *Protecting Rights from Within? Inspectors General and National Security Oversight*, 65 STAN. L. REV. 1027 (2013).

² Press Release, Stop AAPI Hate, Attacks Against AAPI Community Continue to Rise During Pandemic, Aug. 27, 2020.

³ Ctr. for the Study of Hate & Extremism, Fact Sheet: Anti-Asian Prejudice March 2020 – Center for the Study of Hate & Extremism (Mar. 2020), <https://www.csusb.edu/sites/default/files/FACT%20SHEET-%20Anti-Asian%20Hate%202020%203.2.21.pdf>.

⁴ See, e.g., MARK WALTERS, HATE CRIME AND RESTORATIVE JUSTICE: EXPLORING CAUSES, REPAIRING HARMS 76, 88 (2014) (noting empirical research on heightened harm to hate crime victims). See also *Wisconsin v. Mitchell*, 508 U.S. 476, 487-88 (1993) (noting arguments that bias-motivated crimes inflict "greater individual and social harm" and are "more likely to provoke retaliatory crimes, inflict distinct emotional harms on their victims, and incite community unrest.").

fear of racial harassment.⁵ For many people within targeted communities, hate incidents shake one's sense of belonging in this nation—affecting even those born in the United States or whose families have lived here for generations. For many Asian Americans, hate violence sends the message that, no matter how deep your roots, you remain “perpetual foreigners.”

Many South Asian Americans can relate to the recent targeting of Chinese Americans and other Asian American communities. The pervasive racialization of South Asian, Muslim, Sikh, and Arab American communities as “terrorists” over the past two decades has created an abiding fear of hate violence for those communities. In 2012, a white supremacist who had been active in a neo-Nazi skinhead gang shot dead six Sikh worshippers at the Sikh Temple of Washington.⁶ Between 2015 and 2017, multiple reports documented a surge in hate violence directed at South Asian, Muslim, and Arab communities.⁷ The advocacy group South Asian Americans Leading Together observed that this “wave of hate violence against South Asian, Muslim, Sikh, Hindu, Middle Eastern, and Arab communities” occurred at a level “not seen since the year after the attacks of September 11, 2001,” amid anti-immigrant and racial rhetoric that created a “palpable and unparalleled atmosphere of hate and suspicion.”⁸ While that immediate surge may have subsided, hate violence persists. For instance, attacks on Sikh Americans in recent years have included a Denver business owner run over with a vehicle after being told to “go back to your country,” a California man ambushed by two men who then spray-painted a neo-Nazi image on his truck, and a Washington state Uber driver choked by a passenger who assailed his skin color and Indian descent.⁹

II. The Impact of Political Rhetoric and Policies on Hate Violence

The causes of hate crimes are complex and cannot be reduced to a single explanation. That said, academic studies substantiate the notion that government speech and actions towards racial minority groups can influence the level of hate crimes committed against those groups.¹⁰ For

⁵ See, e.g., Kiara Brantley-Jones & Stacy Chen, *Violent Attacks On Elderly Asian Americans In Bay Area Leaves Community Members 'Traumatized,'* abcnews.com Feb. 11, 2021 (referring to elderly Asian Americans afraid to walk the streets); Moriah Balingit, et al, *As Schools Reopen, Asian American Students Are Missing From Classrooms,* WASH. POST, Mar. 4, 2021 (reporting greater absence of Asian American children from classrooms as a result of factors including fears of transmitting virus within multigenerational families and racial harassment).

⁶ A.C. Thompson, *Sikhs in America: A History of Hate,* PROPUBLICA, Aug. 4, 2017.

⁷ Eric Lichtblau, *Hate Crimes Against American Muslims Most Since Post-9/11 Era,* N.Y. TIMES, Sept. 17, 2016 (noting highest level of anti-Muslim hate crimes since the post-9/11 aftermath, based on police department data analyzed by the Center for the Study of Hate and Extremism at California State University-San Bernardino).

⁸ SOUTH ASIAN AMERICANS LEADING TOGETHER, *COMMUNITIES ON FIRE: CONFRONTING HATE VIOLENCE AND XENOPHOBIC POLITICAL RHETORIC* 3 (2018).

⁹ See, e.g., *Man Charged With Hate Crime In Attack On Sikh Uber Driver,* Komo News, Dec. 11, 2019; Lakshmi Sarah & Kate Wolffe, *Hate Crime? Sikh Community Asks FBI to Investigate Stabbing Death in Tracy,* KQED, Aug. 29, 2019; *Man Accused Of Running Over Sikh Man Charged With Hate Crime,* Assoc. Press, July 24, 2020.

¹⁰ Laura Dugan & Erica Chenoweth, *Threat, Emboldenment, or Both? The Effects of Political Power on Violent Hate Crimes,* 58 CRIMINOLOGY 714 (2020). Dugan and Chenoweth studied the relationship between U.S. federal government speech and policies supporting or opposing racial minorities and federal violent hate crime statistics between 1992 and 2012. They found support for two hypotheses drawn from earlier literature: the “political threat hypothesis,” which “predicts that violent backlash against specific groups is triggered by political gains made by those groups,” and the “emboldenment hypothesis,” which predicts increases in hate crimes “triggered by government elites who signal supremacy over those groups, emboldening some members of the dominant group to commit violent action.” *Id.* at 716. The study concluded that, in their data, federal actions against immigrants and

instance, hostile rhetoric from elites targeting particular racial groups can embolden people to engage in hate violence against those communities.¹¹ Studies have also shown an increase in hate crimes following political events that change perceptions of social norms, such as the acceptability of anti-immigrant or racist views.¹² In this case, former President Trump’s use of racist language to characterize the coronavirus, such as the “China virus” or “kung flu,” licenses the public to blame Chinese Americans for the pandemic.¹³ According to one analysis, a quarter of anti-Asian hate incidents reported during the pandemic used “language similar to Trump’s,” such as his racist terms for the virus.¹⁴ Political rhetoric that scapegoats a particular ethnicity makes that group vulnerable to both racially motivated and opportunistic attacks.

Other research supports a connection between hate crimes levels and the rhetoric and policies of former President Trump. Studies showed a surge in hate crimes during and immediately after the 2016 presidential election, which Donald Trump won after campaigning to ban Muslims from entering the United States and build a wall barring Mexican migrants. For example, the Center for Study of Hate and Extremism at California State University-San Bernardino found that November 2016 represented the highest monthly total for hate crimes since 2007, with a spike on the day after the election of President Trump and in the following two weeks, and that in 2017, hate crimes reported to law enforcement in the ten largest U.S. cities rose 12.5%, the fourth consecutive annual rise.¹⁵

Latinx persons emboldened violent hate crimes committed against them, but that federal speech and actions supporting Black people catalyzed violent backlash. Id. at 742.

¹¹ Id. at 743 (“Indeed, our results confirm evidence from other studies suggesting that hate speech among elites can motivate hate crimes among constituents.”).

¹² For example, a number of empirical studies attributed a spike in hate crimes in England and Wales to the unexpected “Brexit” referendum vote to leave the European Union, which was associated with anti-immigrant sentiment. See, e.g., Daniel Devine, *Discrete Events and Hate Crimes: The Causal Role of the Brexit Referendum*, 102 SOC. SCI. Q. 374, 374, 383 (2021) (concluding that Brexit vote led to a 19-23% increase in racial and religious hate crimes and that this result is consistent with the explanation that the “outcome of the referendum legitimated or validated these underlying [anti-immigrant] prejudices enough to lead to public expressions of this prejudice in the form of hate crimes.”); Joel Carr et. al, *Love Thy Neighbour? Brexit and Hate Crime*, IZA Institute of Labor Economics 2-5 (Nov. 2020), <http://ftp.iza.org/dp13902.pdf> (concluding that Brexit vote caused a 15-25% increase in racial and religious hate crimes); Facundo Albornoz et al, *The Brexit Referendum and the Rise in Hate Crime; Conforming to the New Norm*, Nottingham Interdisciplinary Centre for Economic and Political Research Working Paper (Nov. 9, 2020), <https://www.nottingham.ac.uk/research/groups/nicep/documents/working-papers/2020/nicep-2020-06.pdf> (concluding that increase in hate crimes was greater in areas that voted to remain in the E.U. and theorizing that Brexit vote updated perception of social norms especially for people within pro-Remain areas who had previously repressed anti-immigrant beliefs because of social norms).

¹³ See Bruce Y. Lee, *Trump Once Again Calls Covid-19 Coronavirus The ‘Kung Flu’*, FORBES, June 24, 2020; Donald Trump CPAC 2021 Speech Transcript, rev.com, Feb. 28, 2021 (referring several times to the “China virus”).

¹⁴ Jaweed Kaleem et al, *Anti-Asian Hate Crimes And Harassment Rise To Historic Levels During COVID-19 Pandemic*, L.A. TIMES, Mar. 5, 2021 (citing Manjusha Kulkarni, co-founder of the Stop AAPI Hate tracker and the executive director of the Asian Pacific Policy and Planning Council).

¹⁵ Brian Levin & John David Reitzel, Center for the Study of Hate & Extremism, Cal. State. Univ.-San Bernardino, Report to the Nation Hate Crimes Rise in U.S. Cities and Counties in Time of Division & Foreign Interference 3, 15 (2018). Several other studies using FBI hate crime data similarly demonstrated a spike in hate crimes during the month of November 2016 or the final quarter of 2016. Id. at 15 (listing studies). See also Griffin Edwards & Stephen Rushin, *The Effect of President Trump’s Election on Hate Crimes* (Jan. 14, 2018), available at SSRN: <https://ssrn.com/abstract=3102652> (finding a “statistically significant surge in reported hate crimes across the United States, even when controlling for alternative explanations” and that “counties that voted for President Trump by the widest margins in the presidential election experienced the largest increases in reported hate crimes.”). Edwards and

Moreover, a significant fraction of perpetrators in these earlier hate incidents invoked then-President Trump or his campaign policies. A 2018 report from the South Asian Americans Leading Together asserted that, of 302 incidents of hate violence targeting South Asian, Muslim, Sikh, Hindu, Middle Eastern, and Arab communities in the year after the election, one in five perpetrators “referenced President Trump, a Trump policy, or a Trump campaign slogan, underlining a strong link between President Trump’s anti-Muslim agenda and hate violence post-election.”¹⁶ To cite just one example, after the Trump administration announced its second “travel ban” directed at citizens of several majority-Muslim countries, hateful messages sent to a Hawaii mosque stated: “Now we have a president who knows that you guys are evil and we’re going to exterminate you.”¹⁷ While no single hate crimes audit supplies a comprehensive or representative account of U.S. hate crimes, these studies suggest a relationship between presidential rhetoric and policies and a substantial subset of hate crimes. Further support comes from research demonstrating a “strong time series correlation between Trump’s tweets on Islam-related topics and the number of anti-Muslim hate crimes after the start of his presidential campaign, even after controlling for general attention paid to topics associated with Muslims.”¹⁸

Legal scholars have long posited a relationship between “private” hate violence and “public” rhetoric and racial profiling, extending beyond any one administration. When government language and policies treat racial, ethnic, or religious communities as suspicious or dangerous, that encourages ordinary people to do the same. For example, scholars argued that the over 1,000 hate crimes targeting Muslim, South Asian, Sikh, and Arab communities in the months after September 11, 2001, bore a relationship to the explicit racial profiling of the U.S. government.¹⁹ In the same period that witnessed as many as nineteen hate-motivated murders, the “fire bombings of mosques, temples, and gurdwaras,” and “assaults by fist, gun, knife, and Molotov cocktail,” the federal government detained between 1,200 and 2,000 Muslim, South Asian, and Arab immigrants, mandated the registration and questioning of immigrants from 25 Muslim countries, and targeted immigration enforcement measures at Muslims.²⁰ These programs were largely premised on race, religion, or nationality, rather than an individual basis for suspicion, and stigmatized communities without uncovering terrorist threats.²¹ While the

Rushin argue that it was not the rhetoric alone, but Trump’s subsequent election, which appeared to “validate” his claims and led hate crimes to spike.

¹⁶ SOUTH ASIAN AMERICANS LEADING TOGETHER, COMMUNITIES ON FIRE: CONFRONTING HATE VIOLENCE AND XENOPHOBIC POLITICAL RHETORIC 3 (2018). See also Levin & Reitzel, *supra* note 15, at 14 (citing ProPublica study identifying over 300 hate incidents in 39 states, out of 4,700 incidents, in which perpetrators cited Trump by name). See also COMMUNITIES AGAINST HATE & LEADERSHIP CONFERENCE EDUCATION FUND, HATE MAGNIFIED: COMMUNITIES IN CRISIS 9, 16, 19 (2019) (reporting that 16% of hate incidents reported between March 2017 and May 2018 to the Communities Against Hate database or partner organizations or identified through news media accounts invoked then-President Trump by name or “Trump-related rhetoric,” such as the travel ban or border wall).

¹⁷ SOUTH ASIAN AMERICANS LEADING TOGETHER, *supra* note 16, at 33.

¹⁸ Karsten Müller and Carlo Schwarz, *From Hashtag to Hate Crime: Twitter and Anti-Minority Sentiment* at 3-4 (July 24, 2020), available at SSRN: <https://ssrn.com/abstract=3149103>. The study also examined 115 million tweets from a random 1% sample of Trump’s Twitter followers and found that “Trump’s negative tweets about Muslims are not only widely shared by his followers over the next days but also systematically followed by a spike in new content about Muslims.” *Id.* at 34.

¹⁹ Muneer I. Ahmad, *A Rage Shared By Law: Post-September 11 Racial Violence as Crimes of Passion*, 92 CAL. L. REV. 1259, 1265 (2004); Leti Volpp, *The Citizen and the Terrorist*, 49 UCLA L. REV. 1575, 1582-83 (2002).

²⁰ Ahmad, *supra* note 19, at 1266-77.

²¹ See, e.g., Shirin Sinnar, *The Lost Story of Iqbal*, 105 GEO. L.J. 379, 420-25 (2017) (describing profiling in, and lack of terrorism convictions arising out of, post-9/11 immigrant detentions).

government officially denounced hate crimes, federal policies “projected violence against Arabs, Muslims, and South Asians as a social norm” and legitimized the private violence that ensued.²² Nearly two decades later, the sweeping scope of U.S. counterterrorism policies directed at Muslim communities at home and abroad²³ reinforces perceptions of Muslims as terrorists, subjecting Muslim, South Asian, and Arab Americans to a greater risk of discrimination and hate violence even as studies show that far-right political violence has outpaced that of all other ideologies.²⁴

In light of the fraught U.S.-China relationship, the U.S. government has a responsibility to ensure that opposition to the Chinese government’s economic, geopolitical, or human rights practices does not lead to stigmatization, racial profiling, and discrimination targeting Chinese Americans and immigrants. Programs such as the Justice Department’s “China Initiative” send the message that those of Chinese descent constitute a threat by virtue of their race and heritage.²⁵ Even before the Trump Administration, Chinese American scientists and researchers had faced wrongful prosecutions in which their ethnicity likely played a role.²⁶ As with the post-9/11 framing of Muslim, South Asian, and Arab Americans, the “public” framing of Chinese Americans as national security threats exposes the community to a greater risk of “private” discrimination and violence.

To be clear, none of this suggests that political rhetoric or government policy is the sole cause of recent anti-Asian hate violence. Hate crimes research posits a range of individual and social factors that influence the commission of hate crimes. For instance, some research suggests that “thrill-seeking” behavior characterizes a large number of hate crimes, especially by young people subject to peer influence.²⁷ In addition, although the evidence is mixed as to the relationship between hate crimes and economic factors, some theories predict that competition for scarce resources triggers intergroup hostility or that, “when things are difficult, people will strike out at a convenient target.”²⁸ Multiple explanations for hate crimes can co-exist with the

²² Ahmad, *supra* note 19, at 1323-24.

²³ The U.S. global “war on terror” now spans military operations in 80 countries on six continents at the cost of \$6.4 trillion and over 300,000 civilian lives. Neta C. Crawford, Watson Inst. for Int’l & Pub. Aff., Brown Univ., United States Budgetary Costs and Obligations of Post-9/11 Wars through FY2020: \$6.4 Trillion at 1 (Nov. 13, 2019); Neta C. Crawford & Catherine Lutz, Watson Inst. for Int’l & Pub. Aff., Brown Univ., Human Cost of Post-9/11 Wars at 1 (Nov. 13, 2019). Within the United States, security agencies have “mapped” U.S. Muslim communities, deployed informants throughout these communities, conducted wide-scale “voluntary interviews,” and extensively monitored Internet activity—all with little oversight or accountability. Amna Akbar, *Policing “Radicalization,”* 3 U.C. IRVINE L. REV. 809, 854-68 (2013).

²⁴ SETH G. JONES ET AL, CENTER FOR STRATEGIC AND INT’L STUDIES, THE ESCALATING TERRORISM PROBLEM IN THE UNITED STATES 1, 3 (June 2020); Peter Bergen et al, New America Foundation, Part IV: What is the Threat to the United States Today?, <https://www.newamerica.org/in-depth/terrorism-in-america/what-threat-united-states-today/>.

²⁵ Margaret K. Lewis, *Time to Reassess and Reframe the U.S. Government’s “China Initiative,”* U.S.-Asia Law Institute, Jan. 7, 2021, <https://usali.org/usali-perspectives-blog/time-to-reassess-and-reframe-the-us-governments-china-initiative>; Rory Truex, *What the Fear of China Is Doing to American Science*, Feb. 16, 2021.

²⁶ See, e.g., Teresa Watanabe, *Leading Chinese American Scholars Decry Racial Profiling From Trump’s Hard-Line Policies Against China*, L.A. Times, Sept. 29, 2019.

²⁷ See, e.g., PHYLLIS B. GERSTENFELD, HATE CRIMES: CAUSES, CONTROLS, AND CONTROVERSIES 99-100 (2018) (describing research from multiple studies).

²⁸ See *id.* at 120-23 (describing theoretical and empirical evidence related to the relationship between economics and hate crime).

legitimizing role of political speech and policies. And even when people committing crimes are not acting out of prejudice, anti-Asian political rhetoric can make Asian Americans easy targets by lowering the expected social cost of such targeting.

III. Beyond the Hate Crimes Legal Paradigm

Much of the official response to hate crimes over the past several decades has centered on the enactment and enforcement of laws that either create standalone hate crime charges or that lengthen criminal sentences for bias-motivated crimes.²⁹ For instance, in California, the application of a hate crime enhancement can add up to four years to a person's felony conviction.³⁰ States and the federal government adopted hate crimes laws both because civil rights advocates pressed for governments to take hate violence seriously and because the political climate of the 1980s and 1990s emphasized "tough on crime" responses to social problems.³¹ Nearly all states now have laws directed at crimes targeting victims on the basis of race, ethnicity, religion, and other protected characteristics.³² At the federal level, Congress mandated the collection of hate crime statistics in 1990, authorized federal penalty enhancements for hate crimes in 1994, and expanded federal hate crimes offenses and their coverage of sexual orientation and gender identity through the 2009 Shepard Byrd Hate Crimes Prevention Act.³³

While the dominant hate crimes legal model involves charging bias-motivated crimes as hate crimes or seeking enhanced penalties, civil rights and community organizations are also pursuing a range of other strategies to prevent and respond to hate violence. There are several reasons for this interest in broader strategies. First, many hate incidents directed at Asian Americans and others do not necessarily qualify as criminal violations, such as hate speech that does not rise to the level of an actionable threat or assault.³⁴ The law does not criminalize hateful speech alone in part because of First Amendment constraints,³⁵ but these incidents nonetheless cause

²⁹ Avlana Eisenberg, *Expressive Enforcement*, 61 UCLA L. REV. 858, 922-25 (2014) (listing statutes).

³⁰ See CA STATE AUDITOR, HATE CRIMES IN CALIFORNIA LAW ENFORCEMENT HAS NOT ADEQUATELY IDENTIFIED, REPORTED, OR RESPONDED TO HATE CRIMES 7 (2018) (noting that California law provides for the lengthening of a felony sentence for up to four more years for defendants who "voluntarily acted in concert with another person").

³¹ For more on the politics that led to the enactment of hate crimes laws, including the convergence between civil rights advocacy and conservative law-and-order political dynamics, see Note, Terry A. Maroney, *The Struggle Against Hate Crime: The Movement at a Crossroads*, 73 N.Y.U. L. REV. 564, 568-78 (1998); VALERIE JENNESS & RYKEN GRATTEY, MAKING HATE A CRIME: FROM SOCIAL MOVEMENT TO LAW ENFORCEMENT 26-32 (2001); CHRISTOPHER WALDREP, AFRICAN AMERICANS CONFRONT LYNCHING: STRATEGIES OF RESISTANCE FROM THE CIVIL WAR TO THE CIVIL RIGHTS ERA 113-17 (2009).

³² MICHAEL GERMAN & EMMANUEL MAULEÓN, BRENNAN CTR. FOR JUSTICE, FIGHTING FAR-RIGHT VIOLENCE AND HATE CRIMES 10, 21-41 (2019) (identifying forty-four states with hate crimes laws as of 2019). Note that the recent passage of hate crimes legislation in other states may have changed this tally.

³³ Hate Crimes Statistics Act, Pub. L. No. 101-275, 104 Stat. 140 (1990); Violent Crime Control and Law Enforcement Act of 1994 § 280003, Pub. L. No. 103-322, 108 Stat. 1796 (1994); Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act, in National Defense Auth. Act for FY 2010, Pub. L. No. 111-84, 123 Stat. 2190 (2009), codified at 18 U.S.C. § 249.

³⁴ In August 2020, Stop AAPI Hate reported that, of 2,583 incidents, 8.7% included a physical assault, 6.4% involved being coughed or spat at, 21.8% involved shunning, and 70.6% involved verbal harassment or name-calling. STOP AAPI HATE, STOP AAPI HATE NATIONAL REPORT 3.19.20 - 8.5.20 (2020). It appears that incidents could be categorized as more than one incident type. Although some of the verbal harassment may have crossed the line into criminal violations, it appears likely that a large number of the reported incidents would not be criminal.

³⁵ In 1993, the U.S. Supreme Court upheld a state statute that enhanced penalties for crimes selecting victims on the basis of their race because it "aimed at conduct unprotected by the First Amendment" and was supported by an

significant stigma and harm. Second, even when hateful conduct amounts to a crime, many people do not report those crimes to police, especially in communities of color with significant mistrust of law enforcement.³⁶ If a majority of victims do not report hate crimes—as some national data suggests³⁷—then policy responses must consider other means of supporting victims. Third, there is growing concern that the U.S. legal system relies too heavily on criminal law and carceral solutions to social problems, contributing to police lethality and mass incarceration. For all these reasons, many hate crime survivors, community groups, and policymakers are exploring additional avenues to help victims heal, hold perpetrators accountable, and prevent hate violence.

In response to recent attacks on Asian Americans in Oakland and San Francisco, community leaders emphasized cross-racial solidarity and support for the targeted communities. They organized multiracial rallies that drew hundreds of participants, a volunteer effort to escort Asian American seniors in public, and cross-racial fundraising campaigns to support Asian American victims and organizations.³⁸ According to advocates, longstanding mutual aid efforts across communities fostered these efforts to counteract the fear and division the attacks created.³⁹ In addition, nearly one hundred Asian American organizations called for “culturally-relevant and trauma-informed investments” in their communities and cautioned against “an over-reliance on law enforcement approaches” as “disproportionately harmful to Black communities and other communities of color.”⁴⁰ At the state level, California provided \$1.4 million to efforts to track and publicize anti-Asian hate crimes, and legislators introduced bills to fund mental health

adequate explanation, the state’s belief that “bias-inspired conduct...inflict[s] greater individual and social harm.” *Wisconsin v. Mitchell*, 508 U.S. 476, 487-88 (1993). A year earlier, the Court struck down a city ordinance that prohibited the placement of a burning cross or other symbol known to generate “anger, alarm or resentment in others on the basis of race, color, creed, religion or gender” because the ordinance “prohibits otherwise permitted speech solely on the basis of the subjects the speech addresses.” *R.A.V. v. St. Paul*, 505 U.S. 377, 379 (1992). *See also* *Virginia v. Black*, 538 U.S. 343, 347-48 (2003) (holding that a state may prohibit cross-burning with an intent to intimidate, but not use the cross-burning as prima facie evidence of intimidation).

³⁶ A majority of hate crime victimizations reported to the National Crime Victimization Survey were not reported to police between 2011 and 2015, with victims in 41% of cases stating that they did not report to police because they handled the incident in a different way and 23% indicating that they did not report to police because of a belief that the “police would not want to be bothered or to get involved, would be inefficient or ineffective, or would cause trouble for the victim.” MADELINE MASUCCI & LYNN LANGTON, BUREAU OF JUST. STAT., HATE CRIME VICTIMIZATION, 2004-2015 at 5 (2017).

³⁷ *Id.*

³⁸ Claire Wang, *Multiracial Mutual Aid Efforts Help Chinatown Senior Citizens, Asian American Communities*, NBC News, Feb. 19, 2021; Christie Smith & Thom Jensen, *Black, Asian Communities Show Solidarity With Oakland Rally*, NBC Bay Area, Feb. 13, 2021; Kelsie Smith, *Hundreds of People Are Volunteering to Escort Elderly Asian Americans to Help Keep Them Safe*, CNN, Feb. 15, 2021.

³⁹ Cady Lang, *Hate Crimes Against Asian Americans Are on the Rise. Many Say More Policing Isn’t the Answer*, Time, Feb. 18, 2021.

⁴⁰ Chinese for Aff. Action, et. al, *Asian Organizations Across the Bay Area Join Forces to Demand Action Against Violence*, Feb. 9, 2021, at <https://caasf.org/press-release/asian-organizations-across-the-bay-area-join-forces-to-demand-action-against-violence/>. In addition, a statement by many national Asian American organizations and allies struck a similar note. *See* Organizations Representing Asian-American Communities Across the Nation and Allies Release Statement Rejecting Criminalization and Retribution, and Call for Responses Addressing the Root Causes of Racial Violence, Feb. 17, 2021.

services for survivors and restorative justice programs.⁴¹ These initiatives exemplify a growing interest in expanding approaches to hate crimes, beyond the traditional criminal legal model.

One set of alternative responses to hate crimes focuses on mitigating the harm to victims and communities through expanding social services. Beyond providing support, such efforts can serve one of the traditional purposes of hate crimes laws: to send a message that society recognizes the distinct harm that hate crimes inflict.⁴² These efforts can take a variety of forms. For instance, government programs can fund mental health care services for hate crime victims, including through funding nonprofit groups already serving particular identity groups.⁴³ The city of Portland, Oregon, recently funded trainings on hate violence for mental health professionals through Portland United Against Hate, a coalition of over 80 community organizations.⁴⁴ In addition, states can reform their existing victim compensation programs to better support hate crimes victims, both by ensuring that such programs fully cover hate crimes and that they do not exclude victims who did not report the crimes to law enforcement.⁴⁵ Furthermore, several states have established grant programs to protect institutions frequently targeted by hate crimes, such as places of worship or community centers.⁴⁶ Apart from securing sufficient funding for these new initiatives, one challenge will be to design social service programs that can reach people in geographic areas without nonprofit providers or resources tailored to affected communities.

A second set of approaches to hate crimes now under consideration involves forms of “restorative justice”—an umbrella concept for processes that bring together people directly affected by an offense in order to agree upon methods for the person responsible to repair the harm.⁴⁷ Some restorative processes exist outside the criminal legal system, like school-based programs or community mediation services, while others operate to divert cases from the standard criminal process. Among other goals, the latter restorative justice approaches seek to reduce the role of incarceration as a punishment, while holding perpetrators accountable and

⁴¹ Catherine Thorbecke, *California Commits \$1.4 Million To Combat 'Horrific' Attacks On Asian Americans*, abcnews.com, Feb. 24, 2021; Press Release, Rep. Rob Bonta, Bonta Introduces AB 886 to Combat Recent Surge in Hate Attacks with Community-based Solutions Including Prevention Steps and Victim Assistance, Feb. 22, 2021.

⁴² For more on this expressive rationale for hate crimes laws, see generally Avlana Eisenberg, *Expressive Enforcement*, 61 UCLA L. REV. 858 (2014).

⁴³ For a leading example of such a nonprofit group, see About Us, NYC Anti-Violence Project, <https://avp.org/about-us/> (noting “free, confidential counseling to LGBTQ survivors of all forms of violence including hate violence, intimate partner violence, sexual violence, police violence and HIV-related violence.”).

⁴⁴ Portland United Against Hate, 2017-2018 Special Appropriations and 2018-2019 BMP Grant Report Portland United Against Hate Coalition 30 (2019).

⁴⁵ Sinnar & Colgan, *supra* note 1, at 155-63.

⁴⁶ See, e.g., AB-1548, California State Nonprofit Security Grant Program (2019) (establishing grant program “to improve the physical security of nonprofit organizations, including schools, clinics, community centers, churches, synagogues, mosques, temples, and similar locations that are at a high risk for violent attacks or hate crimes due to ideology, beliefs, or mission.”); NY State Governor’s Office, Apply to the Securing Communities Against Hate Crimes Grant Program, <https://www.governor.ny.gov/apply-securing-communities-against-hate-crimes-grant-program>. Such programs should ensure that measures to improve security at institutions, such as the use of private security guards or surveillance technology, do not increase racial profiling or insecurity for other users of those institutions or area residents.

⁴⁷ See HOWARD ZEHR, THE LITTLE BOOK OF RESTORATIVE JUSTICE 40 (2002) (describing restorative justice as “a process to involve, to the extent possible, those who have a stake in a specific offense and to collectively identify and address harms, needs, and obligations, in order to heal and put things as right as possible.”).

restoring victims' sense of safety through other mutually agreed upon commitments.⁴⁸ In her review of restorative justice programs, Georgetown Professor Carrie Menkel-Meadow concluded that a number of studies show that restorative justice "creates greater compliance with agreements or judgments, reduces imprisonment (and therefore costs to the system), provides greater satisfaction for both victims and offenders, and reduces recidivism rates."⁴⁹ Although U.S. research on restorative justice in the hate crimes context is limited, a study of a U.K. restorative justice program specific to hate crimes concluded that it helped alleviate victims' emotional harm.⁵⁰

Interest in restorative responses to hate crimes appears to be growing, especially as applied to youthful offenders and relatively less serious offenses.⁵¹ Existing restorative justice programs in several jurisdictions have included hate crimes cases among the larger set of cases they address.⁵² Such programs offer potential in the hate crimes context, but should be evaluated systematically to inform future efforts. In particular, these programs must address potential concerns that survivors might feel pressure to participate, that restorative meetings with offenders could retraumatize victims, or that segments of the public may (mis)construe restorative justice as an insufficiently serious response to hate crimes.⁵³ Restorative justice programs address some of these concerns through screening mechanisms to ensure that offenders are prepared to accept responsibility, the careful training of facilitators, and extensive preparation of all parties before any direct encounters.⁵⁴ Still, these programs may not be appropriate in all cases, and restorative justice initiatives require careful design and rigorous assessment to ensure that they limit reoffending and help survivors heal.

⁴⁸ These can include apologies, educational requirements, community service obligations, participation in anti-violence programs, or other more tailored requirements sought by victims to restore their sense of safety, with the possibility of the case returning to a traditional criminal process if the person responsible does not comply.

⁴⁹ Carrie Menkel-Meadow, *Restorative Justice: What Is It and Does It Work?*, 3 ANN. REV. L. & SOC. SCI. 10.1, 10.14 (2007).

⁵⁰ MARK AUSTIN WALTERS, HATE CRIME AND RESTORATIVE JUSTICE 184 (2014) (concluding that a U.K. restorative justice program helped hate crime victims by enabling them to articulate their experiences, receive support from trained facilitators, and obtain assurances from perpetrators that they would desist from future harm).

⁵¹ See, e.g., Evan Sernoffsky & Alejandro Serrano, *SF District Attorney Withdraws Charges Against Defendant in Attack on Asian Man*, S.F. CHRON. (Mar. 2, 2020) (describing the dropping of charges against a young man who had videotaped an attack on an older Asian man after the victim expressed interest in a restorative process); NYC AGAINST HATE, NYC AGAINST HATE COALITION POLICY FRAMEWORK: INVESTING IN A RESTORATIVE COMMUNITY-BASED APPROACH, <http://static1.squarespace.com/static/5e1b96b78d93e3087ddd7675/t/5e4720bc9f8d66363b969e34/1581719741136/NYC+Against+Hate+Policy+Platform.pdf> (advocating a restorative justice pilot program for young people suspected of hate violence).

⁵² For example, a Restorative Justice Program within the D.C. Attorney General's Office recently addressed the case of a 16-year-old who participated in an attack on a transgender woman on public transportation. Carrie Johnson, *D.C. Prosecutors, Once Dubious, Are Becoming Believers In Restorative Justice*, Nat'l Public Radio, July 2, 2019. See also DANIELLE SERED, UNTIL WE RECKON: VIOLENCE, MASS INCARCERATION, AND A ROAD TO REPAIR 115-18 (2019) (describing New York restorative justice organization Common Justice's work with the perpetrator and victim of an anti-Semitic hate crime).

⁵³ See Sinnar & Colgan, *supra* note 1, at 166-68. Even incorrect caricatures of restorative justice can be a problem given the desire to communicate a strong message of condemnation for hate crimes, both to targeted communities as well as to would-be perpetrators.

⁵⁴ See Sinnar & Colgan, *supra* note 1, at 167-68.

IV. Conclusion

Political leaders' demonstrations of support for Asian American communities—through words and action—are an important step towards undercutting anti-Asian racism and hate violence, including recent rhetoric and policies that have stigmatized and threatened those communities. Federal, state, and local governments should also support the efforts of diverse community organizations to help survivors heal and prevent further violence, especially through actions that build cross-racial solidarity.