

# **Hate Crime *and*** **Civil Rights in Wisconsin**



A Report of the  
Wisconsin Advisory Committee to the  
U.S. Commission on Civil Rights

June 2017

## **Advisory Committees to the U.S. Commission on Civil Rights**

By law, the U.S. Commission on Civil Rights (Commission) has established an Advisory Committee in each of the 50 states and the District of Columbia. The Committees are composed of state citizens who serve without compensation. The Committees advise the Commission of civil rights issues in their states that are within the Commission's jurisdiction. More specifically, they are authorized to advise the Commission in writing of any knowledge or information they have of any alleged deprivation of voting rights and alleged discrimination based on race, color, religion, sex, age, disability, national origin, or in the administration of justice; advise the Commission on matters of their state's concern in the preparation of Commission reports to the President and the Congress; receive reports, suggestions, and recommendations from individuals, public officials, and representatives of public and private organizations to committee inquiries; forward advice and recommendations to the Commission, as requested; and observe any open hearing or conference conducted by the Commission in their state or district.

## **Acknowledgements**

The Wisconsin Advisory Committee (Committee) would like to thank each of the panelists who presented to the Committee during both the September 12, 2013, and the August 29, 2016 meetings of the Wisconsin Advisory Committee. The Committee is also grateful to members of the public who either submitted written testimony or who spoke during the selected periods of public comment.

The Committee would also like to acknowledge former Chair Adel Mekraz, who presided over the 2013 hearing; and former Committee members Lisa Alexander, Anneliese Dickman, Maria Gamez, Frederic Mohs, Stacy Taeuber, and Jason Rae who assisted in the initial 2013 project planning and hearing preparations.

## Letter of Transmittal

### Wisconsin Advisory Committee to the U.S. Commission on Civil Rights

The Wisconsin Advisory Committee to the U.S. Commission on Civil Rights submits this report regarding hate crimes in Wisconsin, and their impact on communities targeted because of their race, color, age, religion, or disability. The Committee submits this report as part of its responsibility to study and report on civil rights issues in the state of Wisconsin. The contents of this report are primarily based on testimony the Committee heard during two public hearings; one held in Madison, WI on September 12, 2013; the other held in Milwaukee, WI on August 29, 2016.

This report details civil rights concerns relating to the incidence of and response to hate crime in the state. Primary concerns included victim underreporting; a lack of trust and collaboration between communities and law enforcement which may result in unequal protection of the law; respect for First Amendment rights to free speech; and the high burden of proof necessary to successfully prosecute bias-motivated crimes. From these findings, the Committee offers to the Commission recommendations for addressing this problem of national importance.

### Wisconsin Advisory Committee to the U.S. Commission on Civil Rights

Naheed Bleecker, *Chair*, Brookfield

W. Lee Hansen, *Vice Chair*, Madison

Heather Berlinski, Oconomowoc

Demond Means, Milwaukee

Rebecca Bradley, Wauwatosa

Arthur Pontynen, Oshkosh

Elsa Diaz-Bautista, Whitefish Bay

Dawn Shelton-Williams, Brown Deer

Robert Driscoll, Wauwatosa

May yer Thao, Milwaukee

Angelique Harris, Milwaukee

William Tisdale, Milwaukee

Daniel Kelly, Waukesha

Yang Sao Xiong, Madison

**TABLE OF CONTENTS**

**II. Introduction ..... 3**

**III. Background ..... 6**

    A. *Federal Hate Crimes Statutes* ..... 6

    B. *Wisconsin Hate Crimes Statutes* ..... 7

    C. *Hate Crime Data* ..... 10

    D. *Community Context in Wisconsin* ..... 13

**IV. Summary of Panel Testimony ..... 17**

    A. *Understanding Hate Crime* ..... 17

        1. *Hate Crime Typology* ..... 17

        2. *Current Events* ..... 18

        3. *Community Impact* ..... 20

        4. *Community Stories* ..... 22

    B. *Hate Crime Penalty Enhancements* ..... 25

        1. *Purpose* ..... 25

        2. *Protecting Free Speech* ..... 26

        3. *Effectiveness of Enhancers* ..... 29

    C. *Hate Crime Prosecution* ..... 30

        1. *Victim Underreporting* ..... 31

        2. *Hate Incidents versus Hate Crime* ..... 34

        3. *Demonstrating Bias Motivation* ..... 36

        4. *Bias in the Justice System* ..... 38

    D. *Progress and Solutions* ..... 40

        1. *Improving Data Collection* ..... 40

        2. *Law Enforcement Training* ..... 43

        3. *Increased Law Enforcement Collaboration* ..... 45

        4. *Community Relations* ..... 47

        5. *Restorative Justice* ..... 49

**V. Findings and Recommendations ..... 53**

    A. *Findings* ..... 53

    B. *Recommendations* ..... 55

**VI. Appendix ..... 58**

## II. INTRODUCTION

The U.S. Commission on Civil Rights (Commission) is an independent, bipartisan agency established by Congress and directed to study and collect information relating to discrimination or a denial of equal protection of the laws under the Constitution because of race, color, religion, sex,<sup>1</sup> age, disability, national origin, or in the administration of justice. The Commission has established advisory committees in each of the 50 states and the District of Columbia. These Advisory Committees advise the Commission of civil rights issues in their states that are within the Commission's jurisdiction.

On September 12, 2013, the Wisconsin Advisory Committee (Committee) to the Commission hosted a series of five panel discussions as part of a public meeting in Madison, Wisconsin. The Committee's purpose was to better understand the incidence and impact of hate crimes in the state from a civil rights perspective. This meeting was prompted in part by a tragic event on August 5th, 2012, when a white supremacist entered the Sikh Temple of Wisconsin in the city of Oak Creek, and indiscriminately opened fire, fatally wounding six individuals: Satwant Singh Kaleka, 65, the founder of the temple; Prakash Singh, 39, an assistant priest; Sita Singh, 41; Ranjit Singh, 49; Suveg Singh, 84; and Paramjit Kaur, 41. A seventh victim, Punjab Singh, was critically injured and remained hospitalized for more than two months following the incident.<sup>2</sup> The shooter was later injured by law enforcement before taking his own life at the scene. Though he did not leave explicit evidence as to his motive for these killings, his long-standing affiliation with hate groups suggested that the shooting was motivated by religious bias.<sup>3</sup> The act was labeled as one of "domestic terrorism," and prompted a September 19, 2012, hearing on Hate Crimes and the Threat of Domestic Extremism before the Senate Committee on the Judiciary, Subcommittee on the

---

<sup>1</sup> Various federal, state and local laws discussed throughout this report include protections against discrimination on the basis of "gender," "gender identity," and "sexual orientation," in addition to "sex." Likewise, FBI data reporting on hate crime includes incidents of bias motivated crimes on the basis of gender identity and sexual orientation. The Committee includes these categories, where applicable, in the report that follows. A glossary of terms related to sex and gender identity is available at: <http://www.hrc.org/resources/glossary-of-terms> (last visited May 8, 2017).

<sup>2</sup> *August 5, 2012, SERVE2UNITE*, <http://serve2unite.org/about/8-5-12/> (last visited Feb. 23, 2017); Kate DeLong, *Sikh Temple Shooting Victim Punjab Singh Released from Hospital*, FOX 6 NOW (updated Oct. 17, 2012) <http://fox6now.com/2012/10/17/sikh-temple-shooting-victim-punjab-singh-released-from-hospital/> (last visited May 22, 2017).

<sup>3</sup> Steven Yaccino, Michael Schwirtz & Marc Santora, *Gunman Kills 6 at Sikh Temple near Milwaukee*, N.Y. TIMES (Aug. 5, 2012) <http://www.nytimes.com/2012/08/06/us/shooting-reported-at-temple-in-wisconsin.html?pagewanted=all> (last visited Dec. 24, 2014); Marilyn Elias, *Sikh Temple Killer Wade Michael Page Radicalized in Army*, SOUTHERN POVERTY LAW CENTER INTELLIGENCE REPORT, WINTER 2012, ISSUE 148 (Nov. 11, 2012) <http://www.splcenter.org/get-informed/intelligence-report/browse-all-issues/2012/winter/massacre-in-wisconsin> (last visited Dec. 4, 2014); Deepa Iyer, *Oak Creek Community Marks Two Years Since Sikh Temple Shooting*, NBC NEWS (Aug. 5, 2014) <http://www.nbcnews.com/news/asian-america/oak-creek-community-marks-two-years-sikh-temple-shooting-n171981> (last visited Dec. 4, 2014).

Constitution, Civil Rights and Human Rights.<sup>4</sup> It also spurred a national conversation on the rise and impact of hate crimes, hate groups, and the country's legislative response.

Hate crime by definition is criminal behavior targeted at an individual because of his or her real or perceived association with personal characteristics that are protected under civil rights law. The United States Federal Bureau of Investigation (FBI) defines a hate crime as a "criminal offense<sup>5</sup> against a person or property motivated in whole or in part by an offender's bias against a race, religion, disability, ethnic origin, or sexual orientation."<sup>6</sup> The panels before the Wisconsin Advisory Committee on September 12, 2013, included testimony from community members, advocates, legal professionals, scholars, government officials, and law enforcement. The panelists' testimony focused on current hate crime activity in the State of Wisconsin, the effectiveness of applicable laws, and recommendations to address outstanding equal protection concerns. The agenda also included an open forum for discussion whereby members of the public could comment.

Following this meeting, the Committee began a discussion of findings and recommendations to issue to the Commission resulting from the testimony heard. However, the Committee member appointment terms expired before such a report was released. A number of administrative challenges created further delay in finalizing Committee appointments to the subsequent term. On April 27, 2016, the presently appointed Committee voted unanimously to revisit the outstanding, 2013 study on hate crime in Wisconsin. As part of this work, on August 29, 2016, the Committee held an additional public hearing in Milwaukee, Wisconsin. The purpose of this hearing was to solicit current testimony from both academic experts and a diverse group of community leaders regarding any changes to the status and incidence of hate crime in Wisconsin since the time of the original, 2013 testimony. In addition, the Committee reached out to all 2013 panelists to offer them the opportunity to provide any revisions or updated information related to their original testimony.

The report that follows provides an analysis of the testimony before the Committee during both the 2013 and 2016 public meetings of the Committee. It begins with an overview of federal hate crimes law and applicable statutes in the State of Wisconsin, as well as current statistics regarding the incidence of hate crimes. It then provides an overview of panelist testimony, including an overview of the community's experience with hate crime in Wisconsin, a discussion of the merits and challenges of hate crime penalty enhancement, and the challenges facing law enforcement in successfully identifying and prosecuting hate crime. The report concludes with a discussion of

---

<sup>4</sup> Testimony available at: [http://www.judiciary.senate.gov/meetings/time-change\\_\\_hate-crimes-and-the-threat-of-domestic-extremism](http://www.judiciary.senate.gov/meetings/time-change__hate-crimes-and-the-threat-of-domestic-extremism) (last visited Dec. 24, 2014).

<sup>5</sup> A criminal offense or "crime" is any act or omission in violation of a law prohibiting it, or omitted in violation of a law ordering it. Each state, and the federal government, decides what sort of conduct to criminalize. See *Criminal Law*, LEGAL INFO. INSTITUTE, CORNELL U. SCH. OF L., [https://www.law.cornell.edu/wex/criminal\\_law](https://www.law.cornell.edu/wex/criminal_law) (last visited May 5, 2017).

<sup>6</sup> *Hate Crimes Overview*, FBI, [http://www.fbi.gov/about-us/investigate/civilrights/hate\\_crimes/overview](http://www.fbi.gov/about-us/investigate/civilrights/hate_crimes/overview) (last visited Dec. 16, 2014).

potential solutions and a series of recommendations for addressing identified challenges. The purposes of this report are: (i) to relay the civil rights concerns brought forth by the panels relating to hate crime in Wisconsin; and (ii) to lay out specific recommendations to the Commission regarding actions that can be taken to better understand and address these issues moving forward.

### III. BACKGROUND

#### A. Federal Hate Crimes Statutes

The Civil Rights Act of 1968 (CRA) was a momentous statute that criminalized a new class of hate motivated acts.<sup>7</sup> The CRA sought to address racial violence against civil rights workers and individuals pursuing federally protected activities. The CRA permits federal prosecution of any person who willfully injures, intimidates, or interferes with another person, or attempts to do so, by force because of the victim's race, color, religion, or national origin, provided that the offense occurred while the victim was attempting to engage in a statutorily protected activity.<sup>8</sup> Examples of statutorily protected activities under the CRA include voting; enrolling in or attending any institution of public education; applying for or enjoying employment by any private or public employer; and enjoying the benefits or services of any establishment of public accommodation such as hotels, restaurants, movie theaters, and sports arenas.<sup>9</sup> Importantly, the CRA did not designate as a hate crime offenses that occurred while a victim was *not* engaged in one of the identified statutorily protected activities. As such, prosecution under the CRA often proved difficult.<sup>10</sup>

While advocacy groups such as the Anti-Defamation League (ADL), the Southern Poverty Law Center (SPLC), and the National Gay and Lesbian Task Force (NGLTF) began compiling data on bias-motivated violence in the 1980s, official federal data was not collected until 1990 with the passage of the Hate Crimes Statistics Act (HCSA).<sup>11</sup> The HCSA requires the Attorney General to collect, as a part of the Uniform Crime Reports (UCR) Program, data "about crimes that manifest evidence of prejudice based on race, religion, sexual orientation, or ethnicity."<sup>12</sup> In September 1994, the Violent Crime Control and Law Enforcement Act amended the HCSA to add disabilities as a factor that could be considered as a basis for hate crimes.<sup>13</sup> Although the HCSA mandated hate crimes data collection for five years, the FBI considers the collection of such statistics to be a permanent addition to the UCR Program.<sup>14</sup>

---

<sup>7</sup> The Civil Rights Act of 1968, 18 USC § 245(b)(2) (2012).

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> For a successful case using 18 USC § 245, see *United States v. Nelson*, 277 F.3d 164 (2nd Cir. 2002).

<sup>11</sup> Hate Crimes Statistics Act, Pub. L. No. 101-275, 104 Stat. 140 (1990) (codified at 28 U.S.C. § 534 (2011)) [hereinafter Hate Crimes Statistics Act (1990)].

<sup>12</sup> *Id.*

<sup>13</sup> Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796-2151 (1994) (codified at 42 U.S.C. §§ 13701-14223 (2005)).

<sup>14</sup> Pub. Law 101-275, April 23, 1990; <http://www.fbi.gov/ucr/traingd99.pdf>, 5. The Church Arson Prevention Act of July 1996 indefinitely extended the mandate for collection of hate crime statistics, making it a permanent part of the UCR program.

Also included as part of the Violent Crime Control and Enforcement Act of 1994, the Hate Crime Sentencing Enhancement Act<sup>15</sup> (HCSEA) mandated a revision of United States Sentencing Guidelines to provide sentencing enhancements of at least three offense levels for hate crime offenses. The HCSEA included protection for those targeted because of their ethnicity, gender, disability, or sexual orientation, in addition to protecting individuals on the basis of race, color, religion and national origin.<sup>16</sup> Because this sentence enhancement can only be employed when an underlying federal crime is committed, its enactment did not expand the substantive scope of any federal criminal law prohibitions, and it excludes many offenses prosecuted at the state level where hate may be a motive. While the HCSEA did evoke Congressional willingness to address hate crimes, the scope of substantive federal protection remained unchanged.

In 2009, the enactment of the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act of 2009<sup>17</sup> (HCPA) provided additional authority for federal officials to investigate and prosecute hate crimes. The HCPA closed the loophole in the Civil Rights Act which limited federal hate crime prosecution to cases in which the victim had been engaged in a statutorily protected activity at the time of the crime.<sup>18</sup> The HCPA also authorized the U.S. Department of Justice to investigate and prosecute “certain bias-motivated crimes based on the victim’s actual or perceived sexual orientation, gender, gender identity, or disability.”<sup>19</sup> Finally, the HCPA provided limited jurisdiction “for federal law enforcement officials to investigate certain bias-motivated crimes in states where current law is inadequate”<sup>20</sup> and provided federal aid and technical assistance to state, local, and tribal jurisdictions to help them more effectively investigate, prosecute, and prevent hate crimes from occurring.<sup>21</sup>

## **B. Wisconsin Hate Crimes Statutes**

In addition to federal protections, according to the National Institute of Justice, as of January 2017, forty-nine states have hate crime statutes,<sup>22</sup> though as documented by the ADL, protections can

---

<sup>15</sup> Hate Crime Sentencing Enhancement Act, Pub. L. No. 103-322, § 280003, 108 Stat. 1796, 2096 (1994).

<sup>16</sup> *Id.*

<sup>17</sup> Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act of 2009, Pub. L. No. 111-84, §§ 4701-4713, 123 Stat. 2835, 2835-2845 (2009) (codified at 18 U.S.C. § 249 (2009)) [hereinafter Hate Crimes Prevention Act (2009)].

<sup>18</sup> Hate Crimes Prevention Act (2009); *See* ANTI-DEFAMATION LEAGUE, MATTHEW SHEPARD AND JAMES BYRD, JR. HATE CRIMES PREVENTION ACT (HCPA) WHAT YOU NEED TO KNOW, <http://www.adl.org/assets/pdf/combating-hate/What-you-need-to-know-about-HCPA.pdf> (last visited January 10, 2017) [hereinafter HCPA: WHAT YOU NEED TO KNOW].

<sup>19</sup> HCPA: WHAT YOU NEED TO KNOW; *See* 18 U.S.C. § 249(a)(1)-(2).

<sup>20</sup> HCPA: WHAT YOU NEED TO KNOW

<sup>21</sup> 42 U.S.C. § 3716 (2009).

<sup>22</sup> *Hate Crime*, NAT’L INST. OF JUSTICE (modified Apr. 4, 2017) <https://www.nij.gov/topics/crime/hate-crime/pages/welcome.aspx> (last visited Jan. 10, 2017).

vary widely by state.<sup>23</sup> In Wisconsin, The Wisconsin Hate Crimes Act<sup>24</sup> serves primarily as a penalty enhancement mechanism, acting in conjunction with the federal hate crime laws. Specifically, it states:

(1) If a person does all of the following, the penalties for the underlying crime are increased as provided in sub. (2):

(a) Commits a crime under Chapters 939 to 948.<sup>25</sup>

(b) Intentionally selects the person against whom the crime under par. (a) is committed or selects the property that is damaged or otherwise affected by the crime under par. (a) in whole or in part because of the actor's belief or perception regarding the race, religion, color, disability, sexual orientation, national origin or ancestry of that person or the owner or occupant of that property, whether or not the actor's belief or perception was correct.

(2)(a) If the crime committed under sub. (1) is ordinarily a misdemeanor other than a Class A misdemeanor, the revised maximum fine is \$10,000 and the revised maximum term of imprisonment is one year in the county jail.<sup>26</sup>

(b) If the crime committed under sub. (1) is ordinarily a Class A misdemeanor, the penalty increase under this section changes the status of the crime to a felony and the revised maximum fine is \$10,000 and the revised maximum term of imprisonment is 2 years.

(c) If the crime committed under sub. (1) is a felony, the maximum fine prescribed by law for the crime may be increased by not more than \$5,000 and the maximum term of imprisonment prescribed by law for the crime may be increased by not more than 5 years.<sup>27</sup>

(3) This section provides for the enhancement of the penalties applicable for the

---

<sup>23</sup> *State Hate Crimes Statutory Provisions*, ANTI-DEFAMATION LEAGUE, <https://www.adl.org/sites/default/files/documents/assets/pdf/combating-hate/ADL-hate-crime-state-laws-clickable-chart.pdf> (last visited Jan. 10, 2017) [hereafter *State Hate Crimes Statutory Provisions*].

<sup>24</sup> Wisconsin Hate Crimes Act, WIS. STAT. ANN. § 939.645 (West 2001).

<sup>25</sup> See WIS. STAT. §§ 939-948, available at: <https://docs.legis.wisconsin.gov/statutes/statutes> (last visited May 5, 2017).

<sup>26</sup> See WIS. STAT. ANN. § 939.51 (West 2001) available at: <https://docs.legis.wisconsin.gov/statutes/statutes/939/IV/51> (last visited May 5, 2017).

<sup>27</sup> See WIS. STAT. ANN. § 939.60, available at: <https://docs.legis.wisconsin.gov/statutes/statutes/939/IV/60> (last visited May 5, 2017).

underlying crime. The court shall direct that the trier of fact<sup>28</sup> find a special verdict<sup>29</sup> as to all of the issues specified in sub. (1).

(4) This section does not apply to any crime if proof of race, religion, color, disability, sexual orientation, national origin or ancestry or proof of any person's perception or belief regarding another's race, religion, color, disability, sexual orientation, national origin or ancestry is required for a conviction for that crime.

In 1993, Wisconsin's penalty enhancement mechanism was challenged in *Wisconsin v. Mitchell*.<sup>30</sup> The case involved a Wisconsin man whose "sentence for aggravated battery was enhanced because he intentionally selected his victim on account of the victim's race."<sup>31</sup> The defendant challenged Wisconsin's sentencing enhancement as unconstitutional on the grounds that it violated his First Amendment right to free speech and Fourteenth Amendment right to due process. Reversing the ruling of the Wisconsin Supreme Court, the Supreme Court of the United States unanimously upheld the constitutionality of Wisconsin's hate crime penalty enhancement statutes.<sup>32</sup> The Court found:

- (1) The First Amendment does not protect violence;<sup>33</sup>
- (2) Motive is an acceptable factor to consider in determining sentencing for a convicted defendant. Quoting *Tison v. Arizona*, 481 U.S. 137, 156 (1987), the Court wrote: "Deeply ingrained in our legal tradition is the idea that the more purposeful is the criminal conduct, the more serious is the offense, and, therefore, the more severely it ought to be punished";<sup>34</sup>
- (3) Hate crime enhancements are in line with other federal anti-discrimination laws which prohibit discrimination on the basis of race, color, religion, sex, or national origin;
- (4) It is acceptable for the State to single out "bias-inspired conduct because this conduct is thought to inflict greater individual and societal harm."<sup>35</sup> The Court found that "[t]he

---

<sup>28</sup> A judge or jury that determines questions of fact in a trial. See *Trier of Fact*, LEGAL INFO. INST., CORNELL U. SCH. of L., [https://www.law.cornell.edu/wex/trier\\_of\\_fact](https://www.law.cornell.edu/wex/trier_of_fact) (last visited May 5, 2017).

<sup>29</sup> A verdict in which the jury gives its findings on factual issues in the case, without necessarily stating which party should win. The judge decides what questions the jury should answer, and the judge can draw legal implications from the jury's answers. A special verdict can provide many benefits in a complex case, especially if one party appeals the judgment. See *Special Verdict*, LEGAL INFO. INST., CORNELL U. SCH. of L., [https://www.law.cornell.edu/wex/special\\_verdict](https://www.law.cornell.edu/wex/special_verdict) (last visited May 5, 2017).

<sup>30</sup> *Wisconsin v. Mitchell*, 508 U.S. 476 (U.S. June 11, 1993) <https://www.law.cornell.edu/supct/html/92-515.ZO.html> (last visited Jan. 10, 2017).

<sup>31</sup> *Id.* at 479.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at 484.

<sup>34</sup> *Id.* at 485.

<sup>35</sup> *Id.* at 487-88.

State's desire to redress these perceived harms provides an adequate explanation for its penalty enhancement provision over and above mere disagreement with the offenders' beliefs or biases";<sup>36</sup>

(5) Wisconsin's statute is not unconstitutionally "overbroad."<sup>37</sup> The Court wrote: "[T]he prospect of a citizen suppressing his bigoted beliefs for fear that evidence of such beliefs will be introduced against him at trial if he commits a more serious offense against person or property. . . . is simply too speculative a hypothesis to support Mitchell's overbreadth claim";<sup>38</sup>

(6) The First Amendment "does not prohibit the evidentiary use of speech to establish the elements of a crime or to prove motive or intent. Evidence of a defendant's previous declarations or statements is commonly admitted in criminal trials subject to evidentiary rules dealing with relevancy, reliability, and the like."<sup>39</sup>

Compared with other states, Wisconsin's hate crime legislation may be considered relatively broad. Three notable areas in which Wisconsin's Hate Crime Statutes may be lacking in comparison to other states, however, are: (i) a lack of protection against crimes motivated by gender bias; (ii) the absence of any mandate requiring data collection of hate crime statistics; and (iii) a lack of required police training regarding bias motivated crimes.<sup>40</sup>

### C. Hate Crime Data

The Federal Bureau of Investigation (FBI) defines a hate crime as "a traditional offense like murder, arson, or vandalism with an added element of bias. For the purposes of collecting statistics, the FBI has defined a hate crime as a 'criminal offense against a person or property motivated in whole or in part by an offender's bias against a race, religion, disability, sexual orientation, ethnicity, gender, or gender identity.'"<sup>41</sup> It must be noted that the FBI acknowledges freedom of speech and individual civil liberties.<sup>42</sup> Therefore, although hate itself is not criminal, acting upon hate with criminal behavior constitutes a hate crime.

---

<sup>36</sup> 508 U.S. at 487.

<sup>37</sup> *Id.* at 489.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *State Hate Crimes Statutory Provisions*. <https://www.adl.org/sites/default/files/documents/assets/pdf/combating-hate/2014-adl-updated-state-hate-crime-statutes.pdf> (last visited Aug. 7, 2017).

<sup>41</sup> *Hate Crimes, Defining a Hate Crime*, FBI (2016) <https://www.fbi.gov/investigate/civil-rights/hate-crimes> (last visited Jan. 11, 2017).

<sup>42</sup> *Id.*

Federal hate crime law serves to manage hate crime data collection.<sup>43</sup> The two primary sources of federal hate crime data in the United States are The National Crime Victimization Survey (NCVS), and the Uniform Crime Reports (UCR), both administered through the United States Department of Justice.<sup>44</sup> Both of these reports capture data about crimes motivated by bias against federally protected classes, though the two data sets have some key differences. The NCVS is based on interviews of a nationally representative sample of approximately 90,000 households, including approximately 160,000 people.<sup>46</sup> Managed by the Bureau of Justice Statistics, it captures information about both crimes that were reported to the police and crimes that were not reported. In order for a crime to be classified as a hate crime in the NCVS, the victim must report at least one of three types of evidence that the act was motivated by hate: (i) the offender used hate language; (ii) the offender left behind hate symbols; or (iii) police investigators confirmed that the incident was hate crime.<sup>47</sup> The UCR in contrast, is based on a national collection of statistical data submitted by “more than 18,000 city, university and college, county, state, tribal, and federal law enforcement agencies voluntarily reporting data on crimes brought to their attention”<sup>48</sup> Managed by the FBI, the hate crime data compiled in the UCR records only crimes that have been reported to law enforcement, and were found to be motivated by bias against the one or more of the required protected classes.<sup>49</sup>

In 2015, the FBI UCR data indicated a total of 5,850 hate crimes.<sup>50</sup> By far, the majority of single-bias incidents were motivated by race/ethnicity/ancestral bias, followed by religious and sexual-orientation-based biases, which were reported at similar rates.<sup>51</sup>

---

<sup>43</sup> Hate Crime Statistics Act, 28 U.S.C. § 534 (2012). This act requires that the Attorney General gather annual data “about crimes that manifest evidence of prejudice based on race, gender and gender identity, religion, disability, sexual orientation, or ethnicity; including where appropriate the crimes of murder, non-negligent manslaughter, forcible rape, aggravated assault, simple assault, intimidation, arson, and destruction, damage or vandalism of property.” More information available at: [http://www.fbi.gov/about-us/cjis/ucr/hate-crime/2012/resource-pages/hate-crime-statistics-act/hatecrimestatisticsact\\_final](http://www.fbi.gov/about-us/cjis/ucr/hate-crime/2012/resource-pages/hate-crime-statistics-act/hatecrimestatisticsact_final) (last visited Feb. 2, 2015).

<sup>44</sup> U.S. DEP’T OF JUSTICE, FBI, CRIME IN THE UNITED STATES 2004, APPENDIX IV – THE NATION’S TWO CRIME MEASURES 510-512, [https://www2.fbi.gov/ucr/cius\\_04/appendices/appendix\\_04.html](https://www2.fbi.gov/ucr/cius_04/appendices/appendix_04.html) (last accessed Feb. 5, 2015).

<sup>46</sup> *Data Collection: National Crime Victimization Survey*, BUREAU OF JUSTICE STATISTICS, <http://www.bjs.gov/index.cfm?ty=dcdetail&iid=245> (last visited Feb. 5, 2015).

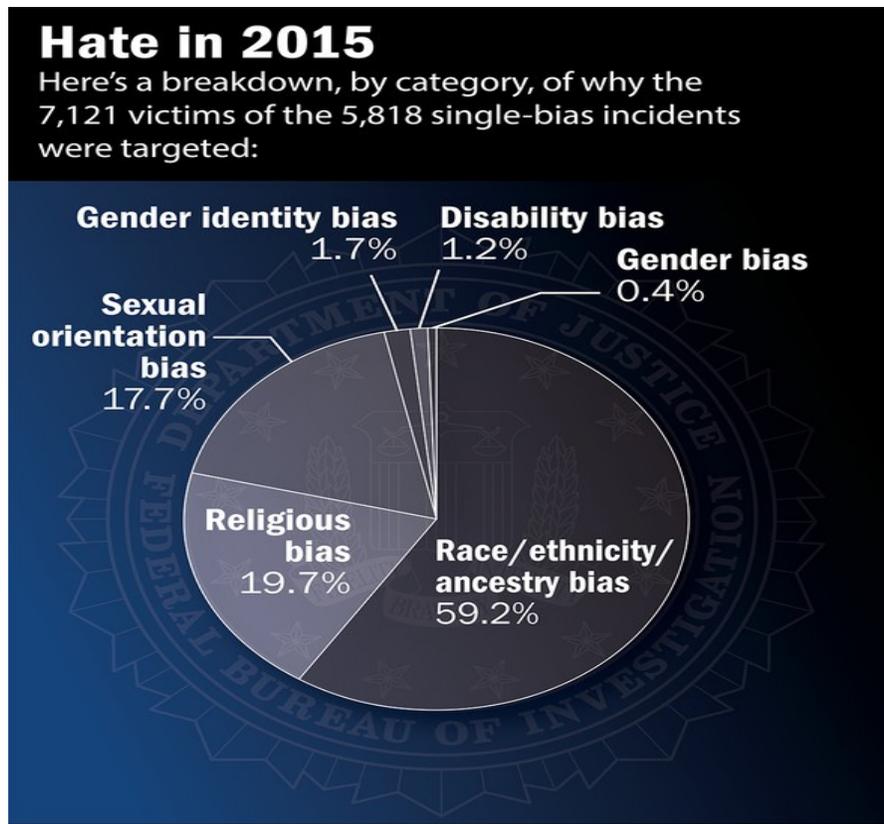
<sup>47</sup> *Hate Crime*, BUREAU OF JUSTICE STATISTICS.

<sup>48</sup> U.S. DEP’T OF JUSTICE, FBI, CRIMINAL JUSTICE INFO. SERVICES DIVISION, *Crime in the United States 2013, About UCR*, <http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2013/crime-in-the-u.s.-2013/about-ucr> (last visited Feb. 2, 2015).

<sup>49</sup> U.S. DEP’T OF JUSTICE, FBI, CRIMINAL JUSTICE INFO. SERVICES DIVISION, *Crime in the United States 2013, Hate Crime Statistics*, [http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2013/crime-in-the-u.s.-2013/resource-pages/hate-crime/hatecrimeholder\\_final](http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2013/crime-in-the-u.s.-2013/resource-pages/hate-crime/hatecrimeholder_final) (last visited Feb. 5, 2015); See CRIME IN THE UNITED STATES 2004, APPENDIX IV – THE NATION’S TWO CRIME MEASURES

<sup>50</sup> FBI, UNIFORM CRIME REPORT, HATE CRIME STATISTICS 2015, INCIDENTS AND OFFENSES (2016) [https://ucr.fbi.gov/hate-crime/2015/topic-pages/incidentsandoffenses\\_final.pdf](https://ucr.fbi.gov/hate-crime/2015/topic-pages/incidentsandoffenses_final.pdf) (last visited Jan. 11, 2017).

<sup>51</sup> *Id.*



\*From *Hate Crime Statistics, 2015*

52

Anti-black/African-American was the race-based category that saw the most bias-motivated incidents in 2015, followed by anti-white and anti-Hispanic/Latino.<sup>53</sup> The most prevalent religious biases were anti-Jewish, anti-Islam, and anti-Catholic.<sup>54</sup> Of special significance to this report is the fact that seven additional religious categories, as well as an anti-Arab category, were added to the FBI reported bias-based incident types in 2015. These include anti-Buddhist, anti-Eastern Orthodox, anti-Hindu, anti-Jehovah's Witness, anti-Mormon, anti-other Christian, and anti-Sikh.<sup>55</sup> This is an important development as the public hearings leading to this report were originally organized in response to the shooting at a Sikh temple in Oak Creek, Wisconsin, in 2013. Further discussion on the challenges faced by religious minorities regarding incidents is presented in the following sections of this report.

<sup>52</sup> *Latest Hate Crime Statistics Released: Annual Report Sheds Light on Serious Issue*, FBI (Nov. 14, 2016) <https://www.fbi.gov/news/stories/2015-hate-crime-statistics-released> (last visited Jan. 11, 2017).

<sup>53</sup> FBI, UNIFORM CRIME REPORT, HATE CRIME STATISTICS 2015, INCIDENTS AND OFFENSES.

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

<sup>55</sup> *Latest Hate Crime Statistics Released: Annual Report Sheds Light on Serious Issue.*

It is important to note that the number of reported incidents likely underestimates the actual incidence of hate crime in the United States. Of the 14,997 participating law enforcement agencies across the country, only 1,742 reported hate crime statistics to the FBI in 2015.<sup>56</sup> In Wisconsin, only 25 of 395 participating law enforcement agencies submitted incident reports to the FBI.<sup>57</sup> There were a total of 47 hate crime offenses reported against people, property, and society in Wisconsin in 2015.<sup>58</sup> When compared to the rest of the country, Wisconsin ranks well below the average of reported hate crimes per resident. This can possibly be attributed to the lack of reporting from 343 participating agencies, which otherwise might shift the state's ranking. Concerns regarding underreporting of hate crime data are discussed in further detail in the following sections of this report.

#### **D. Community Context in Wisconsin**

Before addressing Hate Crimes Statutes in the state of Wisconsin, it is important to first note some of the challenges that the state continues to face when it comes to issues of diversity, equity, and inclusion. According to the 2010 U.S. Census, Wisconsin is a predominately white state, with whites consisting of over 83 percent of the total state population. Blacks and Latinxs each represent a little over 6 percent of the state's total population, with Asian Pacific Islander Americans making up 2 percent, and Indigenous/Native people representing about 1 percent of the state's population.<sup>59</sup> Although people of color represent a relatively small percentage of the state's population, they experience disproportionately higher rates of unemployment, poverty, and poor educational attainment. These inequities are found, most notably, in the state's black population.

---

<sup>56</sup> FBI UNIFORM CRIME REPORT, HATE CRIME STATISTICS 2015, TABLE 12, AGENCY HATE CRIME REPORTING BY STATE, 2015 (2016) <https://ucr.fbi.gov/hate-crime/2015/tables-and-data-declarations/12tabledatadecpdf> (last accessed Jan. 11, 2017) [hereafter AGENCY HATE CRIME REPORTING BY STATE, 2015].

*Note:* The data used in creating this table were from all law enforcement agencies that submitted either of the following: (i) at least one *Group A Incident Report*, a *Group B Arrest Report*, or a *Zero Report* for at least 1 month of the calendar year via the National Incident-Based Reporting System; or (ii) at least one *Hate Crime Incident Report* and/or a *Zero Report* via the *Hate Crime Technical Specification* or the Microsoft Excel Workbook Tool. The published data, therefore, do not necessarily represent reports from each participating agency for all 12 months (or 4 quarters) of the calendar year.

<sup>57</sup> *Id.*

<sup>58</sup> FBI, UNIFORM CRIME REPORT, HATE CRIME STATISTICS 2015, TABLE 11, OFFENSES (2016) <https://ucr.fbi.gov/hate-crime/2015/tables-and-data-declarations/11tabledatadecpdf> (last visited Jan. 11, 2017).

<sup>59</sup> KATHERINE J. CURTIS & SARAH E. LESSEM, CENSUS 2010 CHARTBOOK: DEMOGRAPHIC TRENDS IN WISCONSIN (2014) [HTTP://WWW.APL.WISC.EDU/PUBLICATIONS/2010\\_CENSUS\\_CHARTBOOK\\_WI.PDF](http://www.apl.wisc.edu/publications/2010_census_chartbook_wi.pdf) (LAST VISITED MAY 22, 2017) [HEREINAFTER CURTIS AND LESSEM 2014].

Recent studies note that Wisconsin is the “worst” state in the nation for blacks<sup>60</sup> and it is the worst in the nation for black and white disparities among youth,<sup>61</sup> where four out of five black youth live in poverty, compared to two out of three of Latinx and the three out of ten of white youth.<sup>62</sup> In explaining the high rates of poverty in the state, research often suggests that increased housing segregation in the state and, in particular, in the city of Milwaukee are to blame, where 94 percent of Milwaukee’s outer suburbs are white and only 1-2 percent black.<sup>63</sup> 90 percent of the black population in Milwaukee County lives within the city,<sup>64</sup> however over the past several years, most of the new job opportunities have been located in these outer suburbs, making it a challenge to access for many of the over 40 percent of blacks who are living in poverty in the city.<sup>65</sup>

High rates of segregation, unemployment, and poverty contribute to the rates of incarceration in the state, earning Wisconsin the dubious reputation of incarcerating the highest percentage of its black male population in the nation.<sup>66</sup> Wisconsin incarcerates almost 13 percent of its black male population, as compared to the national average of almost 7 percent.<sup>67</sup> A majority of the incarcerations come from one area in particular, Milwaukee’s Northside.<sup>68</sup> These high rates of incarceration not only contribute to the 52.7 percent unemployment rate found among black men in Milwaukee,<sup>69</sup> it is also one of the reasons why Milwaukee has the highest eviction rate among black women in the nation.<sup>70</sup>

In addition to disproportionately high rates of poverty, unemployment, segregation, and housing insecurity found in the state among its black population, we also find major disparities in terms of educational attainment. As in other areas, Wisconsin ranks worst in educating and graduating black

---

<sup>60</sup> Kenya Downs, *Why is Milwaukee So Bad for Black People?* NPR, Mar. 5, 2015, <http://www.npr.org/sections/codeswitch/2015/03/05/390723644/why-is-milwaukee-so-bad-for-black-people> (last visited May 22, 2017).

<sup>61</sup> ANNIE E. CASEY FOUNDATION, RACE FOR RESULTS: BUILDING A PATH OF OPPORTUNITY FOR ALL CHILDREN, KIDS COUNT POLICY REPORT, (2014) <http://www.aecf.org/m/resourcedoc/AECF-RaceforResults-2014.pdf> (last visited May 22, 2017).

<sup>62</sup> WISCONSIN COUNCIL ON CHILDREN AND FAMILIES, INCREASING ECONOMIC SECURITY FOR EVERY WISCONSIN FAMILY (Dec. 2016) <http://www.wccf.org/assets/WCCF-Child-Poverty-Report-52745-final.pdf> (last visited May 22, 2017).

<sup>63</sup> Brandon E. Patterson, *These Stats Show Why Milwaukee Was Primed to Explode*, MOTHER JONES, Aug. 17, 2016, <http://www.motherjones.com/politics/2016/08/milwaukee-riots-poverty-education-statistics/> (last visited May 22, 2017).

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> JOHN PAWASARAT & LOIS M. QUINN, WISCONSIN’S MASS INCARCERATION OF AFRICAN AMERICAN MALES: WORKFORCE CHALLENGES FOR 2013, 1 (2013) <http://www4.uwm.edu/eti/2013/BlackImprisonment.pdf> (last visited May 22, 2017).

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> MARC V. LEVINE, RACE AND MALE EMPLOYMENT IN THE WAKE OF THE GREAT RECESSION 10 (2012).

<sup>70</sup> MATTHEW DESMOND, EVICTED: POVERTY AND PROFIT IN THE AMERICAN CITY (Broadway Books 2016).

children and has the largest black-white achievement gap in the nation.<sup>71</sup> In fact, Wisconsin schools suspends black youth at more than double the national average.<sup>72</sup>

According to the U.S. Census Bureau, in 2015, Wisconsin's Asian American population totaled 185,000 or 3.2 percent of the state's population (5,742,000).<sup>73</sup> The three largest Asian groups in Wisconsin are Hmong, Asian Indian, and Chinese. Although statistics on hate crimes (bias-motivated crimes) against Asian Americans in Wisconsin are scarce and although authorities have seldom, if ever, prosecuted reported crimes against Asian Americans in Wisconsin as hate crimes, Asian Americans in Wisconsin have been targets of hate crimes from time to time. The 2012 massacre of Asian Indian Sikhs in Oak Creek, Wisconsin<sup>74</sup> is neither the only violence nor the most recent hate crime against Asian Americans.

As the largest Asian group in Wisconsin, Hmong Americans have experienced and reported a number of crimes that, in victims' view and in the view of many civil rights activists, were racially motivated but were never charged at all or were charged but not charged with a hate crime enhancement. As one example, in January 2007, James Nichols, a convicted felon who was out hunting, shot and stabbed Cha Vang to death and then hid Mr. Vang's body in the woods of the Peshtigo Harbor Wildlife Area. Despite testimony from Nichols' former boss that Nichols hated Hmong and despite Nichols' own admission to police that he disliked Hmong since he believed "the Hmong group, they're, they're bad . . ." prosecutors never charged Nichols with a hate crime enhancement.<sup>75</sup> In November 2014, Kevin J. Elberg assaulted and beat 64-year-old Sao Lue Vang unconscious after Elberg accused Vang of trespassing onto private land. Mr. Vang suffered several

---

<sup>71</sup> Molly Beck, *National Report Card: Wisconsin's Achievement Gap Worst in Nation*, WISC. ST. J., Nov. 8, 2013, [http://host.madison.com/news/local/education/local\\_schools/national-report-cardwisconsin-s-achievement-gap-worst-in-nation/article\\_82406e47-5738-5e95-9cb0-78aee1e14254.html?comment\\_form=true](http://host.madison.com/news/local/education/local_schools/national-report-cardwisconsin-s-achievement-gap-worst-in-nation/article_82406e47-5738-5e95-9cb0-78aee1e14254.html?comment_form=true) (last visited May 22, 2017).

<sup>72</sup> *Id.*

<sup>73</sup> U.S. CENSUS BUREAU, AMERICAN COMMUNITY SURVEY, 2015 (2015).

<sup>74</sup> Yaccino, Schwartz, and Santora, *supra* note 3.

Valarie Kaur, Opinion, *President Obama, Come to Oak Creek*, CNN NEWS, updated Aug. 17, 2012, <http://www.cnn.com/2012/08/17/opinion/kaur-obama-sikh-temple/> (last visited May 22, 2017).

<sup>75</sup> *Hmong Killer Guilty of Lesser Charge despite Damaging Evidence*, TWIN CITIES DAILY PLANET, October 30, 2007, <https://www.tcdailyplanet.net/hmong-killer-guilty-lesser-charge-despite-damaging-evidence/> (last visited May 22, 2017); Susan Saulny, *Hmong, Shaken, Wondering if a Killing Was Retaliation*, N.Y. TIMES, Jan. 14, 2007, <http://www.nytimes.com/2007/01/14/us/14hmong.html> (last visited May 22, 2017); State v. Nichols, 2009 Wisc. App. LEXIS 226 (Wis. Ct. App. Mar. 31, 2009) <https://www.wicourts.gov/ca/opinion/DisplayDocument.html?content=html&seqNo=36035> (last visited May 22, 2017).

internal injuries including a lacerated liver and was hospitalized for three days. The victim and his family believe Elberg's assault on Vang was racially motivated.<sup>76</sup>

Just within the past year, the Hmong and Latino communities in Milwaukee and across Wisconsin were devastated by crimes that they believe were hate crimes. In March 2016, Dan Popp was charged with three counts of first-degree intentional homicide in the deaths of Jesus Manso-Perez, Phia Vue, and Mai Vue. According to various local and regional news sources, the perpetrator, Popp, shot and killed Mr. Manso-Perez after asking him and his son where they were from. After they replied, "Puerto Rico," Popp apparently said, "[o]h, that's why you don't speak English," and then moments later, retrieved a rifle from his apartment and stated, "[y]ou guys got to go," before he shot Mr. Manso-Perez in the head. Popp then shot at Mr. Manso-Perez's son who managed to run away. After killing Mr. Manso-Perez, Popp reportedly kicked down the apartment door to Mr. Phia Vue and his wife Mai Vue's apartment. Popp shot Mr. Vue in the head inside Vue's apartment; Popp dragged Mrs. Vue upstairs and shot her in the head and abdomen.<sup>77</sup> Although this case is ongoing and although the families of the victims and others have urged prosecutors to charge Popp with a hate crime enhancement, the Milwaukee district attorney has not done so as of April 2017. In March 2017, according to police, Henry Kaminski of Junction City, Wisconsin fired a handgun toward his Hmong neighbor (an older adult Hmong woman) and made derogatory comments about Hmong people.<sup>78</sup>

It is important to note that the above examples are reported hate crimes or possible hate crimes against Asian Americans in the last 10 years that have received local, state and/or national attention. They do not represent the full range of reported and unreported hate crimes or hate incidents against Asian Americans in Wisconsin.

---

<sup>76</sup> Mike Longaecker, *Wisconsin Lawmaker Condemns Sentence in Assault of Hmong Hunter*, TWIN CITIES PIONEER PRESS, May 23, 2015, <http://www.twincities.com/2015/05/23/wisconsin-lawmaker-condemns-sentence-in-assault-of-hmong-hunter/> (last visited May 22, 2017).

<sup>77</sup> *Judge Rules Suspect Incompetent in Milwaukee Triple Slaying that Families call Hate Crime*, CHICAGO TRIBUNE, Apr. 6, 2016, <http://www.chicagotribune.com/news/nationworld/midwest/ct-milwaukee-triple-slaying-20160406-story.html> (last visited May 22, 2017); Ashley Luthern, *Judge Rules Man Incompetent for Trial in Milwaukee Triple Homicide*, MILWAUKEE WIS. J. SENTINEL, Apr. 6, 2016, <http://archive.jsonline.com/news/crime/expert-man-charged-in-milwaukee-triple-homicide-incompetent-for-trial-b99701754z1-374789401.html> (last visited May 22, 2017); Keri Blakinger, *Milwaukee Man Kills Three Neighbors after Learning One is from Puerto Rico: 'You guys got to go.'* N.Y. DAILY NEWS, updated Mar. 15, 2016, <http://www.nydailynews.com/news/crime/milwaukee-man-kills-neighbors-bigoted-comment-article-1.2564489> (last visited May 22, 2017).

<sup>78</sup> Nathan Vine, *Hmong Group Rallies for Social Justice, Hate Crime Charges*, STEVENS PONT J., USA TODAY NETWORK-WIS., Mar. 18, 2017, <http://www.stevenspointjournal.com/story/news/2017/03/18/hmong-group-rallies-social-justice-hate-crime-charges-henry-kaminski-junction-city/99308400/> (last visited May 22, 2017).

## IV. SUMMARY OF PANEL TESTIMONY

The panel discussions on September 12, 2013, in Madison, Wisconsin, and on August 29, 2016, in Milwaukee, Wisconsin, included testimony from community members, advocates, legal professionals, scholars, government officials, and law enforcement. Panelists were selected to provide a diverse and balanced overview of concerns regarding hate crime in Wisconsin; they represented viewpoints from the Jewish, Muslim, and Sikh faith communities; immigrant communities; and lesbian, gay, bisexual, and transgender (LGBT) communities. Among other topics, panelists discussed challenges related to appropriately applying hate crime penalty enhancements, protecting free speech, prosecuting hate crime, and addressing victim underreporting. Panelists also discussed solutions such as improved law enforcement training, community education efforts, and the need for improved data collection.

### A. Understanding Hate Crime

#### 1. Hate Crime Typology

In describing his research on the different types of hate groups and hate crimes, Dr. Stanislav Vysotsky of the University of Wisconsin-Whitewater, noted: “[H]ate groups and members of hate groups often represent probably the smallest proportion of all hate crime perpetrators.”<sup>79</sup> In order to better understand these groups, and who is most likely to engage in hate violence, Dr. Vysotsky categorized them into five subcategories: political, religious, intellectual, subcultural, and criminal.<sup>80</sup> Of these, Dr. Vysotsky suggested that intellectual groups are least likely to commit a hate crime.<sup>81</sup> Political and religious groups may engage in violent activity, “particularly when they feel they must inspire others, take action, or when they feel that their movement is not taking enough action.”<sup>82</sup> Dr. Vysotsky suggested that the subcultural and criminal hate groups are most likely to engage in hate violence “because it’s linked to a notion of an expectation of toughness and a necessity to prove oneself among one’s peers and to one’s group.”<sup>83</sup>

---

<sup>79</sup> Civil Rights and Hate Crimes in Wis., Hearing Before Wis. Advisory Committee to the U.S. Comm’n on Civil Rights, Aug. 29, 2016 (Aug. 2016) 33 lines 18-25 (statement by Dr. Stanislav Vysotsky, Assistant Professor of Sociology and Criminology, University of Wisconsin-Whitewater) <http://www.facadatabase.gov/committee/historymeetingdocuments.aspx?flr=141359&cid=282&fy=2016> [hereinafter 2016 Transcript].

<sup>80</sup> *Id.* at 34 line 19–37 line 3.

<sup>81</sup> *Id.* at 37 lines 4–8.

<sup>82</sup> *Id.* at 37 lines 11-16.

<sup>83</sup> *Id.* at 37 lines 16-21.

Dr. Vysotsky pointed to research which categorizes hate motivated criminal behavior into two distinct motivations: mission hate crime and defensive hate crime.<sup>84</sup> He explained: “Mission hate crime is one that is often motivated by an extermination of ideology, this idea that a group must be eliminated.”<sup>85</sup> In contrast: “[D]efensive hate crime is one that is motivated by a defense of what one feels entitled to.”<sup>86</sup> He described the 2012 shooting at the Sikh temple in Oak Creek, Wisconsin, as typical of such a “mission” hate crime with subcultural motivations.<sup>87</sup> However, Dr. Vysotsky noted that research suggests such high profile acts are not the most common manifestations of hate crime.<sup>88</sup> Instead, the largest number of hate crimes are known as “thrill” hate crimes, “committed by people who often are not highly committed ‘hatemongers’.”<sup>89</sup> Thrill crimes are often committed by people who are “looking for something to do, which is why when we look at the breakdown of actual committed hate crimes we see a number of simple assaults, intimidations, and acts of vandalism.”<sup>90</sup> Dr. Vysotsky testified: “These are acts that are, while hate motivated, are not likely to be as ideologically motivated as the mission and defensive, which can be much more violent . . . and unless they reach [a large scale] they tend not to be reported.”<sup>91</sup>

## 2. *Current Events*

The Committee notes that various factors impacting social climate throughout the country’s history have resulted in periods of increased hate crime targeting certain groups. For example, Panelist Ibrahim Saeed of the Islamic Center of Madison testified: “[B]ased on the FBI statistics, hate crimes against Muslims in the United States reached the massive peak and spik[ed] following the September 11 attacks<sup>92</sup> . . . then it slowed down, but it is rising up to again 50 percent or so.”<sup>93</sup> Milwaukee Police Officer Karla Lehmann similarly described during her testimony: “These [hate crime] incidents seem to increase whenever there is some kind of national incident or something

---

<sup>84</sup> 2016 Transcript (statement by Vysotsky) 37 line 22–38 line 1; *See*, Jack McDevitt, Jack Levin & Susan Bennett, *Hate Crime Offenders: An Expanded Typology*, 58(2) J. OF SOCIAL ISSUES 303, 303 (Summer 2002) (abstract).

<sup>85</sup> 2016 Transcript (statement of Vysotsky) 38 lines 1–4.

<sup>86</sup> *Id.* at 38 lines 4–6.

<sup>87</sup> *Id.* at 38 lines 7–11.

<sup>88</sup> *Id.* at 38 lines 12–22.

<sup>89</sup> *Id.* at 38 line 23–39 line 2; *See What Motivates Hate Offenders?*, NAT’L INST. OF JUSTICE (Jan. 9, 2008) <https://www.nij.gov/topics/crime/hate-crime/pages/motivation.aspx> (last visited May 15, 2017).

<sup>90</sup> 2016 Transcript (statement of Vysotsky) 39 3–7; *See* 2016 Transcript (statement of Jonathan Scharrer, Director of the Restorative Justice Project, U. of Wis. L. Sch.’s Frank J. Remington Ctr.) 27 lines 4–9.

<sup>91</sup> 2016 Transcript (statement of Vysotsky) 39 lines 13–19.

<sup>92</sup> *9/11 Attacks*, HISTORY CHANNEL, <http://www.history.com/topics/9-11-attacks> (last visited Feb. 23, 2017).

<sup>93</sup> *Hate Crimes in Wis.*, Hearing Before Wis. Advisory Comm. to the U.S. Comm’n on Civil Rights, Sept. 12, 2013 (Sept. 2013) 69 line 25–70 line 5 (statement by Dr. Ibrahim Saeed, Islamic Ctr. of Madison) <http://www.facadatabase.gov/committee/historymeetingdocuments.aspx?flr=110534&cid=282&fy=2013> (last visited May 19, 2017) [hereafter 2013 Transcript]; *See* Kuang Keng Kuek Ser, *Data: Hate Crimes Against Muslims Increased after 9/11*, Sept. 12, 2016, PUB. RADIO INT’L, <http://www.pri.org/stories/2016-09-12/data-hate-crimes-against-muslims-increased-after-911> (last visited Jan. 11, 2017).

that makes the news in our community. The Zimmerman [case]<sup>94</sup> came up, a couple examples came up of things that have kind of elevated things and created issues in our community. I think emotions tend to run high and there [are] some retaliation type crimes.”<sup>95</sup>

Other events, major political changes, political discourse, and popular media rhetoric have also been associated with the rise and fall of hate crimes. David Stacy of the Human Rights Campaign recently explained: “Hate crimes occur during a period of heightened rhetoric . . . .”<sup>96</sup> Commenting on a 2017 review of FBI hate crime data by CNN, Stacy said: “Whenever a vulnerable group is given national attention—whether the attention is positive or negative—people who are biased against the group may lash out.”<sup>97</sup>

For example, panelist Steve Starkey, Executive Director of the South Central Wisconsin LGBT Community Center OutReach<sup>98</sup> testified: “LGBT issues have been in the news a lot in the last couple of years because of federal and state laws regarding gay rights. It seems that this encourages LGBT supporters . . . . However, it also encourages anti-gay people to do hate crimes or at least to have homophobic anti-gay feelings.”<sup>99</sup> Similarly, in reference to current legislation across the country (including in Wisconsin) regarding transgender individuals and the use of sex-segregated facilities such as restrooms and locker rooms, panelist Kathy Flores of Diverse & Resilient, a Statewide LGBTQ advocacy and support initiative, asserted: “We cannot allow harmful legislation to further encourage violence against LGBTQ people. And passing laws about who can go to the bathroom and where they can go to the bathroom will most definitely increase hate crimes in this state.”<sup>100</sup> She said: “These bills perpetuate and support discrimination and violence that already vulnerable LGBTQ communities face daily, in places where they are most likely to experience violence, like schools and their workplaces.”<sup>101</sup>

---

<sup>94</sup> Reference to a Feb. 26, 2016 case in Sanford, Florida, in which an unarmed black teenager, Trayvon Martin, was shot to death after a confrontation with a White Hispanic neighborhood watch volunteer, George Zimmerman. See Michael Pearson and Greg Botelho, *5 Things You Need to Know about the George Zimmerman-Trayvon Martin Saga*, CNN, updated Feb. 26, 2013, <http://www.cnn.com/2013/02/25/justice/florida-zimmerman-5-things/> (last visited May 9, 2017).

<sup>95</sup> 2013 Transcript (statement by Karla Lehmann, Police Officer, Milwaukee Police Department) 190 lines 7–13.

<sup>96</sup> Hailey Middlebrook, *The Fascinating, if Unreliable, History of Hate Crime Tracking in the US*, CNN, Jan. 12, 2017, <http://www.cnn.com/2017/01/05/health/hate-crimes-tracking-history-fbi/> (last visited Feb. 23, 2017) [hereafter *History of Hate Crime Tracking*, CNN 2017].

<sup>97</sup> *Id.*

<sup>98</sup> OutReach is a community based organization providing programs and services for lesbian, gay, bisexual, and transgender people in Madison, Wis. More at: <http://www.lgbtoutreach.org/?q=node/1> (last visited May 9, 2017).

<sup>99</sup> 2013 Transcript (statement by Steve Starkey, Executive Director, South Central Wis. LGBT Community Center OutReach) 84 line 24–85 line 7.

<sup>100</sup> 2016 Transcript (statement by Kathy Flores, Statewide LGBTQ Anti-Violence Program Coordinator, Diverse & Resilient) 118 line 24–119 line 4.

<sup>101</sup> *Id.* at 118 lines 19–23.

In another example, FBI data reveals a rise in anti-black hate crimes in 2008, following the election of the first black President, Barak Obama.<sup>102</sup> Heidi Beirich of the Southern Poverty Law Center told CNN that in 2008, “the law center saw churches with predominantly black congregations burned to the ground, among other incidents . . . with a black president in the White House, ‘people were angry’.”<sup>103</sup> Brian Levin, the Director of the Center for the Study of Hate and Extremism at the California State University, San Bernardino campus, attributed a similar 2015 rise in hate crimes to the rhetoric of the 2016 presidential campaign.<sup>104</sup> He told the New York Times: “We’re seeing these stereotypes and derogative statements become part of the political discourse . . . .”<sup>105</sup> Following the 2016 presidential campaign and election, the Southern Poverty Law Center reported 867 bias-motivated incidents across the country, thirteen of which allegedly took place in Wisconsin within a month of the election.<sup>106</sup> These incidents have involved bias-motivations focused on perceived racial identity, immigration status, gender identity, sexual orientation, and religious affiliation.<sup>107</sup>

### 3. Community Impact

Regardless of current events and popular rhetoric, some groups have consistently faced high incidents of hate crime over time. For example, FBI data indicate that between 1996 and 2014, anti-Jewish crimes accounted for more than triple the number of crimes perpetrated against any other religious community.<sup>108</sup> Race/ethnicity/ancestry remains the most common motivation for hate crime targeting; more than half of victims targeted because of their race are black or African American.<sup>109</sup> Jonathan Scharrer of the Restorative Justice Project at the University of Wisconsin School of Law noted that hate crime is an “attack on one’s identity and their personhood in addition to all other impacts...so we have a much greater impact even if you have very similar conduct because of the very nature of this sort of offense.”<sup>110</sup> Panelist Kathy Flores explained: “Like an act

---

<sup>102</sup> *History of Hate Crime Tracking*, CNN 2017.

<sup>103</sup> *Id.*

<sup>104</sup> Eric Lichtblau, *Hate Crimes Against American Muslims Most Since Post-9/11 Era*, N.Y. TIMES, Sept. 17, 2016, [http://www.nytimes.com/2016/09/18/us/politics/hate-crimes-american-muslims-rise.html?\\_r=1](http://www.nytimes.com/2016/09/18/us/politics/hate-crimes-american-muslims-rise.html?_r=1) (last visited Jan. 11, 2017) [hereafter *Hate Crimes Against American Muslims*, N.Y. TIMES 2016].

<sup>105</sup> *Id.*

<sup>106</sup> S. POVERTY L. CTR., TEN DAYS LATER: HARASSMENT AND INTIMIDATION IN THE AFTERMATH OF THE ELECTION 4 (2016), <https://www.splcenter.org/2016/11/29/ten-days-after-harassment-and-intimidation-aftermath-election> (last visited Jan. 11, 2017) [hereafter TEN DAYS LATER, S. POVERTY L. CTR. 2016].

*Note:* According to the SPLC, data referenced includes incidents reported in news articles as well as those reported directly to the SPLC website. Incidents determined by the authorities to be “hoaxes” have been removed, though all reports were not individually verified.

<sup>107</sup> *Id.* at 6.

<sup>108</sup> Ser, *Data: Hate Crimes Against Muslims Increased after 9/11*.

<sup>109</sup> FEDERAL BUREAU OF INVESTIGATION, UNIFORM CRIME REPORT, HATE CRIME STATISTICS 2015, VICTIMS (2016) [https://ucr.fbi.gov/hate-crime/2015/topic-pages/victims\\_final](https://ucr.fbi.gov/hate-crime/2015/topic-pages/victims_final) (last visited May 19, 2017).

<sup>110</sup> 2016 Transcript (statement of Scharrer) 25 lines 3–11.

of terror, it sends the message telling the entire community that they are not safe. Every time an act like this happens in the State of Wisconsin . . . we've had to send out alerts talking about how to keep us safe and how to walk together and do things like that, because it sends that message.”<sup>111</sup>

A consistent theme across groups that testified before the Committee in both 2013 and 2016 was the impact hate crime has not only on the individuals targeted, but the entire community that surrounds them. Panelist Pardeep Kaleka of Serve2Unite<sup>112</sup> noted that bias-motivated crime against Muslims has affected “[e]very immigrant, Arab, Middle Eastern, Pakistani, Indian, or Sikh . . . [w]e have been an invisible population, severely underrepresented in the social, professional, and political reality of city, state, and national politics.”<sup>113</sup> Jo Ann Oravec of the University of Wisconsin-Whitewater described: “Sometimes the [statistics], when it comes to some of these very restricted, very isolated incidents[,] don't reflect the impact of the crimes when a piece of graffiti is put on the side of a grocery store . . . that kind of impact [goes] far beyond the numbers.”<sup>114</sup> Mr. Baltazar de Anda-Santana of the Latino Academy of Workforce Development in Madison explained that students he works with sometimes avoid engaging in cultural and social events because the anti-immigrant and anti-Latino rhetoric has made it so they “don't feel welcome.”<sup>115</sup> Mr. Anda-Santana's comments illustrate how the real or perceived fear of not being welcomed influences behavior within affected communities, where individuals may avoid interaction with other groups and limit the social and cultural opportunities they could otherwise be exposed to if not for the climate that hate crimes creates.

Panelists also spoke about the compounding effect of intersectionality on those targeted by hate crimes. That is, those individuals who identify with multiple targeted groups may be even more vulnerable to hate motivated attacks. For example, panelist Kathy Flores noted that sexual orientation, gender identity, race, and national origin often overlap to create particularly dangerous situations for many Lesbian, Gay, Bisexual, Transgender, and Queer (LGBTQ) individuals.<sup>116</sup> According to the National Coalition of Anti-Violence Programs:<sup>117</sup> “LGBTQ survivors of color are twice as likely to experience physical violence as those who do not identify as being of color, and undocumented survivors are four times more likely to experience physical violence.”<sup>118</sup> Ms.

---

<sup>111</sup> 2016 Transcript (statement of Flores) 118 lines 8–15.

<sup>112</sup> Serve2Unite is a community based organization working to provide educational programs in schools to prevent and respond to hate crime. More at: <http://serve2unite.org/> (last visited Feb. 23, 2017)

<sup>113</sup> 2016 Transcript (statement of Pardeep Kaleka, Serve2Unite) 84 lines 19–24.

<sup>114</sup> 2013 Transcript (statement of Jo Ann Oravec, Professor in the College of Business and Economics, U. of Wis.-Whitewater) 210 lines 17–25.

<sup>115</sup> 2013 Transcript (statement of Baltazar de Anda-Santana, Latino Academy of Workforce Development) 114 line 24–115 line 5; *See* 115 line 5–14.

<sup>116</sup> 2016 Transcript (statement by Flores) 113 line 25–114 line 6; 140 lines 8–141 line 15.

<sup>117</sup> More information about the National Coalition available at: <http://ncavp.org/about/default.aspx> (last visited May 15, 2017).

<sup>118</sup> 2016 Transcript (statement by Flores) 114 lines 1–6.

Flores also noted that those experiencing homelessness even more vulnerable, because after being attacked they have no safe housing to return to, and thus are often subjected to repeated attacks.<sup>119</sup> Testimony also suggested that LGBTQ individuals may be more likely than average to experience economic hardships and homelessness. Karen Gotzler of the Milwaukee LGBT Community Center noted that LGBTQ individuals on average have “40 percent less income and fewer assets than a typical non-LGBT person.”<sup>120</sup> She concluded: “When combining LGBTQI status with the social and economic status of people of color or a person with a disability, you can imagine the challenges that we try to address.”<sup>121</sup>

Despite this broadly damaging community impact, panelists also offered a vision of hope that hate crime could present an opportunity to educate and make communities stronger. Bonit Gill of the Sikh Student Association of University of Wisconsin-Madison, and a member of the Oak Creek Temple violently attacked in 2012 said: “[T]hroughout the grief and sorrow we found resilience. We found solidarity in the Sikh community, and we resolved to fight hate with love and education. Sikhs around the world vowed to teach others about our faith and to spread awareness.”<sup>122</sup> She concluded: “[A]lthough it’s saddening to hear about these crimes and this hatred, it is uplifting to see the undying efforts of our communities and many communities around the country, regardless of culture and religion. Hate crimes have the power to break spirits and cause a sense of loss, but we have the power to stop them.”<sup>123</sup>

#### 4. *Community Stories*

During both the 2013 and 2016 hearings, community groups, law enforcement, and others shared their specific experiences and stories relating to hate crime and hate incidents in Wisconsin. A selection of these stories is included below. While not all of these stories represent criminal activity, they are included in order to honor the experience of those who testified, and to illustrate the types of experiences community members felt may contribute to a climate that allows hate motivated crimes to occur in the state. Discussion of the distinction between hate incidents and hate crime, and the challenges each pose, is presented in later sections of this report.

- Dr. Ibrahim Saeed of the Islamic Center of Madison reported an incident in which two Muslim families were canoeing on the Kickapoo River in Northern Wisconsin when people in another canoe passed them and told them that if they enjoyed America they shouldn’t be

---

<sup>119</sup> 2016 Transcript (statement by Flores) 115 lines 5–12.

<sup>120</sup> 2016 Transcript (statement by Karen Gotzler, Executive Director, Milwaukee LGBT Community Center) 102 lines 4–5.

<sup>121</sup> *Id.* at 102 lines 5–9.

<sup>122</sup> 2013 Transcript (statement by Bonit Gill, Sikh Student Association of U. of Wis.-Madison) 101 lines 2–9.

<sup>123</sup> *Id.* at 102 lines 18–25; *See* 2013 Transcript (statement by Keith Bailey, Founder, Milwaukee Matters) 106 line 10–108 line 23.

“blowing up this place,” implying accusations of terrorism because of their Muslim faith.<sup>124</sup>

- Dr. Saeed also testified that Muslim girls in school have been regularly harassed by other students who try to pull off their head scarfs; in one incident his own daughter was working at Starbucks when a customer began shouting at her saying, “you are the one who killed our people!” before being removed by security.<sup>125</sup> Mr. Saeed stated that Muslim girls and women are more frequently targeted for such attacks than men and boys because of their identifying head scarfs.<sup>126</sup>
- Mr. Bon Her shared his experience with a local pharmacy, owned and operated by a man who is Arabic, being burglarized seventeen times in three months, with little police response;<sup>127</sup>
- Ms. Karole Kimble recalled being out with her two small children when a man approached them and called them “half-breed niggers.” She reported the incident to a nearby police officer, who questioned her, and then her children, rather than looking for the man who had been harassing them;<sup>128</sup>
- Mr. Baltazar de Anda-Santana recalled the impact of reading racially derogatory language such as “bea[n]er,” and “Wetback” in the local comments section of the local newspaper.<sup>129</sup> He described the marginalization many in the community feel when confronted with such language: “[W]e especially want to feel welcome, we want to feel that we belong to this country, and yet . . . we do not feel that this is our country.”<sup>130</sup>
- Ms. Kahn-Oren emphasized the negative impact of anti-Semitic bullying on youth and provided recent examples of Jewish high school students being subjected to jokes about the Holocaust and being teased with pranks based on stereotypes.<sup>131</sup> Ms. Kahn-Oren provided a 2010 example of an incident that occurred at the University of Wisconsin-Milwaukee, where “there were anti-Israel messages chalked all over the floor of a plaza at the university, and among those messages was a swastika.”<sup>132</sup>

---

<sup>124</sup> 2013 Transcript (statement of Saeed) 87 line 12–88 line 6.

<sup>125</sup> *Id.* 74 line 1–75 line 4.

<sup>126</sup> *Id.* 71 lines 12–15.

<sup>127</sup> 2016 Transcript (statement by Bon Her, Hayat Pharmacy) 143 lines 8–22.

<sup>128</sup> 2016 Transcript (statement by Karole Kimble, Wis.) 147 line 19–148 line 14.

<sup>129</sup> 2013 Transcript (statement by De Anda-Santana) 114 lines 1–12.

<sup>130</sup> *Id.* at 114 lines 17–23.

<sup>131</sup> 2013 Transcript (statement by Elana Kahn-Oren, Jewish Community Relations Council of the Milwaukee Jewish Federation) 62 line 23–63 line 8.

<sup>132</sup> *Id.* at 66 lines 6–12.

- Ms. Kahn-Oren also described a recent, large-scale incident in Algoma, Wisconsin where hand-painted, wooden signs displaying swastikas and anti-Jewish comments were posted throughout the town, the most abhorrent stating “kill the Jews, keep Algoma clean.”<sup>133</sup>
- Mr. Pardeep Kaleka spoke of a recent incident in which a Milwaukee gas station was set on fire with a Sikh immigrant inside. There was no mention of investigating this incident as a hate crime. Elected officials were reportedly unresponsive to community concern regarding this incident.<sup>134</sup>
- Mr. Thai Vue spoke of three specific violent attacks on Hmong Americans between 2007 and 2016 in Wisconsin. Mr. Cha Vang was killed in 2007 while out hunting; his body was found hidden in the woods. Mr. Sau Lue Vang was severely beaten during a hunting trip in 2014; his attacker received just ten days jail time and two years’ probation for the crime. Mr. Phia Vue, and his wife Mai Vue, were killed in their Milwaukee apartment in 2016, leaving behind four children. All three of these attacks were perpetrated by white men, and Mr. Vue testified that the Hmong community believes that all four victims were attacked because of their Hmong heritage.<sup>135</sup>
- Ms. Karen Gotzler noted a dramatic increase in physical assaults and murders of transgender women of color in the United States in the 18 months prior to her testimony. She noted that most of these murders are not reported as hate crime and are often not reported as crimes against transgender individuals. She added, crimes affect the self-worth of the entire community, and make it less likely that other LGBT individuals will access services and report crimes that happen to them.<sup>136</sup>
- Ms. Kathy Flores relayed the story of a young man named Timothy who was attacked after an anti-gay incident in his workplace. Timothy was struck on the head with a two-by-four and suffered head and facial abrasions and multiple facial fractures. Despite multiple witnesses hearing anti-gay slurs during the incident, the case was not tried as a hate crime because the victim and the perpetrator knew each other, so the district attorney said the attack was personal and not hate motivated.<sup>137</sup>

---

<sup>133</sup> 2013 Transcript (statement by Kahn-Oren) 57 line 14–58 line 2.

<sup>134</sup> 2016 Transcript (statement by Kaleka) 85 line 4–86 line 5.

<sup>135</sup> 2016 Transcript (statement by Thai Vue, Wis.) 98 line 2–99 line 16.

<sup>136</sup> 2016 Transcript (statement by Gotzler) 102 lines 10–21.

<sup>137</sup> 2016 Transcript (statement by Flores) 110 line 18–111 line 15.

## **B. Hate Crime Penalty Enhancements**

### *1. Purpose*

A primary function of both state and federal hate crimes statutes is to apply penalty enhancements to criminal behavior motivated by bias toward a protected group or class of people. As panelist Ismael Ozanne, Dane County District Attorney explained, penalty enhancements have “the ability to take a Class B misdemeanor and increase the penalty from 90 days in jail to a year, raise the fine from \$1,000 to \$10,000 or take a Class A misdemeanor, which would be a nine-month misdemeanor, and turning it into a felony, which would have the ability to have a prison sentence attached to it.”<sup>138</sup>

Panelist Miriam Zeidman of the Anti-Defamation League described the purpose and the importance of such enhancements:

Hate crimes are uniquely harmful. When a person is targeted for a crime because of his or her immutable characteristic, whether it is his or her race, religion, national origin, gender, sexual orientation, gender identity or disability, it does not just injure that person. It harms the entire community of people who share that characteristic. And it sends the message that they are not welcome, that they are not safe. Bias crimes are designed to intimidate the victim and members of the victim's community, leaving them feeling fearful, isolated, vulnerable and unprotected by the law. Failure to address this unique type of crime often causes an isolated incident to explode into widespread community tension. The damage done by hate crimes, therefore, cannot be measured solely in terms of physical injury or dollars and cents. By making members of minority communities fearful, angry and suspicious of other groups, and of the power structure that is supposed to protect them, these incidents can damage the fabric of our society and fragment communities. Because hate crimes have unique dangers and harms, they require unique tools to address, combat and prevent them.<sup>139</sup>

Madison Police Department detective Dave Gouran concurred that hate crimes are message crimes: “[I]t’s not just a single individual victim that’s affected, it’s perhaps a larger community that they represent.”<sup>140</sup> Ms. Zeidman noted legal justification for providing special protection to victims of such crimes:

---

<sup>138</sup> 2013 Transcript (statement by Ismael Ozanne, District Attorney, Dane County, Wis.) 129 lines 15–22.

<sup>139</sup> 2013 Transcript (statement by Miriam Zeidman, Midwest Civil Rights Counsel, Anti-Defamation League) 10 line 24–11 line 23; *See* 2013 Transcript (statement by David Gouran, Detective, Madison Police Department) 185 lines 5–12.

<sup>140</sup> 2013 Transcript (statement by Gouran) 185 lines 6–8.

Hate crimes are comparable to other status crimes. Many federal and state laws provide different penalties for crimes depending on the victim's particular status. Virtually every criminal code protects -- provides enhanced penalties for crimes directed at the elderly or the very young or teachers on school grounds or law enforcement officials. Legislators have legitimate and neutral justifications for selective protection of certain categories of victims, and enhanced criminal penalties, based on their judgment of the societal harm that these crimes cause.<sup>141</sup>

Finally, Ms. Zeidman testified that hate crime penalty enhancements are designed to protect citizens of all backgrounds: "It is not focused on just minority communities and, in fact, of the hate crimes that were racially based reported by the FBI in 2011, 16.7 percent stemmed from anti-white bias. The hate crime laws are color blind. They are religion blind. They are national origin blind."<sup>142</sup> As such, Ms. Zeidman concluded that neutrally-applied hate crime laws are an appropriate mechanism for protecting individuals and communities from bias-motivated criminal acts.

## 2. *Protecting Free Speech*

Panelist Rick Esenberg of the Wisconsin Institute for Law and Liberty, raised caution that imposing enhanced penalties for certain criminal behaviors based on the motivation of the offender could create additional, unintended civil rights problems.<sup>143</sup> Citing concerns of free speech and equal protection, Mr. Esenberg testified that it is problematic to identify *any* specific personal characteristic for enhanced protection under hate crime legislation.<sup>144</sup> He stated: "[T]he idea of punishing people more severely, or perhaps charging them at all, because of what they thought or said while committing a crime ought to give us pause. It raises the spectra of unequal treatment and presents difficult questions of proof and prosecution."<sup>145</sup>

For these reasons, Mr. Esenberg warned that considering hate motivations in criminal investigations could lead to unfair prosecution of an individual's personal character and beliefs, rather than his or her actions.<sup>146</sup> Furthermore, he suggested that the task of deciding "what types of group based animus constitute hate"<sup>147</sup> is extremely unlikely to be accomplished in a "neutral

---

<sup>141</sup> 2013 Transcript (statement by Zeidman) 11 line 24–12 line 11.

<sup>142</sup> *Ibid.* at 52 lines 6–11.

<sup>143</sup> 2013 Transcript (statement by Rick Esenberg, Founder, President, & Gen. Couns., Wis. Inst. for L. and Liberty) 23 line 4–24 line 2.

<sup>144</sup> *Id.* at 25 lines 9–17.

<sup>145</sup> *Id.* at 28 lines 4–10.

<sup>146</sup> *Id.* at 50 line 21–51 line 3; *See* 2013 Transcript (statement by Ozanne) 172 lines 9–17.

<sup>147</sup> 2013 Transcript (statement by Esenberg) 29 lines 2–3.

fashion”<sup>148</sup> and thus itself indicates a biased, “state sanctioned war against attitudes.”<sup>149</sup> As such, Mr. Esenberg testified that any “campaign against intolerance always risks itself becoming an exercise in intolerance,”<sup>150</sup> and suggested that such a danger is most concerning because “this time the threat won’t come from the occasional act of a disturbed person but from officials imbued with the coercive power and persuasive authority of the state.”<sup>151</sup>

Ms. Zeidman responded to these concerns by noting that looking into the personal characteristics of a defendant is “not what hate crimes do. Hate crime laws are not intended for law enforcement to examine the type of person a particular perpetrator is.”<sup>152</sup> She clarified: “The investigation is about whether the perpetrator intentionally targeted the victim based on one of those protected characteristics.”<sup>153</sup> For these reasons, she concluded, and cited legal precedents to support, the congruence of hate crime laws with first amendment rights:

Hate crime laws are consistent with the First Amendment. The First Amendment does not protect violence, and it does not prevent the government from imposing criminal penalties for violent discriminatory conduct directed against victims on the basis of their personal characteristics. Hate crime laws do not punish speech. Americans are free to think, say and believe whatever they want. It is only when an individual commits a crime because of those biased beliefs and intentionally targets another for violence or vandalism that a hate crime statute can be triggered. In *Wisconsin v. Mitchell*, the United States Supreme Court unanimously upheld the constitutionality of the penalty-enhancement statute, effectively removing any doubt that state legislatures may properly increase the penalties for criminal activity in which the victim is intentionally targeted because of his or her race, religion, sexual orientation, gender, or ethnicity.<sup>154</sup>

Another panelist, Jeannine Bell, Professor of Law and Fellow at the Maurer School of Law at Indiana University also provided testimony regarding the congruence of free speech rights with hate crime laws. Ms. Bell’s testimony was based on her research into a specialized hate crimes police unit, as published in the 2004 book *Policing Hatred* by the New York University Press.<sup>155</sup> Her research included more than five months of direct observation; accompaniment of officers on trainings, in court, and during surveillance activities; review of over 700 files spanning an 18 year

---

<sup>148</sup> 2013 Transcript (statement by Esenberg) 28 line 13.

<sup>149</sup> *Id.* at 25 lines 9-11.

<sup>150</sup> *Id.* at 23 lines 6–8.

<sup>151</sup> *Id.* at 34 lines 9-12; *See Id.* at lines 1–12.

<sup>152</sup> 2013 Transcript (statement by Zeidman) 51 lines 13–19.

<sup>153</sup> *Id.* at 51 lines 19–22.

<sup>154</sup> *Id.* at 12 line 12–13 line 7.

<sup>155</sup> 2013 Transcript (statement of Jeannine Bell, Professor of Law and Fellow, Ind. U., Maurer Sch. of L.) 35 lines 15–22; *See* JEANNINE BELL, *POLICING HATRED: LAW ENFORCEMENT, CIVIL RIGHTS, AND HATE CRIME* (NYU Press 2004).

period; and direct formal interviews with officers, prosecutors, and victim advocates.<sup>156</sup> Ms. Bell testified that in her research she found law enforcement officers conducting hate crime investigations “to be very careful with respect to the First Amendment,”<sup>157</sup> stating that in the 700 cases she reviewed, she found no evidence of police officers examining a perpetrator’s personal background and affiliations in order to apply hate crime enhancement penalties.<sup>158</sup> Ms. Bell described how she found law enforcement to approach hate crimes investigations:

[I]n order to sort through the incidents, officers developed a shorthand for the types of incidents that could be reported as hate crimes that are really something else. And I divided these into several categories, ranging from traffic accidents to neighbor disputes, including drug deals gone bad and fights. I call these cases the typical non-hate crime. And officers eliminated each of these explanations, and it's only after they do that that they look to the language used during the crime.<sup>159</sup>

Through this work Ms. Bell concluded that “Slurs and epithets were not dispositive of motivation to the detectives . . . [w]e use bad language all the time, and focusing on slurs wouldn't allow detectives to sufficiently separate out bias-motivated cases from cases that were not bias motivated.”<sup>160</sup> As one detective explained to her: “[R]acial words are very violent, racial words may be hate incidents, but words aren't a crime.”<sup>161</sup> However, Ms. Bell cautioned that it is very important for detectives to be appropriately trained, noting: “I studied a large well-funded and well-trained unit. If that's not happening, then the types of routines that I saw that actually respect the First Amendment may not occur.”<sup>162</sup>

Finally, panelist Keith Bailey of Milwaukee Matters, a community organization established to aid victims of violence and their families, cited both the burden of proof necessary to apply penalty enhancements and the historical pattern of violent intolerance toward various social groups in the United States as an acceptable, neutral justification for applying penalty enhancements to hate motivated crime, that do not impinge on free speech protections. He stated: “[T]hat enhancer has to be proven, it's got to be a proven thing, and I think if it is definitely proven that someone hurt someone or destroyed property as a result of someone being different from them, with our American history, I think that they should definitely be penalized accordingly.”<sup>163</sup>

---

<sup>156</sup> 2013 Transcript (statement of Bell) 36 line 22–37 line 10.

<sup>157</sup> 2013 Transcript (statement of Bell) 38 lines 9–12.

<sup>158</sup> *Id.* at 52 lines 17–23.

<sup>159</sup> *Id.* at 39 lines 11–22.

<sup>160</sup> *Id.* at 40 lines 3– 11.

<sup>161</sup> *Id.* at 41 lines 5–7.

<sup>162</sup> *Id.* at 41 line 23– 42 line 2.

<sup>163</sup> 2013 Transcript (statement by Bailey) 121 lines 12-18.

### 3. *Effectiveness of Enhancers*

In order to apply penalty enhancements, hate crime law must clearly define which personal characteristics are to receive such additional protection. In the State of Wisconsin, Ms. Zeidman noted that while strong hate crimes laws do exist, “Wisconsin’s hate crime law does not include crimes where the victim is targeted because of gender or gender identity.”<sup>164</sup> This may be particularly important because, as Mr. Starkey noted, transgender individuals are often more easily identified than gay individuals, who are protected under Wisconsin’s hate crime law, “so they’re a lot more easily attacked.”<sup>165</sup> Ms. Zeidman also raised concern that Wisconsin does not offer protection for victims targeted because of their association with a person of a protected category or perceived to be of a protected category—such as, a white woman attacked not because of her own race but because she is dating an African American, or a child targeted for a crime not because of his own sexual orientation, but because his mother is a lesbian.<sup>166</sup> Ms. Zeidman recommended that Wisconsin’s law be altered to include both of these categories.<sup>167</sup> In discussing the appropriateness of expanding hate crime legislation to include additional protected categories, Dr. Vysotsky urged consideration of the distinction between “ascribed” identities and those that are “achieved,” that is, “a thing you can change your mind on . . . as opposed to something that a person believes intrinsic to themselves.”<sup>168</sup>

Panelists also discussed a number of legal challenges in actually applying the hate crime penalty enhancements, when protected categories are invoked. Panelist Reggie Jackson of America’s Black Holocaust Museum suggested that Wisconsin’s hate crime statutes could be more effective if the existing penalty enhancers were reclassified as sentencing aggravators.<sup>169</sup> He described two concerns with penalty enhancement provisions. First, “[a] penalty enhancer is used as a tool to scare defendants into plea bargaining, and is often dropped after a plea deal is made.”<sup>170</sup> In contrast, sentencing aggravators, “[play] no role in the trial or plea bargaining phase.”<sup>171</sup> Instead, “a judge can use it to impose a longer sentence during the penalty phase.”<sup>172</sup> The second challenge with appropriately implementing penalty enhancers is that in order to be applied, “the prosecutor must provide proof of motive beyond a reasonable doubt.”<sup>173</sup> He noted: “In most hate crime cases, minus

---

<sup>164</sup> 2013 Transcript (statement by Zeidman) 14 lines 18–20; *See* 2016 Transcript (statement by Scharrer) 32 line 22–33 line 2.

<sup>165</sup> 2013 Transcript (statement by Starkey) 82 lines 13–17.

<sup>166</sup> 2013 Transcript (statement by Zeidman) 15 lines 13–22

<sup>167</sup> *Id.* at 14–16; *See* 2016 Transcript (statement by Flores) 120 lines 12–15.

<sup>168</sup> 2016 Transcript (statement of Vysotsky) 70 line 12–71 line 16.

<sup>169</sup> 2016 Transcript (statement by Reggie Jackson, Head Griot, America’s Black Holocaust Museum) 76 line 21–78 line 9; *See* 2016 Transcript (statement by Gotzler) 108 line 16–109 line 1.

<sup>170</sup> 2016 Transcript (statement by Jackson) 77 lines 1–4; *See* 2013 Transcript (statement by Gouran) 185 lines 16–22.

<sup>171</sup> 2016 Transcript (statement by Jackson) 77 lines 5–6.

<sup>172</sup> *Id.* at 77 lines 6–7.

<sup>173</sup> *Id.* at 76 line 21–77 line 1; *See* 2013 Transcript (statement by Ozanne) 165 lines 2–3.

a statement directly attributable to the defendant showing bias, it is nearly impossible to get a [hate crime] conviction.”<sup>174</sup> Jackson cited a 2005 Marquette Law Review article, “Put to the Proof: Evidentiary Considerations in Wisconsin Hate Crime Prosecutions” by Evan M. Read, which suggested that “the questions involved in trying to prove a motive of an offender put the effectiveness of the statute in doubt.”<sup>175</sup> Jackson pointed out that in 2001, Wisconsin did reclassify a number of other criminal code penalty enhancers as sentencing aggravators, though hate crime was retained as a penalty enhancer.<sup>176</sup>

Overall, testimony indicated that hate crimes have a broad impact on communities and a historical significance extending far beyond the damage caused to the individual victims directly targeted. As such, hate crime penalty enhancements are an appropriate and legitimate response to these crimes. State hate crime laws vary widely, though their application is often much farther reaching than federal hate crime statutes. Therefore, state laws perform a critical role in addressing hate crimes. To this end, the Committee heard testimony regarding two specific gaps in Wisconsin hate crime laws that should be addressed in future legislation: protection for crime victims targeted because of their gender or gender identity, and for those targeted because of their association with protected classes of individuals. The effectiveness of hate crime protections may be further strengthened through the use of sentencing aggravators, in lieu of penalty enhancement. The Committee also heard caution that care must be taken to ensure hate crime penalty enhancements are limited to criminal actions; and that law enforcement officers are sufficiently trained to prevent hate crime investigations from imposing on constitutionally protected personal attitudes, beliefs, and freedom of speech. A number of specific challenges facing law enforcement in securing the necessary evidence to demonstrate a perpetrator’s bias-motivation are discussed in the following section of this report.

### **C. Hate Crime Prosecution**

A March 2013 report of the Bureau of Justice Statistics estimated that between 2007 and 2011, just 4 percent of hate crimes ever resulted in an arrest.<sup>177</sup> The Committee heard testimony regarding several challenges facing law enforcement officials which may contribute to this low incidence of hate crime arrests and prosecutions. These challenges include victim underreporting, the discretion

---

<sup>174</sup> 2016 Transcript (statement by Jackson) 78 lines 15– 18; *See* 2013 Transcript (statement by Ozanne) 151 lines 9–25.

<sup>175</sup> 2016 Transcript (statement by Jackson) 77 line 23–78 line 22.

<sup>176</sup> *Id.* at 77 lines 10–16.

<sup>177</sup> NATHAN SANDHOLTZ, LYNN LANGTON & MICHAEL PLANTY, SPECIAL REPORT: HATE CRIME VICTIMIZATION, 2003-2011 5, Table 7 (Bureau of Justice Statistics 2013) <http://www.bjs.gov/content/pub/pdf/hcv0311.pdf> (last visited May 21, 2015) [hereafter BJS SPECIAL REPORT 2013].

required to distinguish between hate incidents and hate crimes, and difficulties in establishing the level of proof necessary to apply relevant penalty enhancements.

### *1. Victim Underreporting*

According to the U.S. Department of Justice, approximately 35 percent of hate crimes were reported to law enforcement between 2007 and 2011—a statistic which marked an 11 percent decline in reporting as compared to between 2003 and 2006.<sup>178</sup> This same study cited victim belief that the “police could not or would not help” as the most common reason why hate crimes were not reported.<sup>179</sup> Victim belief that the act was either “a private matter,” or had been “dealt with another way” was the second most commonly cited reason for underreporting between 2007 and 2011.<sup>180</sup>

Such victim underreporting is a significant problem in addressing hate crime. As Supervisory Special Agent of the FBI, panelist Chadwick Elgersma, noted “...if we're not aware of the information there is nothing that we can do. So we need the information in order to build a federal case that can be presented to the U.S. Attorney Office.”<sup>181</sup> Mr. Elgersma described the difficulty in identifying sources of unreported data. On noting a decline in reported hate crime incidents in Wisconsin between 2010 and 2011, he suggested a lack of education or a belief on the part of the victim or law enforcement that the incident “just didn’t rise to the level [of hate crime] in their mind” as a potential cause.<sup>182</sup>

Other panelists suggested a number of additional factors that may contribute to hate crime underreporting. These include:

- privacy concerns regarding potentially sensitive personal information such as immigration status and sexual orientation;
- victim belief that the crime is not egregious enough to prosecute or the perpetrator won’t be caught;

---

<sup>178</sup> BJS SPECIAL REPORT 2013, 5, table 7; *Note*: Data is from the Bureau of Justice Statistics Hate Crime Victimization Survey. Percentages based on all hate crime victimizations, including those in which the police were not notified or it was unknown whether the police were notified. Hate crime includes incidents confirmed by police as bias-motivated and incidents perceived by victims to be bias-motivated because the offender used hate language or left behind hate symbols. Hate crimes include violent crimes, personal larceny, and household property crimes.

<sup>179</sup> *Id.* at 6, figure 6.

<sup>180</sup> *Id.*

<sup>181</sup> 2013 Transcript (statement by Chadwick Elgersma, Supervisory Special Agent, FBI) 128 lines 15-19; *See* 2013 Transcript (statement by James Santelle, former U.S. Attorney, Eastern district of Wis.) 154 line 17–155 line 5. *Note*: At the time of the Committee’s 2013 hearing, U.S. Attorney Santelle was the current sitting U.S. Attorney for the Eastern District of Wisconsin.

<sup>182</sup> 2013 Transcript (statement by Elgersma) 168 line 25–169 line 17.

- language barriers;
- fear of the police;
- fear of reprisal;
- lack of access to legal representation;
- lack of awareness as to what constitutes a hate crime.<sup>183</sup>

On speaking of victims' fear of police, panelist Kathy Flores of Diverse & Resilient cited a study of the National Coalition of Anti-Violence Programs, which found that "only 41 percent of survivors reported the violence they experienced to police; and of those who reported, 80 percent of survivors said police were indifferent or hostile to them."<sup>184</sup> Additionally, she noted that 39 percent of those 80 percent "also experienced physical violence and the use of slurs of bias language and some sexual violence by police."<sup>185</sup> She concluded:

Is it any wonder why hate crimes in this community are so underreported when local responses continue to be so re-victimizing? LGBTQ individuals and survivors can experience bias when working with the criminal justice system which discourages them from reporting. And LGBTQ people of color and undocumented LGBTQ people experience that discrimination and harassment at an even higher rate.<sup>186</sup>

Ms. Karen Gotzler of the Milwaukee LGBT Community Center told the story of one of her program participants whose partner was shot and killed by their neighbor for being gay. Though the crime was reported in the paper, it was not reported that the victim was a lesbian, and the incident was not reported as a hate crime. Ms. Gotzler explained: "This is in large part because family, and sometimes even victims, want to stay invisible. They are afraid of retaliation. They are afraid of being known. They are afraid of humiliation."<sup>187</sup> She continued to explain that such fear is common; at a recent discussion group involving eighteen members of the Community Center, "every single person there had been a victim of at least one hate crime as defined by law, but not a single group participant had reported it or would . . . ."<sup>188</sup>

---

<sup>183</sup> 2013 Transcript (statement of Zeidman) 17 lines 22–18 line 9; *See* 2013 Transcript (statement by Ozanne) 152 lines 1–20; 2013 Transcript (statement of Santelle) 154 line 17–155 line 5; 2013 Transcript (statement of Gouran) 182 line 23–183 line 6; 2016 Transcript (statement of Vysotsky) 39 line 20–41 line 10; 2016 Transcript (statement of Gotzler) 105 lines 5–10; 2016 Transcript (statement of Kimble) 144 lines 6–25.

<sup>184</sup> 2016 Transcript (statement of Flores) 115 line 13–116 line 13.

<sup>185</sup> *Id.*

<sup>186</sup> *Id.* at 116 lines 4–13.

<sup>187</sup> 2016 Transcript (statement of Gotzler) 103 lines 16–20.

<sup>188</sup> *Id.* at 103 line 21–104 line 10.

In addition to such cases in which victims do not to report hate crimes to police, former U.S. Attorney for the Eastern district of Wisconsin James Santelle noted that sometimes law enforcement are aware that a person was targeted because of bias-motivation, but the victim does not wish to include such information in the relevant report. “[T]hat is a very significant law enforcement hurdle then to not only reporting them properly but certainly to prosecution with the state and federal [prosecutors]”<sup>189</sup>

In order to address the issue of community trust in law enforcement and awareness of people’s rights to protection from hate crime, Dr. Stanislav Vysotsky recommended having a community liaison to encourage reporting and develop a stronger relationship between law enforcement and the communities they serve: “[I]t’s really crucial to develop a liaison with community institutions in targeted communities to encourage reporting. Developing stronger relationships and belief in a representation is crucial for communities and being able to feel comfortable and safe in reporting.”<sup>190</sup>

Mr. Santelle described several such outreach efforts in collaboration with the U.S. Department of Justice, including with the LGBT and Muslim communities in Milwaukee, the Hmong community in Oshkosh, and the Sikh community in Oak Creek; as well as some potential future outreach in the Jewish community in Algoma.<sup>191</sup> Mr. Santelle recalled that after one event, he received several comments from otherwise very active and engaged community members who said that they had been unaware of what services could be available to them.<sup>192</sup> He concluded: “It’s not that the hate crimes are not occurring, I suspect they are . . . some of the relevant public may not know about the process to report them and may not appreciate what the government will do in the appropriate circumstance to prosecute those cases.”<sup>193</sup>

Detective David Gouran and Captain Mary Schauf of the Madison Police Department also described efforts to address underreporting challenges in their department, including establishing a department policy against probing for citizenship status among crime victims and witnesses, so as not to deter people from coming forward with information or when they need help.<sup>194</sup> They also have community outreach programs, including youth activities, and outreach on the Spanish language radio station to help build community trust, while off duty officers work jobs at local Jewish temples during the holidays to help deter anti-Semitic vandalism.<sup>195</sup> Detective Gouran testified that these activities “[inspire] confidence in the police department . . . that you're going to

---

<sup>189</sup> 2013 Transcript (statement of Santelle) 154 line 17–155 line 3.

<sup>190</sup> 2016 Transcript (statement by Vysotsky) 42 lines 14–20; *See* 2016 Transcript (statement by Flores) 120 line 16–121 line 5.

<sup>191</sup> 2013 Transcript (statement of Santelle) 138 line 20–146 line 12, 161 line 20–163 line 10.

<sup>192</sup> *Id.* at 162 line 2–163 line 10.

<sup>193</sup> *Id.* at 163 lines 1–10.

<sup>194</sup> 2013 Transcript (statement by Gouran) 187 lines 10–15.

<sup>195</sup> *Id.* at 187 lines 1–23.

respond and try to solve these situations.”<sup>196</sup> Captain Schauf noted that developing these relationships can have the added benefit of helping law enforcement be more proactive in addressing hate crime.<sup>197</sup>

Finally, panelists suggested the way that hate crime investigations are conducted can help to address victim underreporting. Detective Gouran of the Madison Police Department and Officer Karla Lehmann of the Milwaukee Police Department both recommended that hate crime investigations be approached in a similar manner to other “sensitive crimes” such as sexual assault and child abuse.<sup>198</sup> Detective Gouran remarked: “It requires you employ more thorough interviews of your victims, witnesses to elicit the full information . . . .”<sup>199</sup> Officer Lehmann noted the importance of community collaboration in addressing such sensitive crimes, “having all of the people that have a stake in this at the same table and communicating with one another.”<sup>200</sup>

## 2. *Hate Incidents verses Hate Crime*

As noted in the previous section of this report, hate crime laws and their related penalty enhancements only apply when an underlying criminal act has taken place. However, the Committee heard testimony indicating that such a distinction is not always clear or easy for law enforcement to make. For example, panelist Steve Starkey of OutReach, described an incident in which a same sex couple in a public park in Madison was celebrating a commitment ceremony; protesters arrived at the event holding signs saying that they were going to “burn in hell.” They became increasingly vocal, and reportedly started harassing the children at the event until police arrived and told them they needed to “back off.”<sup>201</sup> Panelists discussed this and other examples of situations in which it may be unclear as to when hateful speech should be protected by the First Amendment, and when it ought to be addressed as criminal. In reflecting on this distinction, Mr. Starkey suggested: “When they start harassing people and move close . . . that's more of a threatening kind of a gesture, and I think that that would be . . . the line where they've crossed it if they're threatening, harassing people. Just standing there with a placard that has their religious view . . . that's one thing, but I think they crossed the line in that case.”<sup>202</sup>

---

<sup>196</sup> 2013 Transcript (statement by Gouran) 187 lines 21-23; *See* 2013 Transcript (statement by Mary Schauf, Captain, Madison Police Department) 176 line 15–177 line 12.

<sup>197</sup> 2013 Transcript (statement by Schauf) 176 line 15–177 line 12.

<sup>198</sup> 2013 Transcript (statement by Gouran) 182 lines 6-22; *See* 2013 Transcript (statement by Karla Lehmann, Officer, Milwaukee Police Department) 189 lines 9-13, 191 lines 12-23.

<sup>199</sup> 2013 Transcript (statement by Gouran) 182 lines 17-19; *See* 2013 Transcript (statement by Lehmann) 192 line 16–193 line 18.

<sup>200</sup> 2013 Transcript (statement by Lehmann) 193 lines 3–18.

<sup>201</sup> 2013 Transcript (statement by Starkey) 79 lines 1-13.

<sup>202</sup> *Id.* at 88 lines 11–21.

Other panelists similarly suggested that there are situations in which speech should be prohibited, particularly when it involves harassment and threats. For example, Kathy Flores noted that “hate violence isn’t always physical . . . [t]here are no strong laws currently in place to monitor hate violence through what we’ve seen as speech and protect people from the constant barrage and verbal harassment and threats.”<sup>203</sup> She argued that constant harassment and intimidation have serious consequences, impacting the mental health, wellbeing, and sense of safety of particularly marginalized community members.<sup>204</sup> Ms. Flores concluded: “We need to expand the definition of hate violence to include discrimination, harassment, and other nonphysical forms of violence.”<sup>205</sup>

Panelist Elana Kahn-Oren, Director of the Jewish Community Relations Council in Milwaukee, agreed, suggesting that both harassment and intimidation should be addressed as hate crime: “I think that when it gets to the point of threats, but I think that there is also intimidation. I think that’s another place where I think law enforcement needs to be involved . . . [s]o there are fuzzy lines, I think intimidation and threats for sure.”<sup>206</sup> Ms. Kahn-Oren offered that defining what words or actions constitute “intimidation” and “threats” can be difficult: “I don’t have a good answer for you because the constitutional right to free speech is really, really, important, so I don’t know that I have a really clear answer for . . . how the law should deal with hateful speech.”<sup>207</sup> Yet, she noted that overt references to the Holocaust and symbols of violence such as the swastika “evokes and justifies our deepest fears . . .” and is “absolutely dangerous.”<sup>208</sup> Panelist Jonathan Scharrer of the Restorative Justice Project at the University of Wisconsin School of Law elaborated on this danger. He noted: “[Hate] actions frequently start as low-level harassment and then escalate into more extreme forms of violence or criminal acts.”<sup>209</sup>

In addition to determining when constitutionally protected free speech crosses the line into criminal behavior, some panelists discussed the need to address organized hate activity that could *incite* actual violence or other criminal activity. Mr. Starkey suggested: “If an individual has those feelings and, you know, says things or does things that are hateful, that’s one thing, but when there are organizations and their whole purpose is to threaten, intimidate, incite people to do hateful acts towards a particular group, it seems that that should be illegal.”<sup>210</sup> While not necessarily rising to the level of criminal activity, Captain Mary Schauff of the Madison Police Department also noted

---

<sup>203</sup> 2016 Transcript (statement by Flores) 116 lines 14–20.

<sup>204</sup> *Id.* at 117 lines 7–23.

<sup>205</sup> *Id.* at 118 lines 1–4.

<sup>206</sup> 2013 Transcript (statement by Kahn-Oren) 89 lines 1–5, 90 lines 4–6.

<sup>207</sup> *Id.* at 91 lines 15–21.

<sup>208</sup> *Id.* at 61 lines 2–14.

<sup>209</sup> 2016 Transcript (statement by Scharrer) 28 lines 5–9.

<sup>210</sup> 2013 Transcript (statement by Starkey) 95 lines 7–13; *See* 2013 Transcript (statement by Saeed) 93 line 15–94 line 11; 2013 Transcript (statement by Schauf) 178 lines 4–22; *See* 2013 Transcript (statement by Ozanne) 172 line 14–173 line 6.

the potential danger of hateful rhetoric that can incite actual violence: “[T]here is still that ongoing current through social media, the Internet, where some people . . . seem to have this freedom to say whatever they want to essentially try to incite others . . . that kind of speech can inflame certain individuals to take action.”<sup>211</sup> For this reason, her department attempts to monitor social media and other cyber activity where possible in order to proactively identify threats.<sup>212</sup>

Still, other panelists cautioned that any attention to hateful speech rather than focusing solely on criminal or violent actions, is a threat. Again, Mr. Rick Esenberg, of the Wisconsin Institute for Law and Liberty stated: “[W]hen we embark on a state sanctioned war against attitudes, the tensions between the First Amendment and the anti-hate project are inevitable . . . .”<sup>213</sup> Despite these concerns, Dr. Donald Downs, Professor of Political Science, Law, and Journalism at the University of Wisconsin-Madison, suggested that current legal precedent appropriately navigates these bounds. He cited a case in which, after a long-standing conflict with a neighbor involving hate speech, a Wisconsin man was finally arrested for disorderly conduct.<sup>214</sup> The man was able to argue that he was arrested for speech, and punished for the viewpoint behind his speech, rather than disorderly conduct itself.<sup>215</sup> Dr. Downs concluded: “[W]hen the criminal conduct itself is a form of speech it gets a little bit grayer . . . but I think, regardless of that, for the most part, the Supreme Court got it right in the *Mitchell* case.”<sup>216</sup>

### 3. *Demonstrating Bias Motivation*

In cases where hate motivation is reported or suspected in a criminal investigation, the Committee heard testimony regarding the challenges law enforcement often face in proving such bias-motivation. Panelist Ismael Ozanne, Dane County District Attorney described: “[H]ow are we to tell that criminal damage to property is a hate crime? Now, if they're going to use a swastika . . . then maybe there is a nexus. Otherwise, if it's just . . . ‘we're going to go throw bricks through a window,’ even if you catch the person who threw the brick, they're not likely to say, [‘]well, I threw it because . . . I believe that person living there is Jewish or gay[’] . . . .”<sup>217</sup> As law enforcement seeks to answer such questions about a defendant’s motives in potential hate crimes, Mr. Ozanne continued: “[W]e're having a debate right now as to privacy, privacy issues and how much of your privacy do you want to give up in order for us, the government, to be able to address

---

<sup>211</sup> 2013 Transcript (statement by Shauff) 178 lines 11–20.

<sup>212</sup> *Id.* at 177 line 19–178 line 22.

<sup>213</sup> 2013 Transcript (statement by Esenberg) 25 lines 9–12.

<sup>214</sup> 2016 Transcript (statement by Donald Downs, Professor of Political Science, Law, and Journalism, U. of Wis.—Madison) 14 lines 7–23.

<sup>215</sup> *Id.*

<sup>216</sup> *Id.* at 14 lines 18–23; *See Wisconsin v. Mitchell*; *See* 2013 Transcript (statement by Zeidman) 53 lines 13–24.

<sup>217</sup> 2013 Transcript (statement by Ozanne) 164 lines 9–19.

these crimes[?] And there is a very thin line with what is your freedom of speech and what is your belief and what then could turn into . . . a hate crime.”<sup>218</sup>

Madison Police Captain Mary Schauf agreed that despite regular screening for indicators of bias-motivation in their crime reports, “finding that motivation, that intent of the offender . . . can be extremely difficult to do.”<sup>219</sup> Mr. Ozanne noted that few defendants provide information regarding their motives.<sup>220</sup> Mr. Ozanne also noted penalty enhancement can be applied when the courts come across this information, though such cases are rare: “We may believe that the motivation of the person is such, but if we don't have the proof, we can't apply the enhancer. . . . [T]hat's not that we don't address the seriousness of the offenses, I just think it's a proof issue for DA's in the State of Wisconsin.”<sup>221</sup>

Dr. Donald Downs cited a number of typical sources for proving bias in hate crime cases: confessions or admissions; contemporaneous statements made during the course of a crime; membership in hate organizations such as the Aryan Brotherhood; racist literature found in the home; tattoos, clothing, and other similar indicators.<sup>222</sup> He noted, the “U.S. Supreme Court has held that using such evidence is okay as long as it is consistent with First Amendment values, but also just regular criminal law standards of evidence.”<sup>223</sup> Dr. Downs pointed out that character evidence and evidence of prior acts cannot be introduced as evidence of hate-motivated bias.<sup>224</sup> He concluded: “All these standards of criminal evidence limit what kind of evidence can be used in a trial; and that's another reason that prosecutors are careful when it comes to bringing a case. They want to make sure they have high evidence of causation as well as clear evidence of prejudice.”<sup>225</sup>

In cases when information on biased-based intent is not available, criminal offenses may still be charged, they just would not include the hate crime penalty enhancement,<sup>226</sup> making hate crime reporting and data tracking particularly difficult.<sup>227</sup> Mr. Ozanne added that resource limitations may prevent law enforcement from being able to fully investigate the potential for bias-motivations in criminal cases.<sup>228</sup> For example, Dane County has yet to establish a cyber unit that could focus on investigating criminal motivation through social media.<sup>229</sup> Mr. Ozanne stated: “If somebody

---

<sup>218</sup> 2013 Transcript (statement by Ozanne) 172 lines 9 – 17.

<sup>219</sup> 2013 Transcript (statement by Schauf) 175 lines 12–18.

<sup>220</sup> 2013 Transcript (statement by Ozanne) 129 lines 23-25.

<sup>221</sup> *Id.* at 130 lines 14–25.

<sup>222</sup> 2016 Transcript (statement by Downs) 20 line 25-21 line 13.

<sup>223</sup> *Id.* at 21 lines 9–13.

<sup>224</sup> *Id.* at 21 lines 14–22.

<sup>225</sup> *Id.* at 21 line 23–22 line 3.

<sup>226</sup> 2013 Transcript (statement by Ozanne) 165 line 24–166 line 14.

<sup>227</sup> *Id.* at 130 lines 16–18.

<sup>228</sup> *Id.* at 166 lines 15–17.

<sup>229</sup> *Id.* at 166 lines 17–21.

actually has an incident where they're caught, they may take down their Facebook page. They may take the pictures off the Facebook page that are showing them displaying firearms or standing around with swastikas or other hate material."<sup>230</sup> Without a cyber-unit to act quickly, such evidence may be lost.

#### 4. *Bias in the Justice System*

A final challenge panelists discussed related to prosecuting hate crime is the significant disparity in beliefs and opinions regarding the role that race and other personal characteristics play in one's life experiences and decisions. Testimony suggested that these differences can impact what evidence is considered in hate crime investigations and prosecutions. Reggie Jackson of the Black Holocaust Museum explained: "The difficult burden on prosecutors to prove bias, especially racial bias, is directly related to how whites and African-Americans see racial inequality in the country. Acts that African-Americans see as racially biased are often seen by whites as having nothing to do with race."<sup>231</sup> Mr. Jackson cited a Gallop poll survey in which 68 percent of Black Americans said that the American justice system is biased against black people, while only 25 percent of white Americans felt the same.<sup>232</sup> Similar disparities exist in how African-Americans and whites view their treatment in the workplace, in financial institutions, in the criminal justice system, in stores and restaurants, when voting, and in schools.<sup>233</sup> This is important because as Mr. Jackson pointed out, "[j]uries in many cases are primarily white due to huge disenfranchisement of African-Americans nationwide, including in Wisconsin."<sup>234</sup> As such, white defendants are more likely than any other group to have jurors from their own racial group, and "[t]he racial makeup of the jury pool will play a role in how bias is perceived in race-based hate crime cases."<sup>235</sup>

Mr. Jackson also testified that these disparities can make a difference in whether or not prosecutors and police take victim reports seriously and choose to investigate bias-motivations as part of criminal investigations in the first place.<sup>236</sup> He noted that in many cases, victims report "the police did not want to hear their version of what happened."<sup>237</sup> He continued, "a majority of police officers in the country are still male, white police officers,"<sup>238</sup> and, "[t]here are a lot of different communities . . . that have issues with the police believing their versions of what happened, taking the crimes that were committed against them seriously."<sup>239</sup> Panelist Karen Gotzler presented

---

<sup>230</sup> 2013 Transcript (statement by Ozanne) 171 lines 11–16.

<sup>231</sup> 2016 Transcript (statement by Jackson) 79 line 20-80 line 1.

<sup>232</sup> *Id.* at 80 lines 2–12.

<sup>233</sup> *Id.* at 80 line 16–81 line 5.

<sup>234</sup> *Id.* at 81 lines 6–8.

<sup>235</sup> *Id.* at 81 lines 20–24.

<sup>236</sup> *Id.* at 122 line 4–124 line 18.

<sup>237</sup> *Id.* at 122 lines 14-20.

<sup>238</sup> *Id.* at 123 lines 15-17.

<sup>239</sup> *Id.* at 123 lines 4-8.

similar concern. She described: “[W]e see dozens of people each month that come in because of harassment, destroyed property, or someone bullying them, maybe even in a public space. . . .”<sup>240</sup> “It is the experience of our staff at the center that many within law enforcement struggle to understand that these are legitimate crimes.”<sup>241</sup>

Panelist Kathy Flores described a 2015 incident in which a gay Latino man, Nico, was brutally beaten in Appleton, Wisconsin. During the attack the perpetrator used both anti-immigrant and anti-gay slurs. He later claimed to law enforcement that he had attacked Nico because Nico had “grabbed him in the crotch.”<sup>242</sup> Ms. Flores referred to this accusation as an example of the “gay-panic defense.”<sup>243</sup> She noted that in every case she has ever worked on involving violence perpetrated against LGBTQ individuals, the perpetrator has made up “elaborate stories of sexual contact using tried and true stereotypes against the cases...even when the evidence shows the contrary, the perpetrator is often believed over the victim.”<sup>244</sup> She pointed out that street cameras, which had captured this incident, indicated this accusation was not true. However, the charge was lowered from “substantial battery” to “disorderly conduct,” and a hate crime enhancer was not added: “because the English-speaking perpetrator was believed that the victim had indeed somehow provoked this attack.”<sup>245</sup> She concluded: “[i]t is very much the belief of advocates, myself included, who worked with Nico that this did not receive equal protection because he is gay, Spanish speaking and Latino..”<sup>246</sup>

Ms. Flores likened this challenge to that of the long struggle to address violence against women in the United States. She noted it is difficult to enforce laws addressing sexual assault and intimate partner violence, with “police officers who might have had issues with women in general.”<sup>247</sup> She pointed to government-supported victim advocacy services and programs for survivors of sexual assault and intimate partner violence as key to improving this response, and suggested that a similar approach may be the best way to improve outcomes for survivors of hate crime as well.<sup>248</sup>

Additionally, Dr. Vysotsky suggested that a cultural change within law enforcement is necessary: “[t]here’s a wealth of data on police culture, on culture within . . . [the] office of the prosecutor, DA’s offices, and how that informs the way which people make decisions about . . . everything from identifying perpetrators to prosecuting people. That culture needs to reform.”<sup>249</sup> He described

---

<sup>240</sup> 2016 Transcript (statement by Gotzler) 106 lines 18–21.

<sup>241</sup> *Id.* at 106 lines 8-11; *See* 2016 Transcript (statement by Kimble) 148 line 15–149 line 10.

<sup>242</sup> 2016 Transcript (statement by Flores) 112 line 1–113 line 24.

<sup>243</sup> *Id.* at 114 line 13–115 line 4.

<sup>244</sup> *Id.* at 114 lines 13–21.

<sup>245</sup> *Id.* at 112 lines 2-15; *See Id.* at 114 line 13–115 line 4.

<sup>246</sup> *Id.*

<sup>247</sup> *Id.* at 124 line 19–125 line 20.

<sup>248</sup> *Id.*

<sup>249</sup> 2016 Transcript (statement by Vysotsky) 68 lines 7-13; *See id.* at 67 line 7-69 lines 22

a training in which a group of police sergeants “scoffed” at the presenter when he began discussing issues of queer and gender nonconforming identity.<sup>250</sup> He noted: “[W]e can teach people what we want, but if there is a culture of lack of recognition, if there’s a culture of not deeming certain kinds of actions as being recognized as necessitating protection, that that is—no amount of training can surpass that.”<sup>251</sup> In such situations, Dr. Vysotsky recommended diversifying the workforce with individuals who are more aware of patterns of historical discrimination, and ensuring a leadership who will support those individuals in speaking up and challenging the status quo.<sup>252</sup>

## **D. Progress and Solutions**

### ***1. Improving Data Collection***

Ms. Zeidman of the Anti-Defamation league described the importance of collecting and analyzing hate crime data:

[C]ollection of data is indispensable to counteract violent bigotry. We rely on statistics to identify patterns, analyze trends and ultimately to create solutions, legislative and otherwise. Data collection raises public awareness of the problem and sparks improvements in the local response of the criminal justice system to hate violence.<sup>253</sup>

Despite this importance, for reasons discussed in previous sections of this report, the Committee heard significant concern that many hate crimes go unreported—both by victims and law enforcement. Thus, available data remains inconsistent and incomplete. Mr. Reggie Jackson of America’s Black Holocaust Museum noted: “the FBI hate crime count is based on a voluntary reporting system that many local police jurisdictions refuse to support.”<sup>254</sup> He questioned: “if only one in 35 hate crimes is reported, how can the laws be effective deterrence in Wisconsin or any other jurisdiction?”<sup>255</sup> Ms. Zeidman asserted that regardless of whether underreporting stems from victims or law enforcement, “together we need to work to address and reduce both levels of underreporting.”<sup>256</sup>

To this end, panelists discussed various methods of data collection that could improve public understanding of and response to hate crime. Dane County District Attorney Ismael Ozanne noted that criminal justice records, such as numbers of criminal prosecutions or convictions, are not a

---

<sup>250</sup> 2016 Transcript (statement by Vysotsky) 67 lines 16-19.

<sup>251</sup> *Id.* at 67 lines 24-68 line 4.

<sup>252</sup> *Id.* at 68 line 15-69 line 22.

<sup>253</sup> 2013 Transcript (statement by Zeidman) 16 lines 13-20.

<sup>254</sup> 2016 Transcript (statement by Jackson) 76 lines 15-17; *See Id.* at 74 line 14-76 line 20.

<sup>255</sup> *Id.* at 76 lines 5-7.

<sup>256</sup> 2013 Transcript (statement by Zeidman) 18 lines 14-16.

comprehensive indicator of hate crime.<sup>257</sup> This is because if—as in the example of the shooting at the Oak Creek Sikh temple—the perpetrator is deceased after the crime, the perpetrator is never found, or there is insufficient evidence to bring hate crime charges, there would be no record of the crime within the court system.<sup>258</sup> Therefore, police records of reported incidents may provide a more accurate picture. Detective David Gouran of the Madison Police Department noted that his department tracks “not just incidents that are actually arrested or charged as hate crimes but all reports indicating hate bias.”<sup>259</sup> Unfortunately, each law enforcement office throughout the state collects and reports their hate crime data differently. Many departments may not include reported incidents that do not result in an arrest, and most do not submit their data to the FBI at all, resulting in incomplete data at the state and federal levels.<sup>260</sup> For this reason, in a statement submitted to the Committee on behalf of the Anti-Defamation League in 2016, Ms. Zeidman recommended that Wisconsin “include mandatory reporting and data collection both to state officials and to the FBI.”<sup>261</sup>

In addition to official law enforcement data, some local community groups also conduct their own outreach and tracking to obtain an even more comprehensive assessment of the community’s experiences. Dr. Stanislav Vysotsky, Assistant Professor of Sociology and Criminology at the University of Wisconsin-Whitewater, noted that while victims may not report crimes to the authorities: “They do report them to the community itself . . . to other people who share their identity or maybe reported to advocacy agencies . . . .”<sup>262</sup> For this reason, Dr. Vysotsky recommended “data collection tools that go beyond police statistics by incorporating reports to community organizations . . . .”<sup>264</sup> Resource limitations may make it difficult for community groups to collect such data, and some panelists expressed disappointment and frustration that often times researchers and public officials do not pay attention to the data they do collect.<sup>265</sup> However, where such resources do exist, testimony indicated that this data can serve an important purpose.

For example, The Southern Poverty Law Center collects data on “bias-incidents,” from both news reports and its individual online reporting form, #ReportHate—regardless of whether or not such incidents have been reported to or recorded by police.<sup>266</sup> In a project known as *Documenting Hate*

---

<sup>257</sup> 2013 Transcript (statement by Ozanne) 151 lines 9–17.

<sup>258</sup> *Id.* at 131 lines 1–11, 151 line 9–153 line 19; *See* 2013 Transcript (statement by Santelle) 154 lines 10–16.

<sup>259</sup> 2013 Transcript (statement by Gouran) 184 lines 21–23.

<sup>260</sup> AGENCY HATE CRIME REPORTING BY STATE, 2015

<sup>261</sup> Written Testimony before the Wis. Advisory Committee for the U.S. Comm’n on Civil Rights, Sept. 1, 2016 (Wis. 2016) 3 (statement by Zeidman) (Appendix C.1).

<sup>262</sup> 2016 Transcript (statement by Vysotsky) 40 lines 20–25.

<sup>264</sup> *Vysotsky Testimony, 2016 Transcript, p.Id.* at 42 line 24 – p. 43 line 06.3 lines 1–3.

<sup>265</sup> 2016 Transcript (statement by Gotzler) 128 lines 6–18; 2016 Transcript (statement by Flores) 129 line 16–130 line 10; 2016 Transcript (statement by Kimble) 146 line 20–147 line 5.

<sup>266</sup> S. POVERTY L. CTR., #REPORTHATE INTAKE PAGE, <https://www.splcenter.org/reporhate> (last visited Apr. 18, 2017).

established in collaboration with the independent, nonprofit, investigative journalism organization ProPublica, the organizers note “no government agency documents lower-level incidents of harassment and intimidation, such as online or real-life bullying.”<sup>267</sup> While considering such “lower level” incidents or indicators of a bias climate may recall some of the challenges noted in previous sections of this report, the project states that recording this data is essential to “enrich a national understanding and conversation about hate crimes and bias incident[s].”<sup>268</sup> The organizers conclude: “It is impossible to tackle a problem without good data on which to base decisions. . . . Reliable data will help local policymakers and law enforcement understand the problem; reporting will make it hard for them to ignore it.”<sup>269</sup>

In his written testimony submitted to the Committee, Mr. Carl Hampton, Chief Diversity Officer at the University of Wisconsin-Madison, noted that students may report hate incidents on campus via one of several mediums: online, through the UW-Madison app, or in person at one of a number of community centers around campus.<sup>270</sup> While these incidents may not all rise to the level of “hate crime,” all are reviewed by a team of responders who conduct follow up to address any victim needs, organize efforts to improve the campus climate, and report the perpetrators to either police or the Office of Student Conduct and Community Standards as appropriate.<sup>271</sup>

Panelist Elana Kahn-Oren of the Jewish Community Relations Counsel said that her organization conducts an annual audit of Anti-Semitic incidents.<sup>272</sup> She noted that in collecting this type of “unofficial” data, the phrasing of questions on materials such surveys can make a significant difference in levels of reporting.<sup>273</sup> For this reason, her organization recently changed its survey questions to ask “if people ever felt uncomfortable revealing that they’re Jewish” rather than “if people have experienced anti-Semitism.”<sup>274</sup> They found that “there was an absolutely higher percentage of people answering that they felt uncomfortable sometimes revealing that they’re Jewish rather than people say they don’t feel they have experienced anti-Semitism.”<sup>275</sup>

Some law enforcement panelists agreed that such “lower level” data to measure overall community climate can help proactively identify threats and risks. Captain Schauf of the Madison Police

---

<sup>267</sup> PROPUBLICA, DOCUMENTING HATE, ABOUT THIS PROJECT, <https://projects.propublica.org/graphics/hatecrimes> (last visited Apr. 18, 2017).

<sup>268</sup> PROPUBLICA: DOCUMENTING HATE, WHAT DATA? <https://projects.propublica.org/graphics/hatecrimes> (last visited Apr. 18, 2017).

<sup>269</sup> PROPUBLICA: DOCUMENTING HATE, WHY NOW? <https://projects.propublica.org/graphics/hatecrimes> (last visited Apr. 18, 2017).

<sup>270</sup> Written Testimony before the Wis. Advisory Committee for the U.S. Comm’n on Civil Rights, Aug. 29, 2016 (Wis. 2016) 2-3 (statement by Carl Hampton, Chief Diversity Officer, U. of Wis.-Madison) (Appendix C.2).

<sup>271</sup> *Id.* at 2-4.

<sup>272</sup> 2013 Transcript (statement by Kahn-Oren) 64 lines 14–21.

<sup>273</sup> *Id.* at 65 lines 5–23.

<sup>274</sup> *Id.* at 65 lines 15–19.

<sup>275</sup> *Id.* At 65 lines 19–23.

Department said that while her department does not have the resources to continually monitor social media and other cyber activity for hate, their criminal intelligence and interagency communication units do provide such monitoring “during certain times of the year when there are significant dates . . . as well looking for any targeting that may occur within our community” in order to preventatively identify and address threats.<sup>276</sup> Similarly, FBI Special Agent Elgersma said: “[W]e use intelligence . . . to focus our investigations, to establish a national threat picture and to identify risk factors that the FBI can use to assess potential for hate crimes in various jurisdictions.”<sup>277</sup> While it is important to clearly and accurately identify data sources and the activity they represent, testimony from law enforcement and community members alike suggested that: (i) making uniform data reporting mandatory; and (ii) considering some assessment of hate motivated incidents that do not necessarily rise to the level of criminal activity; are essential to understanding, preventing, and addressing hate crime.

## 2. *Law Enforcement Training*

After describing her extensive research into the enforcement of hate crime legislation, panelist Jeannine Bell, Professor of Law at the Maurer School of Law at Indiana University, highlighted one important recommendation as she concluded her testimony: “[T]hat detectives . . . or police officers enforcing the law are appropriately trained.”<sup>278</sup> Professor Bell’s conclusion stemmed from her findings that:

[P]olice officers in hate crime units have significant discretion regarding whether to enforce the law, whether to investigate and when and whether to arrest perpetrators. This is not a simple decision like it is in traffic, write a ticket or not. There are lots of different options they have, and each of the options that they select affect[s] the amount of services that victims will receive.<sup>279</sup>

Professor Bell noted that such discretion requires extensive training in order to appropriately enforce hate crime protections while balancing other concerns described in this report, such as respect for the First Amendment.<sup>280</sup>

Other panelists agreed. Miriam Zeidman of the Anti-Defamation League pointed out that “the strongest hate crime laws in the country include mandatory hate crimes training for law enforcement officers . . . .”<sup>281</sup> She continued: “In order for hate crime laws to be most effective, the first responders, police officers, must be trained about hate crimes so that they can effectively

---

<sup>276</sup> 2013 Transcript (statement by Schauf) 197 lines 4–14.

<sup>277</sup> 2013 Transcript (statement by Elgersma) 126 lines 14–18.

<sup>278</sup> 2013 Transcript (statement by Bell) 41 lines 21–23.

<sup>279</sup> *Id.* at 37 lines 13–21.

<sup>280</sup> *Id.* at 41 line 20–42 line 2.

<sup>281</sup> 2013 Transcript (statement by Zeidman) 16 lines 6–8.

identify and respond to them.”<sup>282</sup> Former U.S. District Attorney James Santelle explained that training should ensure first responders, such as officers and investigators, know how to identify a hate crime, how to address potential victims, and how to deliver this information to the FBI.<sup>283</sup> For this reason, he concluded that training for officers across the state must include a partnership between law enforcement agencies at all levels, such as the FBI, the Wisconsin Department of Justice, and state and local police.<sup>284</sup> Dr. Stanislav Vysotsky also recommended including prosecutors in such training, in addition to patrol officers and investigators.<sup>285</sup>

Officer Karla Lehmann of the Milwaukee Police Department noted that while no hate crime training for law enforcement is currently required by the state, her Department already includes some hate crime related training during their in-service: “We have a full curriculum on fair and impartial policing which directly relates to bias, teaches cultural competency, so there is some touch on hate crimes in that forum as well.”<sup>286</sup> Similarly, Detective David Gouran of the Madison Police Department noted that his Department has annual in-service trainings that include a section on hate crimes.<sup>287</sup> The training is intended to increase officer sensitivity “so they can be cognizant of the hate crime situation and investigate according. We also familiarize officers with the existence of hate groups and things, the symbols and the tattoos and the language, the cultural things that go with those groups to help them recognize.”<sup>288</sup>

While these training opportunities may serve as a positive model, Madison Police Captain Mary Schauf noted that they are inconsistent across the state. She recommended an inquiry into available and required trainings as a starting point to further addressing hate crime in Wisconsin: “[W]hile I think our agencies really are very mindful of these matters, I don't know how consistent that is across the state. . . . And so maybe that's a place to start to look at what's required in curriculum for basic, for the first line officers going out, and also what's required from a follow-up standpoint as far as in-service requirements.”<sup>289</sup>

In addition to consistently providing officers with basic information about how to identify and properly report on hate crimes, some panelists offered other training ideas to improve hate crime response. For example, Officer Lehmann of the Milwaukee Police Department recommended expanding training beyond basic knowledge of hate crime legal protections and applicable statutes, to include “the sensitivity of dealing with victims of hate crimes . . . the traumatic response to

---

<sup>282</sup> 2013 Transcript (statement by Zeidman) 16 lines 9–13.

<sup>283</sup> 2013 Transcript (statement by Santelle) 138 lines 1–11.

<sup>284</sup> *Id.* at 137 lines 15–23.

<sup>285</sup> 2016 Transcript (statement by Vysotsky) 41 lines 11–17, 41 line 23–42 line 13.

<sup>286</sup> 2013 Transcript (statement by Lehmann) 195 lines 10–13.

<sup>287</sup> 2013 Transcript (statement by Gouran) 183 lines 7–13; *See* 2013 Transcript (statement by Schauf) 175 lines 20–25.

<sup>288</sup> 2013 Transcript (statement by Gouran) 183 line 21–184 line 2.

<sup>289</sup> 2013 Transcript (statement by Schauf) 198 line 19–199 line 7.

being a crime victim.”<sup>291</sup> She noted that her department is working to create “a new standard operating procedure as it relates to hate crimes, and that would include transgender policy as well.”<sup>292</sup> Officer Lehmann emphasized that such training must be conducted on an ongoing, rather than one-time basis<sup>293</sup>: “[I]t’s hard for us to get everybody all on the same page all at the same time, which I think is one of the reasons why ongoing, an ongoing training standard would be a really good idea.”<sup>294</sup> Captain Schauf of the Madison Police noted that if the state were to make hate crime training a priority, it could provide curriculum and other support services.<sup>295</sup> She suggested the “train the trainer” model as an effective way to expand training to other agencies and address some of the structural challenges related to hate crime response in the state.<sup>296</sup>

### 3. *Increased Law Enforcement Collaboration*

Panelists highlighted the importance of law enforcement and community collaboration both across departments of the same agency and across different agencies at the local, state, and federal levels, in order to most effectively, and proactively, respond to hate crime concerns. Detective Gouran of the Madison Police Department noted that his Department previously had a single detective, since retired, who oversaw all hate crime cases: “[T]hose that look and smell like a hate crime city wide [were] directed to her for her review, just as a fail-safe to make sure that officers were doing a proper job . . . .”<sup>297</sup> Having a single detective assigned the responsibility to respond to all hate-motivated crimes helped to coordinate the Department’s response across districts and “led to a situation where each of our five geographic police districts would have one detective who assumed that same responsibility.”<sup>298</sup>

At the time of his testimony, Detective Gouran stated that he and one other detective were both notified of potential hate crime cases in the city, in order to “follow up on . . . whether this is a case where a hate crime charge should have been contemplated and applied . . . or if there were some existing charges handled by the patrol officers that we need to augment or rehabilitate.”<sup>299</sup> Detective Gouran stressed the importance of such review, noting that the very morning of his testimony, he had been in court on a case that “seemed fairly clear that a hate crime based on hate crime motive had occurred, but the individuals were given a citation rather than being arrested . . . for state offenses.”<sup>300</sup> While he noted that that his Department does not currently have a formal

---

<sup>291</sup> 2013 Transcript (statement by Lehmann) 199 lines 14–25.

<sup>292</sup> *Id.* at 195 lines 16–18.

<sup>293</sup> *Id.* At 199 lines 14–18

<sup>294</sup> *Id.* at 200 lines 3–7.

<sup>295</sup> 2013 Transcript (statement by Schauf) 200 lines 10–23.

<sup>296</sup> *Id.* at 200 lines 14–20.

<sup>297</sup> 2013 Transcript (statement by Gouran) 180 lines 11–19.

<sup>298</sup> *Id.* at 180 lines 22–25.

<sup>299</sup> *Id.* at 181 lines 12–17.

<sup>300</sup> *Id.* at 181 lines 19–25.

hate crimes unit, and incidents of hate crime might not be prevalent enough to warrant such a full time unit,<sup>301</sup> his Bureau has structured its Detective Unit into specialty groups, such as “person crimes” and “sensitive crimes.”<sup>302</sup> “[E]ach of those specialty groups, even though they’re geographically separated, will meet every month and do an information sharing.”<sup>303</sup> Such collaboration allows detectives to “stay abreast of regional hate activity,” communicating not only within the Department but also remaining aware of resources outside of the law enforcement community, such as hate watch bulletins and alerts from community groups like the Anti-Defamation League or the Southern Poverty Law Center.<sup>304</sup>

Captain Schauf, also of the Madison Police Department, added that communicating with other local law enforcement agencies can be equally important to communicating within a department: “With our partner just to the east, Milwaukee, monitoring what they’re seeing and experiencing there obviously gives us an indication of what we need to be mindful of here in Madison and be aware of. And that’s really kind of the whole prevention side and that sharing of information within law enforcement.”<sup>305</sup>

FBI Supervisory Special Agent Chadwick Elgersma noted that collaboration with state and local authorities, as well as the U.S. Attorney’s Office, and the U.S. Department of Justice Civil Rights Division, allows the FBI to stay informed of “developing situations” that may require follow up.<sup>306</sup> Milwaukee Police Officer Karla Lehmann also stressed the importance of collaboration with state and federal agencies. The city’s Intelligence Fusion Center collaborates with the U.S. Department of Homeland security to “detect, prevent, and respond to crime and terrorism;”<sup>307</sup> Officer Lehmann noted that the Center also “does a lot of tracking of hate groups . . . so they might get involved in certain situations . . . .”<sup>308</sup> For example, the Center works closely with the FBI “to make sure that they’re information sharing as well as other departments. They have been working very closely with Oak Creek PD since the tragedy there and building a lot of relationships that way.”<sup>309</sup> The Milwaukee Police Department further collaborates with the Wisconsin Department of Justice Crime Information Bureau (CIB); Officer Lehmann recalled a recent case in which the Milwaukee Police Department’s Sensitive Crimes Unit and CIB went out to conduct a follow up investigation

---

<sup>301</sup> 2013 Transcript (statement by Gouran) 179 line 23–180 line 3.

<sup>302</sup> *Id.* at 182 lines 5–10.

<sup>303</sup> *Id.* at 182 lines 10–13.

<sup>304</sup> *Id.* at 184 lines 12–19.

<sup>305</sup> 2013 Transcript (statement by Schauf) 179 lines 2–8.

<sup>306</sup> 2013 Transcript (statement by Elgersma) 126 lines 2–10; *See* 2013 Transcript (statement by Santelle) 137 line 1–138 line 11.

<sup>307</sup> CITY OF MILWAUKEE, EMERGENCY MGMT. & HOMELAND SEC., SOUTHWESTERN WIS. THREAT ANALYSIS CENTER, <http://city.milwaukee.gov/hls/IntelligenceFusionCenter.htm#.WQereBPYvRY> (last visited May 1, 2017).

<sup>308</sup> 2013 Transcript (statement by Lehmann) 192 lines 8–11.

<sup>309</sup> *Id.* at 195 lines 20–24.

together.<sup>310</sup> Collaboration with the District Attorney's office, community groups, and others is also often required. Officer Lehmann concluded: "I think one of the most logical ways to deal with hate crimes is . . . having all of the people that have a stake in this at the same table and communicating with one another."<sup>311</sup>

#### 4. *Community Relations*

Beyond collaboration across law enforcement agencies, community outreach and education also emerged from the testimony as critical components to effectively addressing hate crimes. In recognition of this need, U.S. Attorney James Santelle testified that in March of 2010, then Attorney General Eric Holder issued a memorandum, following the passage of the Shepard/Byrd Hate Crimes Prevention Act,<sup>312</sup> commissioning U.S. Attorneys across the country to include community outreach in their hate crimes investigation and prosecution work.<sup>313</sup> Such collaboration with community groups is essential to ensuring the law enforcement is informed of emerging threats and most effectively able to investigate and respond to crimes when they do occur. Agent Elgersma of the FBI reported: "We've focused on civic and religious leaders trying to get the message across that in order to fully investigate our crimes, we need information from the public. . . . We want to take a joint approach to addressing this threat."<sup>314</sup>

Madison Police Detective David Gouran described an example of community collaboration through an initiative known as Tools for Tolerance. The program, which brings together police, district attorneys, probation agents, and judges in small teams for hate crimes training, then requires participants to return to their home district to conduct a community outreach or collaboration project. "We've done that in Madison and the various groups have actually kind of melded with each other and now we have a super group called STAJOH, which is Seeking Tolerance and Justice Over Hatred, and this has gone on to include all kinds of community members who have nothing to do with the legal system."<sup>315</sup>

Detective Gouran also suggested involving the media in responding to hate crime: "[L]etting your community be aware of situations that are happening . . . there are plenty of people who will stand up and react to that. . . . [S]ociety is much larger than the police, and we're given sometimes all of the burden of handling social problems. . . . It is a message crime and we should have message responses."<sup>316</sup> Bonit Gill of the Sikh Student Association of UW Madison expressed similar

---

<sup>310</sup> 2013 Transcript (statement by Lehmann) 192 lines 8–15.

<sup>311</sup> *Id.* at 193 lines 3–7.

<sup>312</sup> Hate Crimes Prevention Act (2009).

<sup>313</sup> 2013 Transcript (statement by Santelle) 134 lines 7–16.

<sup>314</sup> 2013 Transcript (statement by Elgersma) 126 line 23–127 line 6.

<sup>315</sup> 2013 Transcript (statement by Gouran) 188 lines 11–17.

<sup>316</sup> *Id.* at 186 lines 11–25.

sentiments regarding the media: “[T]he media is a huge contributor to letting people know like what different cultures are and who we are . . . a big thing that we can do is...talk to people in television, talk to people in radio, tell them to kind of shed light more on minorities or shed light more on people that . . . [other people] aren't very familiar with . . . .”<sup>317</sup>

Whether through the media or other means of public outreach, several panelists emphasized the critical importance of communicating and making an intentional effort to bring people together across social groups.<sup>318</sup> Ms. Karen Gotzler recommended public education on “what it means to be different and what it means to be LGBTQI.”<sup>319</sup> Mr. Thai Vue suggested that increasing public awareness of the Hmong culture and social and economic contributions, particularly Hmong contributions to the United States during the Vietnam War, could help increase community tolerance and understanding.<sup>320</sup> While deep-seated traumas and historical conflicts may make such education and collaboration difficult, Mr. Vue concluded: “We cannot afford to segregate our communities. When I say ‘our communities’ I do not mean the Hmong communities. I mean all the people who live in Wisconsin here.”<sup>321</sup>

Carl Hampton, Special Assistant to the Vice Provost and Chief Diversity Officer at the University of Wisconsin-Madison, noted in a written statement to the Committee that the University can only accomplish its mission “if the university’s teaching, learning, research, and services activities occur in living and learning environments that are safe and free from violence, harassment...and intimidation.”<sup>322</sup> For this reason, the University student handbook prohibits not only hate crime but also “hate and bias incidents” that include “slurs, degrading language, epithets, graffiti, vandalism, intimidation, symbols, and harassment that are directed toward or affect the targeted individual or team.”<sup>323</sup> The University response to such behavior may involve law enforcement (if criminal), administrative discipline (if a violation of the student code of conduct), or be educational in nature, as appropriate.<sup>324</sup> Mr. Hampton explained: “We’re launching a community-building program to provide new students with the ability to understand and discuss our differences as individuals and also what unites us . . . .We believe educating students in this way not only prepares them to be better citizens, it provides them skills that are valued by employers operating in an increasingly diverse landscape.”<sup>325</sup>

---

<sup>317</sup> 2013 Transcript (statement by Gill) 122 lines 9–17.

<sup>318</sup> 2016 Transcript (statement by Downs) 62 line 17–63 line 16; 2016 Transcript (statement by Gotzler) 107 lines 17–22; 2016 Transcript (statement by Vue) 98 line 24–99 line 6, 99 line 17–100 line 15.

<sup>319</sup> 2016 Transcript (statement by Gotzler) 107 lines 17–19.

<sup>320</sup> 2016 Transcript (statement by Vue) 99 line 17–18, 100 lines 1–5.

<sup>321</sup> *Id.* at 99 lines 3–6.

<sup>322</sup> Written Testimony (statement by Hampton) 1.

<sup>323</sup> *Id.* at 2.

<sup>324</sup> *Id.*

<sup>325</sup> *Id.* at 4.

Ms. Gill concluded:

Awareness and education is one of the most amazing tools we have as humans. Simply telling others about who you are and what you stand for can make an immeasurable impact on society. Learning about the unknown contributes to acceptance and tolerance. Hate crimes can be stopped by making an effort to inform. Informing others of your religion and differences is pivotal in attempting to stop hate and ignorance. Along with societal education, promoting open-mindedness and tolerance within school systems by teaching about different cultures and religions is an essential way of creating and accepting citizens of upcoming generations.<sup>326</sup>

### 5. *Restorative Justice*

Restorative justice is as an alternative approach to addressing criminal activity and its resulting individual and community harm. The Restorative Justice Project at the University of Wisconsin School of Law describes “[t]his restorative process focuses on meeting victim-survivors’ needs and achieving offender accountability; the results can be transformative for all parties involved.”<sup>327</sup> Panelist Jonathan Scharrer, director of the Project, testified that under appropriate circumstances, restorative justice can offer victims and survivors “empowerment, diminishing fear, an increasing level of sense of safety and community, increased community support, and reparation . . . .”<sup>328</sup> Mr. Scharrer also noted that restorative justice can often times be more effective at offender rehabilitation than traditional, punitive approaches to justice.<sup>329</sup> This is because in order to have a deterrent effect, traditional approaches to justice such as the penalty enhancer require “fear of the law . . . to overcome fear or hate of the other.”<sup>330</sup>

Testimony before the Committee suggested that in many cases, such requisite fear may not be in place. Mr. Arno Michaelis, former white supremacist and founding member of the neo-Nazi skinhead group Norther Hammerskins, told the Committee: “with a lot of confidence, that amongst members of violent racist organizations hate crime is not a deterrent. . . . [a]s a matter of fact, I think it could have been quite the opposite. If you are a hardcore white supremacist, being convicted of a hate crime would be a badge of honor.”<sup>331</sup> Mr. Michaelis, who now works to provide educational programs in schools to prevent and respond to hate crime, explained that many people

---

<sup>326</sup> 2013 Transcript (statement by Gill) 101 lines 10–23.

<sup>327</sup> RESTORATIVE JUSTICE PROJECT, U. OF WISC. L. SCH., <https://law.wisc.edu/fjr/rjp/> (last visited May 16, 2017).

<sup>328</sup> 2016 Transcript (statement by Scharrer) 25 lines 16–22.

<sup>329</sup> *Id.* at 25 line 12–27 line 9, 24 lines 4–17.

<sup>330</sup> *Id.* at 26 lines 1–22.

<sup>331</sup> 2016 Transcript (statement by Arno Michaelis, Wis.) 90 line 14–23.

get involved in hate groups because they feel that they are oppressed and not respected by society, “therefore you should join a white supremacist group if you want to stand up for your people.”<sup>332</sup>

Mr. Pardeep Kaleka shared that after the tragic 2012 shooting at the Sikh temple in Oak Creek, he had the opportunity to meet with Pete Simi, a Professor of Criminology who documented spending extensive time with Wade Page, the shooter at the temple, prior to the incident. Professor Simi described Page as “vulnerable,” having been “let go by the military, let go as a truck driver, and right before the attack let go by his girlfriend.”<sup>333</sup> He explained: “Page displayed the typical signs of lifelong trauma, feelings of hopelessness, internalized oppression, hypervigilance, diminished creativity, inability to embrace complexity, sense of persecution, guilt, anger, cynicism, and the inability to empathize.”<sup>334</sup> In this light, Mr. Kaleka testified that in order to prevent and deter hate crime, it is necessary to work out of a “trauma informed lens, understanding the civil rights concerns such as hate, racism, xenophobia, homophobia, are as much products of trauma as they are historical injustices. Therefore, not simply be address by laws, but we need to engage in mindset shifts if we are truly to become effective.”<sup>335</sup> Dr. Vysotsky similarly noted that social psychological research suggests many people’s motivation for hate stems from a feeling of loss, and that addressing this sense of loss is key to reducing overall hatred and prejudice.<sup>336</sup>

Given this importance, Mr. Scharrer suggested that allowing victims to have the option to choose a restorative justice process would be extremely valuable.<sup>337</sup> Mr. Scharrer noted that the use of restorative justice “does not require complete removal from the criminal justice system, not does it necessarily preclude punishment as some common perceptions or misperceptions of restorative justice would have many people believe.”<sup>338</sup> Instead, “[t]he restorative justice process can be used as a diversion or alternative to the traditional criminal justice system where jurisdictions choose to apply such an approach as well as to inform or enhance the traditional process, sometimes even guiding sentencing recommendations in more serious cases . . . .”<sup>340</sup> Mr. Scharrer explained: “[W]hile helpful, a focus on crimination and retribution related to hate crime is not enough. There must also be systemic ways to address both its causes and consequences.”<sup>341</sup> Mr. Scharrer emphasized that restorative justice must be voluntary for all parties, victims and offenders, and should not be legislated as a mandatory process.<sup>342</sup> Restorative justice may not be appropriate in

---

<sup>332</sup> 2016 Transcript (statement by Michaelis) 91 lines 1–6, lines 16–20

<sup>333</sup> 2016 Transcript (statement by Kaleka) 88 lines 10–13.

<sup>334</sup> *Id.* at 88 lines 14–19.

<sup>335</sup> *Id.* at 86 line 24–87 line 18.

<sup>336</sup> 2016 Transcript (statement by Vysotsky) 62 lines 8–16.

<sup>337</sup> 2016 Transcript (statement by Scharrer) 51 lines 4–7.

<sup>338</sup> *Id.* at 28 line 18–29 line 3.

<sup>340</sup> *Id.* at 29 lines 4–9.

<sup>341</sup> Written Testimony before the Wis. Advisory Committee for the U.S. Comm’n on Civil Rights, Sept. 30, 2016, (Wis. 2016) 1 (statement by Scharrer) (Appendix C.3).

<sup>342</sup> 2016 Transcript (statement by Scharrer) 29 lines 11–20.

cases where the offender has too great an empathetic divide, or where victims do not feel safe and may be re-victimized.<sup>343</sup> However, under appropriate circumstances, “studies have found that restorative justice approaches to hate crimes have been . . . effective for both victims and offenders . . . .”<sup>344</sup>

To illustrate, Mr. Scharrer related the stories of two individuals. The first was a victim of a hate crime who, despite the successful prosecution of her attacker, left the experience unsatisfied because the traditional justice system “didn’t address her experience, her fear, mistrust of community, and what her life was like after that crime.”<sup>345</sup> Mr. Scharrer noted that “a restorative justice process alternative would help mobilize victims from spaces of vulnerability to being a key element within the justice process—allowing victims to be part of their own conflict resolution and opportunity to express their voice.”<sup>346</sup> The second was the story of a young “hard core white supremacist” offender, who through engagement in dialogue and the restorative justice process “has changed both his beliefs and his ideologies, really rejecting the legacy that his father left him with.”<sup>347</sup> Mr. Scharrer noted “through the traditional justice system approach, it is unlikely that a perpetrator of a hate crime will receive adequate interventions to address the disordered thinking that caused the criminal behavior motivated by hate in the first place.”<sup>348</sup>

Mr. Scharrer concluded by recommending a state-level effort to address hate crime through a restorative justice model.<sup>349</sup> He noted: “[T]he majority of incidents involving hate-based conflict and hostility fall outside the realm of the formal legal system and beyond criminal punishment.”<sup>350</sup> However, many “low-level,” hate motivated incidents become daily occurrences, and can escalate over time into violent outbursts and extremely dangerous or life-threatening behavior.<sup>351</sup> Therefore, Mr. Scharrer recommended the development of a “multi-agency and multi-disciplinary approach” to addressing hate crime in Wisconsin.<sup>352</sup> In a written supplement to his testimony he asserted:

Creating a statewide restorative justice option and associated network would offer hate crime victims and those in the justice system a new and responsive way to address the harm that has been done as well as provide a space for accountability and possible intervention into perpetrator issues of perception and disordered thinking. Providing for this opportunity

---

<sup>343</sup> 2016 Transcript (statement by Scharrer) 29 line 21–30 line 5.

<sup>344</sup> *Id.* at 30 lines 7–9.

<sup>345</sup> *Id.* at 31 lines 4–17.

<sup>346</sup> Written Testimony (statement by Scharrer) 1.

<sup>347</sup> 2016 Transcript (statement by Scharrer) 31 line 18–32 line 6.

<sup>348</sup> Written Testimony (statement by Scharrer) 1-2.

<sup>349</sup> *Id.* at 1-3.

<sup>350</sup> *Id.* at 1-2.

<sup>351</sup> *Id.*

<sup>352</sup> *Id.* at 3.

may play a key role in reducing the overall prevalence and severity of hate crime incidents in the State of Wisconsin.<sup>353</sup>

---

<sup>353</sup> Written Testimony (statement by Scharrer) 3.

## V. FINDINGS AND RECOMMENDATIONS

Among their duties, advisory committees of the U.S. Commission on Civil Rights are authorized to advise the Commission (i) concerning matters related to discrimination or a denial of equal protection of the laws under the Constitution and the effect of the laws and policies of the Federal Government with respect to equal protection of the laws and (ii) upon matters of mutual concern in the preparation of reports of the Commission to the President and the Congress.<sup>354</sup> While much progress in addressing hate crime has been made, the Committee heard testimony that some individuals and communities in the state remain vulnerable to be the target of hate-motivated crimes because of their race, color, sex, age, disability, and national origin. Furthermore, many of these communities may not receive full and equal protection of the law after experiencing such crimes.

Below, the Committee offers to the Commission a summary of concerns identified throughout the Committee's inquiry. Following these findings, the Committee proposes for the Commission's consideration several recommendations that apply both to the State of Wisconsin and to the nation as a whole.

### A. Findings

#### 1. Understanding Hate Crime

- a. Hate crime motivations can be understood in five categories: political, religious, intellectual, subcultural, and criminal. Of these, subcultural and criminal motivations may be most likely to lead to violence, while political motivation the least likely. A majority of hate crimes are low-level offenses such as intimidation, simple assault, and vandalism which may go unreported to law enforcement.
- b. The incidence of hate crimes may rise and fall over time along with such factors as major political changes, political discourse, and popular media rhetoric. Attention to this rhetoric may help law enforcement, public figures, and community groups proactively address community tensions which, if unaddressed, may give way to violence.
- c. Hate crime results in broad community impact beyond the individual(s) targeted. As "message crimes" targeted toward an aspect of an individual's core identity, hate crime has the capacity to terrorize the entire community of individuals who share the same identity.

---

<sup>354</sup> 45 C.F.R. § 703.2 (2002).

## 2. Penalty Enhancement

- a. Hate crime penalty enhancements have the ability to raise the penalty for convictions of crimes perpetrated due to a victim's real or perceived association with a protected class. Penalty enhancements do not apply to non-criminal activity, such as hate or bias motivated speech. Similar to other penalty enhancements for crimes perpetrated against children, the elderly, law enforcement, and other special populations, this enhancement is based on lawmakers' assessment of societal harm these crimes create.
- b. While hate crime laws have been found to be congruent with First Amendment protections of free speech, careful implementation and law enforcement training is necessary in order to ensure such rights remain protected.
- c. Federal, state and local hate crime laws may differ significantly. In Wisconsin, victims targeted because of their gender or gender identity are not protected under state law. Victims targeted because of their association with a person of a protected class (for example, a child targeted because one of his parents is gay) are also not protected under Wisconsin hate crime law.
- d. In order to successfully apply a hate crime penalty enhancer, prosecutors must prove "beyond all reasonable doubt" that a victim was selected because of his or her real or perceived association with a protected category, which is rarely possible. Even when penalty enhancers are applied, they are often dropped as part of a plea bargaining arrangement. Sentencing aggravators, applied by a judge in the sentencing phase of a conviction, may be a more effective alternative.

## 3. Hate Crime Prosecution

- a. Evidence suggests a majority of hate crimes go unreported for a variety of reasons, such as privacy concerns, fear/mistrust of the police, lack of adequate legal representation, and language barriers. Community/Police outreach initiatives and collaboration, as well as victim advocacy services, may help to increase reporting.
- b. Many hate incidents which do not rise to the level of criminal activity can still be concerning for law enforcement and community members alike. Balancing the need to protect free speech can be particularly difficult when such speech results in consistent harassment or intimidation or has the potential to escalate into or incite others to engage in actual violence.
- c. Differences in personal background and life experiences can influence whether or not law enforcement, prosecutors, judges, and jurors recognize bias motivation in hate crime cases. Differing experiences within particularly marginalized

communities may make it difficult to demonstrate bias motivations. Increased advocacy services and diversity efforts may help to bridge the intergroup understanding of those with differing life experiences.

#### 4. Progress and Solutions

- a. Hate crime data collection and reporting to the FBI is currently voluntary, and a majority of law enforcement agencies do not participate. Mandatory, uniform reporting is necessary in order to understand the scope and impact of hate crime in Wisconsin and the United States. “Low-level” reporting in collaboration with community groups on bias incidents that do not rise to the level of criminal activity can help to shed light on community conflicts and areas of need to assist in education and prevention efforts.
- b. Law enforcement officials hold significant discretion in how they identify, report on, and investigate hate crime. Uniform training initiatives involving officers, investigators, and prosecutors can improve hate crime response. Currently some departments in Wisconsin are engaged in such training, though training is not mandatory and is inconsistent across the state.
- c. Collaboration efforts across law enforcement agencies at the federal, state, and local levels can help to improve hate crime response, and ensure that relevant cases do not get lost in the system.
- d. Collaboration efforts between law enforcement and community groups can improve hate crime reporting and response. Such collaboration can also help to address concerns regarding community tensions and non-criminal bias incidents before such incidents escalate into actual violence.
- e. Restorative justice may function in collaboration with or as an alternative to the traditional justice system to address the root causes of hate motivated crimes and restore victim’s sense of empowerment and community safety.

### **B. Recommendations**

1. The U.S. Commission on Civil Rights should conduct a national study on the response to hate crime in the United States. This study should focus consideration on the extent to which current federal law, as instituted in practice, guarantees equal protection to victims of criminal acts targeted because of their real or perceived race, color, religion, sex, national origin, age, or disability status. The Commission should also include in its inquiry:
  - a. The efficacy of utilizing restorative justice practices and sentencing aggravators as alternatives to traditional hate crime penalty enhancement;

- b. Potential gaps in protection for individuals who reside in states where state-level hate crime laws may be lacking;
  - c. Data collection and law enforcement training requirements at the national level, and related areas of need to improve hate crime protections;
  - d. Measures to ensure the congruency of hate crime protections with Amendment rights to free speech.
2. The U.S. Commission on Civil Rights should issue the following formal recommendations to the U.S. Congress:
  - a. The U.S. Congress should amend the Hate Crime Statistics Act to make uniform hate crime data reporting mandatory for all law enforcement agencies as a condition of federal funding.
  - b. The U.S. Congress should amend the Hate Crime Prevention Act to include mandatory hate crime training for law enforcement under its existing technical assistance program.
  - c. The U.S. Congress should amend the Hate Crime Prevention Act to include protection for individuals targeted because of their real or perceived association with a person or persons from a protected class.
3. The U.S. Commission on Civil Rights should issue the following, formal recommendations to the U.S. Department of Justice Federal Bureau of Investigation:
  - a. The Bureau should make participation in the Uniform Crime Report data collection and reporting mandatory for all law enforcement agencies across the county.
  - b. As part of mandatory data collection and reporting requirements, the Bureau should require training for all state and local law enforcement on identifying and reporting hate crime.
4. The U.S. Commission on Civil Rights should issue the following, formal recommendations to the Wisconsin Governor and State Legislature:
  - a. The Legislature should amend the Wisconsin Hate Crimes Act to include protection for: (i) those targeted because of their real or perceived gender or gender identity; (ii) those targeted because of their real or perceived association with a person or persons from a protected class.
  - b. The Legislature should require state-wide training for all law enforcement agencies regarding identifying, responding to, and reporting on hate crime. Such training

may utilize a “train the trainer” model and be conducted in collaboration with local community groups to most effectively utilize resources.

5. The U.S. Commission on Civil Rights should issue the following formal recommendations to the Wisconsin Department of Justice:
  - a. The Department’s Division of Criminal Investigation should conduct mandatory, hate crime specific training for all law enforcement agencies in the state regarding identifying, responding to, and reporting on hate crime. Such training may utilize a “train the trainer” model and be conducted in collaboration with local community groups to most effectively utilize resources.
  - b. The Department should establish a pilot program to assess the cost and effectiveness of instituting a state-wide, voluntary restorative justice program in conjunction with or as an alternative to the established state justice system. Such a pilot should include a mechanism for community collaboration and diversion of “low level” bias offenses that do not rise to the level of criminal activity into alternative mediation or other civil interventions.

**VI. APPENDIX**

- A. Hearing Agenda, September 2013
- B. Hearing Agenda, August 2016
- C. Written Testimony
  - 1. Zeidman Written Testimony, Statement presented on behalf of the Anti-Defamation League September 1, 2016
  - 2. Hampton Written Testimony, August 29, 2016
  - 3. Scharrer Written Testimony, September 30, 2016
- D. Dissent Statement

# AGENDA

## WISCONSIN ADVISORY COMMITTEE TO THE U.S. COMMISSION ON CIVIL RIGHTS

### Hate Crime in Wisconsin

Thursday, September 12, 2013

**First Congregational UCC  
1609 University Ave.  
Madison, WI 53726**

#### **Welcome and Introductions**

1:30 p.m. to 1:45 p.m.

Adel Mekraz, Chairman, Wisconsin Advisory Committee

#### **Panel 1**

1:45 p.m. to 2:55 p.m.

Jeannine Bell, Professor of Law and Louis F. Niezer Faculty Fellow, Maurer School of Law (via phone)

Rick Esenberg, Founder, President, and General Counsel, Wisconsin Institute for Law & Liberty

Mark Potok, Senior Fellow, Southern Poverty Law Center (via phone)

Miriam Zeidman, Midwest Civil Rights Counsel, Anti-Defamation League

#### **Panel 2**

3:00 p.m. to 3:55 p.m.

Elana Kahn-Oren, Director, Jewish Community Relations Council

Ibrahim Saeed, Ph.D., Islamic Center of Madison

Steve Starkey, Executive Director, OutReach

**(OVER)**

**Panel 3**

4:00 p.m. to 4:45 p.m.

Bonit Gill, Sikh Student Association- UW Madison

Keith Bailey, Milwaukee Matters

Baltazar de Anda-Santana, Co-Director, Latino Academy of Workforce Development

**Panel 4**

4:50 p.m. – 5:50 p.m.

Chadwick Elgersma, Supervisory Special Agent, Federal Bureau of Investigation

Ismael Ozanne, Dane County District Attorney

James L. Santelle, U.S. Attorney for the Eastern District of Wisconsin

**Panel 5**

5:50 p.m. – 6:30 p.m.

David Gouran, Detective, Madison Police Department

Mary A. Schauf, Captain of Police, Madison Police Department

Neil Saxton, Milwaukee Police Department

**Open Session**

6:30 p.m. to 7:00 p.m.

**Adjournment**

7:00 p.m.

# U.S. COMMISSION ON CIVIL RIGHTS



## Civil Rights and Hate Crimes in Wisconsin

### Hosted By:

The Wisconsin  
Advisory Committee  
to the U.S.  
Commission on Civil  
Rights

### Date:

Monday, August 29,  
2016

### Time:

1:00 p.m.-4:30 p.m.  
CDT

### Location:

Hampton Inn & Suites  
8201 W. Greenfield  
Avenue  
West Allis, WI 53214

### U.S. COMMISSION ON CIVIL RIGHTS

Regional Programs Unit  
55 West Monroe  
Suite 410  
Chicago IL, 60603

Phone: 312-353-8311  
Fax: 312-353-8324  
Online: [www.usccr.gov](http://www.usccr.gov)

The Wisconsin Advisory Committee to the United States Commission on Civil Rights is hosting a public meeting regarding civil rights and hate crimes in Wisconsin. This meeting is free and open to the public. Of concern to the Committee is the formation and activity of hate groups in Wisconsin, and the effectiveness of hate crime laws to ensure equal protection for hate crime victims.

Opening Remarks and Introductions (1:00pm-1:10pm)

- Panel 1: Academic (1:10pm-2:25pm)
- Panel 2: Community (2:40pm-4:10pm)
- Open Forum\* (4:15pm-4:45pm)

Closing Remarks (4:45pm)

The Committee will hear public testimony during the open forum period as time allows. Please arrive early if you wish to speak. For more information please contact the Regional Programs Unit of the U.S. Commission on Civil Rights.

*\*Open forum may be extended as necessary to accommodate additional testimony.*

*State Advisory Committees to the U.S. Commission on Civil Rights are composed of state citizens who serve without compensation. The Committees advise the Commission of civil rights issues in their states, providing recommendations and advice regarding such matters to the Commission.*

# Agenda

## Opening Remarks and Introductions (1:00pm-1:10am)

- Naheed Bleecker, Chair, Wisconsin Advisory Committee
- Martin Castro, Chairman, U.S. Commission on Civil Rights

## Panel 1: (1:10pm-2:25pm) Academic

- Dr. Stanislav Vysotsky, Assistant Professor of Sociology and Criminology, University of Wisconsin-Whitewater
- Mr. Jonathan Scharrer, Director, Restorative Justice Project, University of Wisconsin School of Law
- Mr. Carl Hampton, Special Assistant to the Vice Provost and Chief Diversity Officer, University of Wisconsin-Madison
- Dr. Donald Downs, Professor of Political Science, Law, and Journalism, University of Wisconsin-Madison

## Panel 2: (2:40pm-4:10pm) Community

- Mr. Reggie Jackson, Board Chair and Head Griot, America's Black Holocaust Museum
- Mr. Pardeep Kaleka, Co-Founder, Serve 2 Unite
- Mr. Thai Vue, Executive Director, Wisconsin United Coalition of Mutual Assistance Associations, Inc.
- Ms. Karen Gotzler, Executive Director, MKE LGBT Community Center
- Ms. Kathy Flores, LGBTQ Intimate Partner Violence (IPV) Statewide Program Coordinator, Diverse & Resilient

## Open Forum (4:15 pm-4:45pm)\*

## Closing Remarks (4:45pm)

**Statement by Anti-Defamation League**  
**Wisconsin Advisory Committee to the United States Commission on Civil Rights**  
**Panel on “Civil Rights and Hate Crimes in Wisconsin”**  
**September 1, 2016**

The Anti-Defamation League is honored to submit this statement to the Wisconsin Advisory Committee to the U.S. Commission on Civil Rights.

The horrible bias-motivated murders of Sikhs in their house of worship in Oak Creek, Wisconsin in August 2012 demonstrated, once again, the tragic impact of hate crimes – and the critical importance of partnerships between government and community groups to prevent and effectively respond to hate crimes.

**The Anti-Defamation League**

Since 1913, the mission of ADL has been to "stop the defamation of the Jewish people and to secure justice and fair treatment to all." Dedicated to combating anti-Semitism, prejudice, and bigotry of all kinds, defending democratic ideals, and promoting civil rights, ADL is proud of its leadership role in the development of innovative materials, programs, and services that build bridges of communication and respect among diverse groups.

Over the past three decades, ADL has been recognized as a leading expert on effective responses to bias-motivated crime, and in 1981 the League drafted a model hate crime law, upon which many states' hate crime laws are based. For thirteen years, we were privileged to lead a broad coalition of civil rights, religious, educational, professional, law enforcement, and civic organizations that helped secure enactment of the federal Hate Crimes Prevention Act. In the wake of the Oak Creek tragedy, ADL helped coordinate a successful coalition effort to urge the FBI to expand the hate crime data collection categories to include hate crimes directed against Sikhs, Arabs, and Hindus. The FBI has incorporated these new categories into its annual hate crime data collection report. We expect that the first hate crime data that will include Arabs, Sikhs, Hindus, and other religious groups will be released in November of this year. ADL's work to fight violent bigotry takes place in many arenas: in the legislature, in the halls of justice, and through education programs geared toward law enforcement officers and the public.

**The Impact of Bias-Motivated Violence And The Need for Hate Crime Laws**

All Americans have a stake in effective response to violent bigotry. These crimes demand priority attention because of their special impact. Hate crimes are uniquely harmful. When a person is targeted for a crime because of an immutable characteristic – whether it is race, religion, national origin, gender, sexual orientation, gender identity, or disability – it does not just injure that person. It harms the entire community of people who share that characteristic, and it sends the message that they are not welcome, that they are not safe. Bias-motivated crimes are designed to intimidate the victim and members of the victim's community, leaving them feeling fearful, isolated, vulnerable, and unprotected by the law. Failure to address this unique type of crime can cause an isolated incident to explode into widespread community tension. The damage done by hate crimes, therefore, cannot be measured solely in terms of physical injury or dollars and cents. By making members of minority communities fearful, angry, and suspicious of other groups – and of the power structure that is supposed to protect them – these incidents can damage the fabric of our society and fragment communities. Because hate crimes have unique dangers and harms, they require unique tools to address, combat, and prevent them.

## **Punishing Bias-Motivated Violence: The Framework for Hate Crime Laws**

**Consistent with the First Amendment.** Hate crime laws are consistent with the First Amendment. The First Amendment does not protect violence – and it does not prevent the government from imposing criminal penalties for violent discriminatory conduct directed against victims on the basis of their personal, immutable characteristics. Hate crime laws do not punish speech. Individuals are free to think, say, and believe whatever they want. It is only when an individual commits a crime because of those biased beliefs and intentionally targets another for violence or vandalism that a hate crime statute can be triggered. In *Wisconsin v. Mitchell*, 508 U.S. 476 (1993), the U.S. Supreme Court unanimously upheld the constitutionality of the Wisconsin penalty-enhancement statute – effectively removing any doubt that state legislatures may properly increase the penalties for criminal activity in which the victim is intentionally targeted because of race, color, religion, sexual orientation, national origin, or disability.

**Deterrence.** Law enforcement officials have historically demonstrated strong support for hate crime laws. They recognize that strong enforcement of these laws can have a deterrent impact and can limit the potential for a hate crime incident to explode into a cycle of violence and widespread community disturbances.

**Punishment to fit the crime.** Because bias-motivated violence has a uniquely serious impact on the community, it is entirely appropriate for legislators to acknowledge that this form of criminal conduct merits more substantial punishment.

Bigotry cannot be outlawed. But laws shape attitudes, and attitudes shape behavior. Hate crime laws demonstrate an important commitment to confront bias-motivated criminal activity.

### **Wisconsin's Hate Crime Law**

Forty-five states and the District of Columbia have enacted hate crime laws, many of which are based on or similar to the model statute that ADL drafted in 1981. Wisconsin enacted a strong hate crime law, which the United States Supreme Court upheld as constitutional. In fact, James Doyle, Wisconsin's Attorney General at the time, who later became governor, defended Wisconsin's law so successfully that not only did Wisconsin win the case, but the Supreme Court issued a unanimous decision. The law provides an enhanced penalty when a perpetrator intentionally targets a victim for a crime because of that person's actual or perceived race, religion, color, disability, sexual orientation, national origin, or ancestry. And yet, there is room for improvement.

Wisconsin's law should be strengthened in four primary ways.

**Gender and gender identity:** Currently, the Wisconsin hate crime law does not include crimes where the victim is targeted because of gender or gender identity. Inclusion of these categories is essential. As we have seen in news reports across the country, violence targeting transgender individuals continues to be prevalent. Best practices on hate crime laws, response, and training include gender and gender identity for that reason. Indeed, the International Association of Chiefs of Police includes those categories in its model policy for hate crimes investigations, the federal Hate Crimes Prevention Act includes those categories, and the FBI now collects statistics on hate crimes based on gender and gender identity as part of its annual Hate Crime Statistics Act report and includes information on these hate crimes in its recently revised Hate Crime Training Manual. Wisconsin should address these types of hate crimes, too.

**Inclusion of 'associated with' hate crimes:** Wisconsin's law currently only applies when the victim is targeted because of the victim's own protected, immutable characteristic. However,

consider the scenario in which a white woman is attacked, not because of *her* race, but because she is dating an African American man. Or a scenario where a child is targeted for a crime not because of *his* sexual orientation, but because his mother is a lesbian. Wisconsin's hate crime law does not encompass these situations. For this reason, several other states' hate crime statutes, including Illinois's, not only address the targeting of victims for their own characteristics, but also cover crimes in which the victim is targeted because of the victim's association with a person who has or is perceived to have those characteristics. Wisconsin should alter its hate crime law similarly.

**Mandatory training:** The strongest hate crime laws in the country include mandatory hate crimes training for law enforcement officers. In order for hate crime laws to be most effective, the first responders – police officers – must be trained about hate crimes, so that they can effectively identify and respond to them. Wisconsin should include mandatory law enforcement training.

As the leading non-governmental organization trainer of law enforcement on bias-motivated crimes in the country, the Anti-Defamation League is available to assist. For decades, we have provided training – free of cost – to federal, state, and local law enforcement entities around the country regarding hate crimes and hate crime laws. This training addresses, among other issues, the elements of state and federal hate crime laws, criteria for determining whether a hate crime occurred, the difference between hate crimes and bias incidents, the constitutional framework in which hate crime statutes operate, reporting and data collection issues, and investigative and enforcement strategies that are unique to hate crimes.

**Mandatory reporting and data collection:** Collection of data is indispensable to counteract violent bigotry: we rely on statistics to identify patterns, analyze trends, and ultimately, to create solutions – legislative and otherwise. Data collection raises public awareness of the problem and can spark improvements in the local response to the issue. We recommend that Wisconsin include mandatory reporting and data collection both to state officials and to the FBI.

By making these four modifications, Wisconsin can strengthen its hate crime law and provide better protection for hate crime victims.

### **Hate Crime Activity in Wisconsin:**

The FBI has been tracking and documenting hate crimes reported by federal, state, and local law enforcement officials since 1991 under the Hate Crime Statistics Act of 1990 (HCSA). Though clearly incomplete, the Bureau's annual report provides the best single national snapshot of bias-motivated criminal activity in the United States.

In 2014, the most recent year for which FBI data is available, the FBI documented 5,479 hate crimes across the country – which is almost one hate crime every hour and a half of every day. Wisconsin reported 51 hate crimes in 2014. 28 of those reported hate crimes were motivated by racial bias, 9 were motivated by sexual orientation bias, 6 were motivated by religious bias, 5 were motivated by ethnicity/national origin bias, and 3 were motivated by disability bias.

And we know that these numbers are significantly understated due to underreporting on two levels. Many hate crimes never get reported to law enforcement. A variety of factors may cause victims not to report, including lack of awareness of what constitutes a hate crime, fear of reprisal, language

barriers, fear of the police, fear by immigrants of deportation, and fear by LGBT individuals who may not be 'out' in their communities of discrimination or hostility. These are just a few of the many barriers to reporting for community members. In fact, studies by the National Organization of Black Law Enforcement Executives (NOBLE) and others have revealed that some of the most likely targets of hate violence are actually the least likely to report these crimes to the police. Even when hate crimes are reported to law enforcement, law enforcement may not report to the FBI. Under the Hate Crime Statistics Act, reporting is not mandatory, and many law enforcement agencies do not participate. Together, we need to work to address and reduce both levels of underreporting.

Behind every one of the reported hate crimes in Wisconsin is an individual or a community targeted for violence for no other reason than race, religion, sexual orientation, disability, or national origin.

### **Conclusion**

The fundamental cause of bias-motivated violence in the United States, whether it is committed by members of extremist groups or not, is the persistence of racism, homophobia, transphobia, xenophobia, anti-Semitism, Islamophobia, and other forms of bigotry. Unfortunately, there are no quick, complete solutions to these problems. Yet, in conjunction with anti-bias educational programs, state hate crime laws play a strong role in confronting criminal activity motivated by prejudice. And effective responses to hate violence by public officials and law enforcement authorities can play an essential role in deterring and preventing these crimes.

**Remarks by Carl Hampton, Special Assistant to the Vice Provost and Chief Diversity**

**Officer, University of Wisconsin-Madison, on**

**The Academic Panel to The Wisconsin Advisory Committee to the United States**

**Commission on Civil Rights Regarding Civil Rights and Hate Crimes in Wisconsin on**

**Monday, August 29, 2016**

Good Afternoon, my name is Carl Hampton and I'm the special assistant to the Vice Provost and Chief Diversity Officer at the University of Wisconsin-Madison. I'd like to thank Naheed Bleecker, chair of the Wisconsin Advisory Committee and Martin Castro, chairman of the U.S. Commission on Civil Rights, for inviting me to testify on this academic panel regarding civil rights and hate crimes in Wisconsin.

The University of Wisconsin-Madison has a deep commitment to ensuring that our campus climate is positive and welcoming to all of our faculty, staff, students and members of the greater Madison community. We also believe strongly in freedom of expression and in the university as a place where differing opinions and ideas should be encouraged. The policies and procedures I will describe today are informed by both of these principles.

As clearly noted in the University of Wisconsin System student non-academic misconduct code, UW-Madison can accomplish its mission "only if the university's teaching, learning, research and service activities occur in living and learning environments that are safe and free from violence, harassment ... and intimidation." Unfortunately, like college campuses across the country, UW-Madison has experienced incidents where students, faculty and staff are targeted for harassment or other unwelcome behaviors based on race, religion, gender and other factors.

What is a hate and bias incident? The definition of hate and bias on our campus is “single or multiple acts towards an individual, group, or their property that have a negative impact and that one could reasonably conclude are based upon actual or perceived age, race, color, creed, religion, gender identity or expression, ethnicity, national origin, disability, veteran status, sexual orientation, political affiliation, marital status, spirituality, cultural, socio-economic status, or any combination of these or other related factors. “These hate and bias incidents include but are not limited to: “slurs, degrading language, epithets, graffiti, vandalism, intimidation, symbols, and harassment that are directed toward or affect the targeted individual or team. Incidents of hate and bias can contribute to a hostile campus climate and can occur even if the act is unintentional or delivered as a joke, prank, or having the intent of humor.”

In some cases these behaviors are crimes or violations of our student code of conduct, warranting a law enforcement or disciplinary response. In others, our response is educational in nature. In all cases, we also provide support and resources to the targeted individual(s).

Our responses are led by a campus Hate and Bias Incident Response Team made up of representatives from various parts of campus including my division, the Division of Diversity, Equity and Educational Achievement; our campus police; the Division of Student Life, University Housing, and our student government, Associated Students of Madison. In addition to responding to reported incidents, the team serves as a resource for student organizational meetings; division or department meetings, housing and residence hall programming; and other campus events to provide workshops, training and resources to improve campus climate.

Incidents may be reported online through the university website and the UW-Madison app or in person at locations such as: the Multicultural Student Center; LGBT Campus Center; Dean of Students Office, International Student Services; McBurney Disability Resource Center;

Residence Life/University Apartments; Center for the First-Year Experience; Center for Leadership and Involvement; Office of Student Conduct and Community Standards; and Veteran Services & Military Assistance Center. The incident reporting form stresses that this is not a police report and anyone in immediate danger should call the police.

When an incident is reported, the team examines its possible impact on the person(s) reporting the incident as well as on any specific populations and on the broader campus community. If the individual reporting incident has requested follow-up, a representative from the team will contact them in order to make sure they receive the resources they need from units such as University Health Services, which offers counseling and consultation to address emotional well-being; and the Multicultural Student Center, which organizes discussion and dialogue groups. In some cases, individuals do not request any follow-up; they are reporting simply to make the university aware of what they have experienced.

Where appropriate, the team refers incidents for investigation by law enforcement or the Office of Student Conduct and Community Standards. Incidents can often involve graffiti or vandalism or concerning posts on social media and email that may constitute a criminal act or a violation of the student conduct code.

For example, during this calendar year, one incident resulted in the charge of a hate crime. In May 2016, an individual was accused of spray-painting anti-Semitic symbols on buildings on and around campus, including one used by a Jewish student organization. The individual was charged with four counts of graffiti, two of which were charged with hate crime enhancers

An incident may also involve conduct that violates Chapter 17 of the University of Wisconsin System Administrative Code that governs student non-academic misconduct.

Examples of such conduct include damage to property, disruption of university-authorized activities, harassment, violations of other university rules.

Disciplinary sanctions that may be imposed under Chapter 17 are: a written reprimand; denial of specified university privileges; payment of restitution; educational or service sanctions, including community service; disciplinary probation; imposition of reasonable terms and conditions on continued student status; removal from a course in progress; enrollment on a course or program; and suspension.

In closing, I want to note that the hate and bias incident response system is just one of numerous actions UW-Madison has taken to make our campus a place where all feel safe, welcome and able to thrive. For example, this fall we're launching a community-building program to provide new students with the ability to understand and discuss our differences as individuals and also what unites us as Badgers. We believe educating students in this way not only prepares them to be better citizens, it provides them skills that are valued by employers operating in an increasingly diverse landscape. So in the words of our university fight song, and in the spirit of a more inclusive community, I say "On, Wisconsin!"

To the Wisconsin Advisory Committee to the U.S. Commission on Civil Rights:

Thank you for this opportunity to add additional testimony to my August 29 appearance. I would like to further respond to the question regarding my advocacy for the creation of a state-level restorative justice organization or body for hate crimes by expanding on several points:

The first is that, while helpful, a focus on criminalization and retribution related to hate crime is not enough. There must also be systemic ways to address both its causes and its consequences and I would advocate for the creation of a state-level restorative justice response and organization. A focus on retribution doesn't foster acceptance of difference between people and perceived groups. Rather, such an approach that separates offenders from their victims and the impact their actions have creates further division, polarization, and resentment.

For the perpetrator of hate crime, enhanced penalties may simply reaffirm his or her own erroneous perception that the state gives preferential treatment to minority identity groups, and engender the perpetrator's own sense of persecution. Further, through the traditional system approach, it is unlikely that a perpetrator of a hate crime will receive adequate interventions to address the disordered thinking that caused the criminal behavior motivated by hate in the first place.

From a victim's perspective, in order to adequately grasp the extent of the consequences and level of trauma and harm that hate crime can create, a hate offense must be viewed within the larger context of structural disadvantage and oppression. These structural elements magnify the harm of individual hate acts; a compounding effect connecting individual acts to larger social harms experienced by marginalized groups. Reorienting to a different process, one that empowers victims, can possibly lessen the long-term impacts and enduring effects of a hate crime.

Restorative justice, and more specifically, dialogical encounter processes, can provide this orientation. A restorative justice process alternative would help mobilize victims from spaces of vulnerability to being a key element within the justice process—allowing victims to be part of their own conflict resolution and opportunity to express their voice. A state-level response or organization would provide the framework for addressing hate crime and possibly hate incidents more broadly, if carefully crafted.

## **Part II**

Though there is a relatively small annual number of hate crime prosecutions reported in Wisconsin, I believe that there is a strong probability that the number of prosecutions for hate crimes is not reflective of the actual number of hate incidents that occur in the state. There may be a number of reasons for this beyond the hurdle of the burden of proof for a criminal prosecution, from incidents not being reported to law enforcement due to victim dissatisfaction with the system to law enforcement not investigating claims or viewing incidents as domestic

disputes or low-level incidents not warranting criminal referral. Presented with another option of a restorative justice alternative or state-level restorative justice entity, there may be increased reporting from victims or significant numbers of referrals from law enforcement who otherwise may not have a discretionary option viewed as adequate for the situation.

As I noted in my oral testimony, though there are no U.S. examples of a restorative justice organization that deals exclusively with hate crimes, there are numerous restorative justice organizations across the nation that have handled hate crime cases. There is also a project in the United Kingdom that could be examined as a possible model for Wisconsin: The Hate Crimes Project (HCP) out of the Southwark Mediation Centre. The HCP deals with all types of hate and prejudice incidents experienced by individuals and receives referrals from police and other agencies, often where reports of hate incidents are made to police and no formal prosecutorial action was taken. The benefits that victims reported from participating in the HCP include emotional recovery from hate crime, an opportunity to address the harm that they had experienced, and cessation of hate-based incidents against them.

It is important to point out for this examination that England has a broader definition of “hate crime” than the US, which includes hate incidents possessing lower causal levels of prejudice related to the crime. Interestingly, even though there are significantly higher rates of recorded hate crimes and incidences in the UK based on this lower standard, there are still relatively few prosecutions for these incidents (approximately 1 in 3 hate offenses reported to police were referred for prosecution according to 2012 data provided by the Association of Chief Police Officers). This is likely due to the complex nature of offense dynamics and the appropriate legal standard of proof of beyond a reasonable doubt.

This data suggests that the majority of incidents involving hate-based conflict and hostility fall outside the realm of the formal legal system and beyond criminal punishment. As I discussed in my oral testimony, the majority of the low level hate incidents committed do not rise to the level of police or court action, and often become daily occurrences. Similarly, repeated contact and incidents between parties frequently escalate over time, resulting in violent outbursts and extremely dangerous or life-threatening behavior. These ongoing and escalating incidents between individuals who exist in proximal spaces develop into multi-layer hate disputes that are difficult to parse out; the traditional retributive system has difficulty exploring and responding to the social context and relationships that a restorative justice approach can acknowledge and address.

### Part III

State agencies and authorities will need to play an incredibly important role in any substantial, concentrated effort to address hate crime through restorative justice at the state level. The state enables restorative justice through legislating its inclusion in the criminal justice system and providing financial resources for programs to develop restorative practices. State agencies

and actors also help victims obtain the support and healing they may need, which may not be available in a victim's immediate community. Further, state agencies such as the county prosecutor's offices will be imperative partners for any response that seeks to address hate crime at a broad level and provide an alternative or complement to the traditional system.

For all the enclosed reasons along with my oral testimony, I would advocate for a state-level restorative justice organizational response that takes into account a multi-agency and multi-disciplinary approach (law enforcement, social services, legal and judicial, human services, schools, housing, ect.). The state-level initiative or organization should utilize local agencies as community supporters and primary resources. These agencies can serve as referral sources, support services, and even participants in a dialogical encounter process where they have been the organization that responded to a complaint. The local agencies may also be able to provide valuable information regarding contextual issues as well as unique dynamics that exist in individual cases. Creating a statewide restorative justice option and associated network would offer hate crime victims and those in the justice system a new and responsive way to address the harm that has been done as well as provide a space for accountability and possible intervention into perpetrator issues of perception and disordered thinking. Providing for this opportunity may play a key role in reducing the overall prevalence and severity of hate crime incidents in the State of Wisconsin.

Thank you.

Respectfully Submitted on 9/30/2016 by:

Jonathan Scharrer, Director – Restorative Justice Project  
University of Wisconsin Law School

## Appendix D

### Statement of Dissent by Regarding Removal of Key Information and Recommendations from Report on Hate Crime and Civil Rights in Wisconsin

July 11, 2017

Although we approve of the intent behind the overall production of the Hate Crime *and* Civil Rights in Wisconsin report by the Wisconsin Advisory Committee to the U.S. Commission on Civil Rights and agree with a majority of the information in the report, we do not approve of the final published report. Specifically, we disapprove of the majority decision by the Committee to remove three key items from the report:

1. The Committee voted to remove any suggestions to the Wisconsin Governor, State Legislature, and the Wisconsin Department of Justice concerning how to address these hate crimes.
2. The Committee voted to remove a substantial amount of information describing the disproportionate amount of marginalization that people of color experience in Wisconsin, and more specifically, in Milwaukee.
3. The Committee voted to remove other experiences and incidents of hate that do not meet the narrow definition of hate crimes.

We firmly believe that the removal of this information is unnecessary and potentially harmful because it further silences already highly marginalized communities and community members and panelists who worked to convey the urgency and pain that they and their communities have experienced as a result of hate crimes and hate incidents. It also minimizes the role that the State's law enforcement institutions play in the (under) reporting and prosecution of hate crimes.

The Wisconsin Advisory Committee to the U.S. Commission on Civil Rights was charged with completing a report examining hate crimes and hate incidents in Wisconsin and the impact they have on the lives of people in the state. As such, it is the responsibility of every member of the Committee to ensure that the Federal Government, the State of Wisconsin, and American citizens have as much information as possible concerning hate crimes and incidents in the State of Wisconsin. As addressed in the report, people of color, LGBTQ people, and other marginalized groups are more likely to experience hate crimes at the hands of groups that typically have racial, gender, and heterosexual privilege. It is also important to note that a vast majority of those who commission the hate crime laws, vote on hate crime legislation, and apprehend and prosecute those who violate those laws overwhelmingly have the same privileges as those perpetrating hate crimes. The Committee members who voted to one, remove suggestions to the State; two, delete information highlighting the extreme racial disparities in Wisconsin; and three, argued that experiences of hate speech, hate incidents, and harassment should not be included in the body of the report did so because they felt that it was not the responsibility of the U.S. Commission on

Civil Rights to include this information and/or they believed it was not pertinent to the report. Information about the racial disparities in Wisconsin, primarily in terms of education, income, incarceration, and housing helps readers understand the social and political contexts of hate crimes and various other oppressions that marginalized groups continue to experience. Hate speech, although protected by the First Amendment, is still threatening and in many instances, terrorizing to marginalized groups and communities. However, unaware of the relationships that these systemic problems likely have on marginalized peoples' experiences with hate crimes and incidents in the State as well as the impact that they might have on reporting such hate crimes, these committee members decided to remove this information. Although the removal of information concerning experiences of people of color in the State and of testimonies provided by community members was highly problematic, it was not as egregious as the removal of the suggestions to the State on how to best address hate crimes.

The suggestions that the Wisconsin Advisory Committee had for the Wisconsin Governor, the State Legislature, and the Wisconsin Department of Justice included amending the Wisconsin hate crimes law to include protections for those targeted because of their gender identity and those targeted because of their real or perceived association with a protected class. They suggested that state law enforcement agencies receive additional training on identifying, responding to, and reporting on hate crimes. They also suggested that the State adapt a restorative justice approach. Voting to remove these suggestions shows little concern with ensuring that the civil rights laws in the State protect those most in need and clearly shows the lack of concern for the State's role in preventing future hate crimes. The fact that some members of a state advisory committee would evoke such a convenient federalist argument in suppressing information crucial to understanding hate crimes within the Wisconsin context is deeply offensive, concerning, problematic, and faulty. The decision by the majority of the Wisconsin Advisory Committee to submit a report on hate crimes in Wisconsin that omits crucial information and suggestions is extremely unfortunate, particularly when other state advisory committees to the U.S. Commission on Civil Rights opt to include suggestions to state legislatures and state agencies.

We firmly believe it is the responsibility of the federal and state governments to provide equal rights and protections to all citizens as well as ensure they can live and work in a safe environment. We believe it is also the responsibility of the U.S. Commission on Civil Rights to provide information and advice to not only the Federal Government but also states, including the State of Wisconsin. The majority decision in this final report shows that although some members of the Wisconsin Advisory Committee are knowledgeable about various laws, policies, and procedures as they pertain to civil rights, their lived experiences provide them with the privilege to exclude certain information and analysis they deem irrelevant as they can rest assured that they will likely never be victims of hate crimes themselves.

**Dissent Submitted by Wisconsin Advisory Committee Members:**

**Angelique Harris**

**Dawn Shelton-Williams**

**May yer Thao**

**Yang Sao Xiong**

## Wisconsin Advisory Committee to the United States Commission on Civil Rights



### U. S. Commission on Civil Rights Contact

---

USCCR Contact                      Melissa Wojnaroski, Civil Rights Analyst  
   Regional Programs Unit  
   U.S. Commission on Civil Rights  
   55 W. Monroe, Suite 410  
   Chicago IL, 60603  
   (312) 353-8311

This report is the work of the Wisconsin Advisory Committee to the U.S. Commission on Civil Rights. The report, which may rely on studies and data generated by third parties, is not subject to an independent review by Commission staff. Advisory Committee reports to the Commission are wholly independent and reviewed by Commission staff only for legal and procedural compliance with Commission policies and procedures. Advisory Committee reports are not subject to Commission approval, fact-checking, or policy changes. The views expressed in this report and the findings and recommendations contained herein are those of a majority of the Advisory Committee members and do not necessarily represent the views of the Commission or its individual members, nor do they represent the policies of the U.S. Government. For more information or to obtain a print copy of this report, please contact the Regional Programs Unit.