New Federal Initiatives Project

The Proposed Local Law Enforcement Hate Crimes Prevention Act of 2009 (H.R. 1913)

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May 18, 2009

The Federalist Society
for Law and Public Policy Studies

www.fed-soc.org

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The proposed Local Law Enforcement Hate Crimes Prevention Act of 2009 (H.R. 1913) has been pending in Congress in roughly the same form since the 1990s.[1] It passed the House on April 29, 2009. No Senate action has occurred yet. President Obama has said that he will sign it.

Proponents argue that the bill is a long-overdue effort to combat the menace of hate crimes that divide our country along various lines, and that it will assure all persons that the federal government takes their personal safety seriously--regardless of their race, color, religion, national origin, gender, sexual orientation, gender identity or disability. They also assert that hate crimes represent a particularly loathsome category of crime and that special treatment, and even special punishment, is warranted. Without the bill's passage, proponents argue, it is possible (1) that one day a serious hate crime will be committed and state law enforcement officials will choose not to prosecute it or (2) that the defendant who committed the crime will be acquitted, despite his guilt, by a state jury. As former Attorney General Janet Reno put it, the bill would "give people the opportunity to have a forum in which justice can be done if it is not done in the state court." These rationales essentially support an oversight role by the federal government *vis-a-vis* state criminal law enforcement, perhaps reflecting a perceived history of injustice at the state court level.

Critics point out that the most significant effect of the bill will be the abrogation of double jeopardy protections, since the Double Jeopardy Clause does not apply to dual prosecutions by the federal and state governments. Many proponents are not disquieted by this argument, since one of their primary reasons to support the bill is to provide for federal re-prosecution when state prosecutions have resulted in acquittals. Opponents argue that abrogation of double jeopardy protections is not a thing to be celebrated, notwithstanding Attorney General Reno's comment. They further argue that while the bill's title suggests that it will prohibit only crimes that are conventionally described as "hate crimes," in fact it will cover much more and that by greatly expanding the number of crimes that can be classified as federal, the bill will create turf battles between state and federal prosecutors. In addition, they say, all the arguments made against state hate crimes statutes apply equally well to this federal proposal.

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Under current law, adopted in 1969, federal authorities may bring a prosecution for a crime because it was motivated by the victim's "race, color, religion, or national origin" only to protect certain "federally protected activities." For example, if the defendant prevented a black woman from enrolling in a public school or from traveling by common carrier because she is black, he has committed a federal offense. This statutory provision does not purport to be a hate crimes statute; it was enacted to enforce the rights recognized by the courts or enacted by Congress during the Civil Rights Era.

The new proposal would remove the requirement that the victim be engaged in a federally-protected activity and expand the list of protected categories to include actual or perceived "gender, sexual orientation, gender identity, or disability" in addition to the "race, color, religion and national origin" already covered. Any defendant who "willfully causes bodily injury to any person or, through the use of fire, a firearm, or an explosive or incendiary device, attempts to cause bodily injury to any person" may be fined and imprisoned for up to 10 years if he acts with the requisite connection to one of the protected categories. As a result, some offenses that would have been misdemeanors under state law become felonies under federal law. If death results or "the offense includes kidnapping or an attempt to kidnap, aggravated sexual abuse or an attempt to commit aggravated sexual abuse, or an attempt to kill," the defendant may be sentenced to life in prison.

In addition to creating a new set of federal hate crimes, the proposed law would provide technical and financial assistance to state, local and tribal law enforcement.

Critics point out that despite the use of the words "hate crimes" in the title, the bill does not require that the defendant be inspired by hatred or ill will towards a protected category in order to convict. It is sufficient if he acts "because of" someone's actual or perceived race, color, religion, national origin, gender, sexual orientation, gender identity, or disability. This could expand the reach of the federal criminal code greatly. For example, according to critics, since rapists are seldom indifferent to the gender, virtually all rape would be covered by the bill. Although one of the bill's sponsors, Senator Edward Kennedy, has stated that this would not be the case,[2] Clinton Administration officials at DOJ declined to disclaim the view that all rape would be covered. The views of those officials are consistent with the views of a number of scholars who argue that all rape should be regarded as a hate crime.[3]

Crimes that occur "because of" the victim's disability are particularly susceptible to broad interpretation. A thief might well select a disabled victim, because in general the disabled are less able to defend themselves. A thug might well hurl his glass at a bartender whom he perceives to be too slow, not even realizing that the bartender's lack of speed is the result of a disabling injury. Yet both crimes would be covered by the proposed Act, according to its critics.

Proponents of the bill argue that the critics' concerns are imaginary horribles, that DOJ officials can be trusted not to apply the proposed law in situations in which it would be inappropriate, and that internal DOJ policies would be established to avoid this problem. No one argues, however, that defendants will have the right to invoke these policies in their defense if DOJ officials choose not to follow their internal policies or if they fail to promulgate policies at all.

The double jeopardy issue is especially troubling to the bill's critics. School children are taught that the Constitution's Double Jeopardy Clause guarantees that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb." They are seldom taught, however, about the dual sovereignty rule, which holds that the Double Jeopardy Clause does not apply when separate sovereign governments prosecute the same defendant. See *United States v. Lanza*, 260 U.S. 377 (1922). The doctrine is founded upon considerations that are real and understandable. If a state has the power to oust the federal government from jurisdiction by beating it to the prosecutorial punch, it can, in effect, veto the implementation of federal policy (and vice versa).

But the dual sovereignty exception is still at best a troubling problem to many people. In the past, opportunities for such double prosecutions seldom arose, since so few federal crimes were on the books. But with the explosive growth of the federal criminal code in the last couple of decades, this is no longer true. Critics assert that the current bill will cause double prosecutions in two ways. First, it would make true hate crimes, which are perhaps the most high-profile, emotionally-charged crimes on the criminal docket, into federal crimes. The temptation to prosecute a defendant who has been acquitted by a state jury, as was done in the high-profile Rodney King and Crown Heights prosecutions of the 1990s, will be especially great. Second, the bill would greatly expand the scope of federal criminal code by adding crimes that occur "because of" someone's race, color, religion, national origin, gender, sexual orientation, gender identity or disability. This will multiply the opportunities for double prosecution.

The bill's supporters return to the argument that DOJ officials can be trusted to engage in double prosecutions only in cases under which their internal guidelines would consider it appropriate. This would involve the more serious miscarriages of justice. Opponents respond that these guidelines already allow double prosecutions promiscuously, that the guidelines can be changed at any point and that, in any event, they are unenforceable against DOJ.[4] Moreover, the notion that double prosecutions will be

limited to those cases when a serious miscarriage of justice has occurred is an open invitation to political decision-making.

Finally, some critics argue that *all* hate crimes statutes present problems, not just those enacted on the federal level. For example, some critics argue that if a defendant strikes his neighbor because the neighbor is a Democrat, it is a misdemeanor battery. But if he strikes him because the neighbor is from Afghanistan, that is a hate crime and hence a felony. This constitutes content discrimination under the First Amendment, according to these critics. Proponents argue, on the other hand, that the First Amendment does not apply in such a case. They argue that distinctions are often made among criminal defendants' thoughts that lead to harsher or more lenient punishments. For example, a defendant who openly regrets his actions is likely to be punished less harshly. Yet regret or lack of regret is simply a matter of the defendant's opinion about his own actions. The criminal act itself is identical. The House version of the bill attempts to deal with this objection in a section that reads, "Nothing in this Act, or the amendments made by this Act, shall be construed to prohibit any expressive conduct protected from legal prohibition by, or any activities protected by the free speech or free exercise clauses of, the First Amendment to the Constitution."

Other questions that are raised in hate crimes statutes in general include the following:

Will hate crimes statutes accomplish the goal of making women and minorities feel that the law takes their safety seriously? Or might it have just the opposite effect? Sooner or later, a high profile crime will occur that some citizens strongly believe ought to be prosecuted as a hate crime. Rightly or wrongly, the prosecution will decline to prosecute it as such or the jury will convict only on the underlying crime. (The most likely reason for this will not be ill will or spite, but rather a genuine disagreement about whether the extra elements necessary for a hate crime can be or have been proven beyond a reasonable doubt.) These citizens will wind up feeling cheated–when they would have felt completely vindicated had no hate crimes statute ever existed. Rather than foster community harmony, hate crimes statutes can exacerbate tensions in the community by transforming every decision to prosecute and every decision to convict into a potential slight.

The vote on H.R. 1913 was 249 to 175.

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[1] The Senate equivalent to H.R. 1913 has not yet been introduced into the 111th Congress, although introduction is expected soon. The 110th Congress version was S. 1105 and was dubbed the proposed "Matthew Shepard Local Law Enforcement Hate Crimes Prevention Act of 2007."

[2] See Edward Kennedy, Hate Crimes: The Unfinished Business of America, 44 Boston Bar J. 6 (Jan./Feb. 2000)("This broader jurisdiction does not mean that all rapes or sexual assaults will be federal crimes."). But see Senate Report 103-108, issued in connection with the Violence Against Women Act, which stated that "[p]lacing [sexual] violence in the context of civil rights laws recognizes it for what it is–a hate crime."

[3] See, e.g., Kathryn Carney, Rape: The Paradigmatic Hate Crime, 75 St. John L. Rev. 315 (2001)(arguing that rape should be routinely prosecuted as a hate crime); Elizabeth Prendo, Recognizing Violence Against Women: Gender and the Hate Crimes Statistics Act, Harv. Women's L.J. 157 (1994)(arguing that rape is fundamentally gender-based and should be included in the Hate Crimes Statistics Act); Peggy Miller & Nancy Biele, Twenty Years Later: The Unfinished Revolution, in Transforming a Rape Culture 47, 52 (Emilie Buchwald, et al., eds., 1993)("Rape is a hate crime, the

logical outcome of an ancient social bias against women.”).

[4] See, e.g., *United States v. Howard*, 590 F.2d 564, 567-58 (4th Cir.), cert. denied, 440 U.S. 976 (1979)(noting that internal guidelines concerning double prosecutions are “mere housekeeping” provisions not subject to enforcement).

Related Links:

“Hate Crimes: What is the Proper Federal Role?” Panel Discussion held on May 8, 2008. Event Audio/Video: http://www.fed-soc.org/publications/pubID.1030/pub_detail.asp

“Lights, Camera, Legislation: Congress Set to Adopt Hate Crimes Bill that May Put Double Jeopardy Protections in Jeopardy” by Gail Heriot, *Engage,* February 16, 2009: http://www.fed-soc.org/publications/pubid.1261/pub_detail.asp