

ENGLISH only



United States Mission to the OSCE

SHDM on Hate Crimes - Effective Implementation of Legislation

As prepared for delivery by Keenan R. Keller, Counsel to the Committee
on the Judiciary, U.S. House of Representatives
May 4, 2009

U.S. DELEGATION STATEMENT

Introduction

On behalf of the United States delegation, I would like to express my thanks to the Organization for Security and Cooperation in Europe for hosting this conference on the effective implementation of hate crimes legislation. It is an honor to participate in this event. Given events in the United States, the Conference could not be more timely. Just last Wednesday, the U.S. House of Representatives passed the Local Law Enforcement Hate Crimes Prevention Act (H.R. 1913), with strong bipartisan support. We hope that this legislation will be signed by the President this year and conclude a decade of legislative activity on the issue. The Federal government of the United States is committed to ensuring the civil rights and human rights of all people and protecting their safety from attack because of their status or group membership is a key part of that commitment.

While the United States has a rich history of cultural diversity, the nation still struggles with the by-products of discrimination rooted in its experience with chattel slavery. That discrimination has historically manifested itself in violence toward minorities, particularly, but not limited to, African-Americans.¹ Anti-lynching legislation was first introduced in Congress more than a century ago and three anti-lynching measures were passed by the U.S. House of Representatives in the first half of the 20th century. However, each measure ultimately died in U.S. Senate where Southern conservative lawmakers expressed concern for states' rights and used procedural tactics to defeat the measures. The first Federal hate crimes legislation would not pass until the full bloom of the civil rights era in 1968.

¹ 4,733 lynchings have been recorded in American history, and 3, 446 of them were committed against African Americans. While the term has been historically associated with race-motivated hangings in the southern United States, lynching today is more broadly defined as a method of intimidation where mob terrorism is used to humiliate and dehumanize. See "1959 Tuskegee Institute Lynch Report", Montgomery Advertiser; April 26, 1959, re-printed in 100 Years Of Lynching by Ralph Ginzburg (1962, 1988).

The Federal Approach to Hate Crimes Enforcement: Overview

As a matter of policy, the United States government has taken the position that bias crimes pose a significant threat to the full participation of all Americans in our democratic society. These so-called hate crimes involve the purposeful selection of victims for violence and intimidation based on their perceived attributes. These acts represent a dangerous manifestation of prejudice against identifiable groups. A majority of the States (45) have statutes criminalizing various types of bias-motivated violence or intimidation. Each of these statutes covers bias crimes committed on the basis of race, religion, and ethnicity or other additional classifications.²

The principal Federal hate crimes statutes are 18 U.S.C. § 245 (Interference with Federally Protected Activities) and 42 U.S.C. § 3631 (Interference with Housing).³ Enacted in 1968, these statutes prohibit a limited set of hate crimes committed on the basis of race, color, religion, or national origin.⁴ The main provision, § 245(b) of Title 18, prohibits the use of force, or threat of force, to injure, intimidate, or interfere with (or to attempt to injure, intimidate, or interfere with) “any person because of his race, color, religion or national origin” with the intent

² See www.adl.org-state_hate_crime_laws.pdf. Of the 45 States with the basic classifications of race, religion, and ethnicity, 32 of them also cover sexual orientation; 32 cover disability; 28 cover gender; 13 cover age; 11 cover transgender/gender-identity; and 5 cover political affiliation.

³ 42 U.S.C. § 3631 also punishes violent intimidation with housing activities when the victims are selected based on sex, handicap, and familial status.

⁴ The Federal criminal code also contains a penalty enhancement provision. The Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 280003a, provides:

DIRECTION TO UNITED STATES SENTENCING COMMISSION REGARDING SENTENCING ENHANCEMENTS FOR HATE CRIMES.

(a) DEFINITION.--In this section, "hate crime" means a crime in which the defendant intentionally selects a victim, or in the case of a property crime, the property that is the object of the crime, because of the actual or perceived race, color, religion, national origin, ethnicity, gender, disability, or sexual orientation of any person.

(b) SENTENCING ENHANCEMENT.--Pursuant to section 994 of title 28, United States Code, the United States Sentencing Commission shall promulgate guidelines or amend existing guidelines to provide sentencing enhancements of not less than 3 offense levels for offenses that the finder of fact at trial determines beyond a reasonable doubt are hate crimes. ***.

to interfere with his or her participation in any of six “federally protected activities” specifically enumerated in the statute.⁵

To prove a violation of section 245(b), the Government must prove beyond a reasonable doubt two intents on the part of the accused: first, that the crime of violence was motivated by racial, ethnic, or religious hatred, and second, that the crime was committed with the intent to interfere with the victim's participation in one or more of the federally protected activities. Even in the most blatant cases of racial, ethnic, or religious violence, an accused has committed no Federal crime in violation of section 245(b) unless he is proved to have possessed both these intents.

While bias crimes are investigated and prosecuted at both the Federal and State/local level, depending on the facts of the case and the needs of the investigation, it is important to emphasize that State and local authorities currently investigate and prosecute the overwhelming majority of hate crimes.⁶ However, in limited circumstances, it is necessary to use the Federal criminal civil rights statutes to “backstop” State and local efforts by bringing Federal charges. Such concurrent jurisdiction is necessary, for example, where the State does not have an appropriate statute, or otherwise declines to investigate or prosecute; where the State requests that the Federal government assume jurisdiction; or where actions by State and local law enforcement officials leave demonstratively unvindicated the Federal interest in eradicating bias-motivated violence.

Where Federal jurisdiction exists in the circumstances covered by 18 U.S.C. 245(b), the Federal government’s resources, forensic expertise, and experience in the identification and proof of bias motivated violence and criminal networks have provided an invaluable investigative complement to State and local investigator’s familiarity with the local community. Through this cooperation, State and Federal law enforcement officials have been able to bring the perpetrators of hate crimes swiftly to justice.

The investigation conducted into the death of James Byrd in Jasper County, Texas, is an excellent example of the benefits of an effective Federal/State investigative partnership in a high-profile hate crime case. Mr. Byrd was selected to be tortured and killed solely because of his race. From the time of the first reports of Mr. Byrd's death, the FBI collaborated with local officials in an investigation that led to the prompt arrest and indictment of three men on State

⁵ The six enumerated “federally protected activities” are: “(A) enrolling in or attending any public school or public college; (B) participating in or enjoying any benefit, service, privilege, program, facility or activity provided or administered by any State or subdivision thereof; (C) applying for or enjoying employment, ***; (D) serving *** as grand or petit juror; E) traveling in or using any facility of interstate commerce, ***; (F) enjoying the goods [or] services [of certain places of public accommodation].” 18 U.S.C. § 245(b)(2).

⁶ From 1991-2005, the FBI has received reports of almost 114,000 hate crimes. During that period, however, the Department of Justice has brought fewer than 100 cases under 18 U.S.C. § 245. For more information see: <http://www.fbi.gov/ucr/hc2005/index.html>

capital murder charges. The resources, forensic expertise, and civil rights experience of the FBI and the Department of Justice provided valuable assistance to local law enforcement officials. The fact that the crime at issue appeared to violate established Federal criminal civil rights law was critical in the FBI's determination of its legal authority to lend assistance to the State prosecution.

It is also useful to consider the work in the mid-1990s of the National Church Arson Task Force, which investigated and prosecuted violations of 18 U.S.C. § 247. Section 247, which was enacted in 1988 and amended in the mid-1990s, does not have limitations analogous to the "federally protected activity" requirement of 18 U.S.C. § 245(b)(2). Created to address a rash of church fires across the country, the Task Force's Federal prosecutors and investigators from the Bureau of Alcohol, Tobacco and Firearms and the FBI collaborated with State and local officials in the investigation of every church arson that had occurred since January 1, 1995. The results of these State/Federal partnerships were extraordinary: thirty-four percent of the joint State/Federal church arson investigations conducted during the 2-year life of the task force resulted in arrests of one or more suspects on State or Federal charges, an arrest rate that was more than double the normal 16 percent rate of arrest in all arson cases nationwide (most of which are investigated without Federal assistance).⁷ More than 80 percent of the suspects arrested in joint State/Federal church arson investigations during the life of the Task Force were prosecuted in State courts under State laws.⁸

The Necessity of Data Collection: The Hate Crimes Statistics Act

As a general matter, data collection should be included as a part of any anti-bias crime legal regime. Data collection has been a critical management tool in many areas of law enforcement. Comprehensive crimes statistics have enabled law enforcement agencies generally to improve training and tactical planning to enhance community safety. However, in the hate crimes context, data collection serves the additional function of highlighting the need for community outreach and resources from policy makers and providing a means of accountability for targeted communities. In the United States, the Federal government and 27 states have statutes requiring the collection hate crime statistics.

The Hate Crime Statistics Act of 1990 requires the Attorney General to collect data on crimes committed because of the victim's race, religion, disability, sexual orientation, or ethnicity. The bill was the first federal statute to "recognize and name gay, lesbian and bisexual people." 28 U.S.C. § 534. Since 1992, the Department of Justice and the FBI have jointly published an annual report on hate crime statistics. In 1994 Congress expanded the scope to include crimes based on disability, and in 1996 Congress permanently reauthorized the Act.

⁷ See Statement of Eric H. Holder, Jr., Deputy Attorney General, U.S. Department of Justice, May 11, 1999, www.usdoj.gov/archive/dag/testimony/daghate051199.htm.

⁸ Id.

The data compiled pursuant to the Statistics Act has been a valuable legislative resource, supporting the justification for expanding the scope of Federal law. Since 1991, the FBI has documented over 118,000 hate crimes. For the year 2007, the most current data available, the FBI compiled reports from law enforcement agencies identifying 7,624 bias-motivated criminal incidents.⁹ Law enforcement agencies identified 9,535 victims arising from 9,006 separate criminal offenses. As in the past, racially-motivated bias accounted for approximately half (50.8 %) of all incidents. Religious bias accounted for 1,400 incidents (18.4 %) and sexual orientation bias accounted for 1,265 incidents – (16.6 %), followed by ethnicity/national origin bias with 1,007 incidents – (13.2%).

Though the reporting program here is voluntary and incomplete, the Federal data collection effort has been important to managing national hate crime policy. Over the last decade, we have seen shifts in the reported number of hate crimes, with a marked rise in ethnicity and national origin bias post-9/11 and a steady increase in sexual orientation bias crime. Based upon this information, the Federal government was able to develop an appropriate law enforcement response and outreach strategy to the Arab and Muslim communities in the wake of 9-11. Moreover, data collection has galvanized the political response by the LGBT community and other civil society groups to the substantial number of bias incidents across the nation.

Current Legislation: The Local Law Enforcement Hate Crimes Prevention Act

The Local Law Enforcement Hate Crimes Prevention Act (H.R. 1913, the “Act”) is designed to provide assistance to state and local law enforcement agencies in the investigation and prosecution of hate crimes, and would amend chapter 13 of title 18, United States Code, to make certain assaults against persons of defined groups a crime. It would also require enhanced data collection on certain crimes.

H.R. 1913 is intended to address two serious limitations in the reach of the current Federal hate crimes statutes, 18 U.S.C. § 245 (Interference with Federally Protected Activities) and 42 U.S.C. § 3631 (Interference with Housing): (1) the statutes require the Government not only to prove that the defendant committed an offense because of the victim's race, color, religion, or national origin but also because of the victim's participation in one of six narrowly defined “federally protected activities” (under 18 U.S.C. § 245) or in connection with housing (under 42 U.S.C. §3631), and (2) the existing statutory scheme provides little or no coverage whatsoever for violent hate crimes committed because of the victim’s perceived sexual orientation, gender, gender identity or disability. Taken together, these deficiencies limit the Federal government's ability to prosecute certain hate crimes, and its ability to assist State and local law enforcement agencies in the investigation and prosecution of many of the most heinous hate crimes.

⁹ See U.S. Department of Justice, Federal Bureau of Investigations, 2007 Hate Crimes Statistics, www.fbi.gov/ucr/hc2007/incidents.htm.

The Act amends the Criminal Civil Rights Chapter (Chapter 13) of title 18 of the United States Code by creating a new law, § 249, to address the limited reach of existing law. Section 249 establishes two criminal prohibitions. In cases involving violence because of the victim's race, color, religion or national origin, § 249(a)(1) prohibits the intentional infliction of bodily injury (or certain attempts) without regard to the victim's participation in specific enumerated activities. In cases involving certain violent crimes motivated by hatred based on the victim's actual or perceived sexual orientation, gender, gender identity, or disability, the new § 249(a)(2) prohibits the intentional infliction of bodily injury when the incident has a nexus, as defined in the bill, to interstate commerce.¹⁰

There is an emerging consensus in the United States that hate crimes motivated by bias based on the victim's actual or perceived sexual orientation, gender, gender identity, or disability are deserving of prosecution. Notably, in 1994, Congress passed legislation directing the United States Sentencing Commission to promulgate a sentencing enhancement for crimes committed on account of the victim's actual or perceived sexual orientation, gender, or disability.¹¹ Further, since 1994, gender identity has been added to a plethora of state and local hate crimes statutes that are based on the same analytical understanding of violent prejudice, in recognition of the law enforcement reality that criminals target such persons for particularly violent assault.¹²

By expanding the reach of the federal criminal laws to address both sets of limitations, § 249 provides the Federal government the tools to effectively pursue the significant Federal interest in eradicating bias-motivated violence – both by assisting States and local law enforcement, and by pursuing Federal charges where appropriate. It is expected that this cooperation will result in an increase in the number of hate crimes solved by arrests and successful prosecutions, in the same way that the devotion of federal law enforcement efforts increased the number of arrests and prosecutions in the church arson context. And, as noted, it is also believed that a large majority of hate crimes prosecutions will continue to be brought in State court under State law.

Balancing Freedom of Expression

In crafting hate crime statutes, legislative bodies in the United States have been careful to work within the free expression and association bounds set by the First Amendment. As a general matter, hateful speech or expressions are not crimes and cannot be entered as evidence at trial. This legislation has been crafted in a fashion that protects the First Amendment Rights of

¹⁰ The approach taken in this legislation is identical to that taken in the Church Arson Prevention Act of 1996, which also amended Chapter 13 of Title 18. See 18 U.S.C. § 247.

¹¹ The Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 280003a.

¹² See, Hate Crime Laws, Transgender Law & Policy Institute, www.transgenderlaw.org/hatecrimelaws/index.htm (State survey of legal policy).

the accused and the general citizenry.¹³ The bill is designed only to punish violent acts, not beliefs or thoughts – even violent thoughts. The legislation does not punish, nor prohibit in any way, name-calling, verbal abuse or expressions of hatred toward any group, even if such statements are hateful. Moreover, nothing in this legislation prohibits the lawful expression of one’s deeply held religious or personal beliefs. The Act only covers violent actions that result in death or bodily injury committed because of the victim’s defined or covered status.

The legislation contains specific legal prohibitions against the introduction of a defendant’s abstract beliefs at trial to prove biased intent, unless the evidence specifically relates to the offense. This provision of the legislation attempts to harmonize competing interests – it recognizes the need to protect First Amendment values and provide protection for persons or groups who profess unpopular beliefs, but recognizes the need to permit the proper use of evidence of an accused’s statements and associations where such evidence is clearly relevant to the charges and is not unfairly prejudicial.

This provision reflects Congress’s concern that the right to free expression must be balanced with the need to protect the public against bias-based violence. Evidence of an accused’s expressions, associations or group memberships should be carefully scrutinized and only be admitted at trial where they can be shown, either by the content of the statements, the nature of the associations, or other independent evidence to be specifically relevant to the charged offense. This ensures that evidence of expression or association is not presented at trial merely because a person has expressed, for example, religious beliefs, unpopular beliefs, or belongs to an organization that holds or professes such beliefs that may be consistent with the crime charged, with little or no other evidence of the individual’s culpability in the charged offense.

The Role of Civil Society in the Legislative Process

Civil society plays an important role in the American legislative process, particularly in the realm of civil rights and civil liberty reform. Advocacy groups, dating back to the turn of the Twentieth Century, have been active in pursuing hate crime legislation. The early anti-lynching law efforts galvanized groups that would become the National Association for the Advancement of Colored People (NAACP) and Anti-Defamation League (ADL). Both groups, along with many others built on their examples, have lobbied Congress for legislation that would become 18 U.S.C. Section 245, the Hate Crimes Statistics Act, and the Local Law Enforcement Hate Crimes

¹³ Doubts about the constitutionality of hate crimes laws were squarely addressed by the Supreme Court in the early 1990s in two cases, R.A.V. v. City of St. Paul, 505 U.S. 377 (1992) and Wisconsin v. Mitchell, 508 U.S. 47 (1993). In Wisconsin v. Mitchell, the Supreme Court clarified that the First Amendment does not prohibit the evidentiary use of speech to establish the elements of a crime or to prove motive or intent. These cases clearly demonstrate that a hate crimes statute may consider bias motivation when that motivation is directly connected to a defendant’s criminal conduct. By requiring this connection to criminal activity, this legislation does not chill protected speech and does not violate the First Amendment.

Prevention Act. Their perseverance has allowed Congress to maintain its focus on bias crime issues and forward a legislative agenda through even hostile political climates.¹⁴

Opposition groups in civil society also play an important role in shaping American policy. While some groups, in the case of civil rights legislation, may express views in support of an arguably discriminatory status quo, their activities also ensure that legislation does not over-reach Constitutional principles and are consistent with traditional American notions of free speech. This expression of opposing views is critical to finding the appropriate legislative middle ground and balancing the needs of society.

Conclusion

Over the last 40 years, hate crimes law in the United States has evolved from the narrowly crafted approach in § 245, that was designed to assert Federal jurisdiction where states refused to act to enforce against racial violence, to the more cooperative approach found in the new § 249, that focuses on Federal, State and local interagency cooperation. During that time, other minority groups with a history of violent discrimination have found their voice and sought coverage under Federal law. While the Federal government has not yet passed comprehensive legislation, there has been incremental improvement in the anti-bias crimes legal regime through the States and the enactment of data collection and penalty enhancement provisions at the Federal level. During this legislative session, Congress is expected to send legislation to the President for the enactment of the first comprehensive bias crime legislation in over 40 years.

¹⁴ Various versions of H.R. 1913 have been pending before Congress for over a decade. The current bill is supported by more than 300 civil rights, education, religious, and civic organizations, including virtually every major law enforcement organization in the country. Due in large part to efforts of civil society groups, the legislation had over 120 cosponsors in the House of Representatives.