

Written Testimony  
Prepared for the Senate Judiciary Committee  
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By  
Family Research Council  
Tony Perkins  
President

The Family Research Council strongly opposes the enactment of a Federal hate crimes law (H.R. 1913).

Hate crime laws force the court to guess the thoughts and beliefs which lie behind a crime, instead of looking at the crime itself, in order to prosecute and convict someone of a hate crime. Violent crimes are already punishable by law. "Hate crime" laws put the perpetrator's thoughts and beliefs on trial. Hate crime laws are tantamount to federally prosecuting "thought crimes." The Family Research Council believes that all crime should be prosecuted to the fullest extent of the law, and that every violent crime has some form of hate behind it. All around the country, crimes are being prosecuted in the state justice systems. American justice is being done. There is simply no need for a federal hate crimes law.

Even more distressing is the impact that Federal hate crime laws could have upon religious communities. Examples from Europe and Canada have shown what hate crime laws can do to the Christian community. In some countries, pastors have been threatened for what they preach in the pulpit and passing out the Bible can lead to hate crime prosecution. While the bill before us is ostensibly limited to acts which cause "bodily harm," it would put us on a slippery slope toward the punishment of so-called "hate speech" as well.

A federal hate crime law is unnecessary and violates the First and Fourteenth Amendments to the Constitution.

### **Unnecessary and Ineffective**

Expanding the Federal hate crime law would not only be unnecessary, it would be ineffective. When H.R. 1913 was presented in the House of Representatives, it listed 10 Congressional findings. Section 2.1 of the bill states that Congress has found that:

"The incidence of violence motivated by the actual or perceived race, color religion, national origin, gender, sexual orientation, gender identity, or disability of the victim poses a serious national problem."<sup>1</sup>

However, the statistical data does not support such a finding. The FBI's statistics on hate crime actually show a decrease in the number of hate crimes being reported even though

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<sup>1</sup> 111<sup>th</sup> Congress. H.R. 1913, Local Law Enforcement Hate Crimes Prevention Act of 2009.

there is an increase in the agencies reporting such crime. In the most recent year for which statistics are available, 2007, the FBI found that 7,624 hate crime incidents were reported.<sup>2</sup> Racially motivated incidents were 50.8% of the total, followed by religiously motivated incidents at 18.4%, then ones motivated by “sexual orientation” bias at 16.6%.

In 2007, there were 90,427 forcible rapes and 16,929 murders reported.<sup>3</sup> Less than one tenth of one percent of the national crime total for those offenses consisted of “hate crimes.” This does *not* (emphasis added) constitute a serious national problem or warrant Federal interference.

Another reason that the numbers do not prove a serious national problem is that the statistics include reports of “intimidation.” The Hate Crimes Reporting Act of 1990 required that the FBI interpret hate crimes more broadly to include acts of intimidation. Of the hate crime offenses reported, 28.5% of them were intimidation related, and when it came to crimes against persons, 47.4% of them were intimidation related. To use these statistics and claim they constitute a *serious national problem* (emphasis added), which this bill would address, is misleading.

The bill presented to the House of Representatives on April 2, 2009 also made the finding that “Existing Federal law is inadequate to address this problem” (Sec 2:4). Not only have we just shown that there is no *serious national problem* (emphasis added), 44 states, plus the District of Columbia, have their own form of hate crime law. A 1990 law (Public Law 101-275) required the Federal government to begin collecting statistics on so-called “hate crimes” from states and local governments, but did not provide for any federal prosecution of them. A 1994 law (Public Law 103-322) provided for “sentencing enhancement” (that is, higher penalties) for existing Federal offenses that are found to be motivated by “hate,” but did not actually create a new category of offense. H.R. 1913 would, for the first time, allow the Federal government to prosecute any alleged “hate crime” that occurs anywhere in the country, regardless of the other circumstances--thus effectively usurping the primary responsibility of states and localities for law enforcement. Federal hate crimes bureaucrats can intervene and claim jurisdiction in localities which lack “hate crime” laws, or where those laws are judged not to be zealously enforced.

Proponents of “hate crime” legislation have not presented evidence that state and local authorities are failing to prosecute such crimes. Ironically, in the most high-profile case cited in calls for hate crimes legislation, the murder of the homosexual Wyoming college student Matthew Shepard, the killers were convicted and sentenced to double life sentences without parole even in the *absence* of any “hate crime” law. Only the pleas of Shepard's parents persuaded the judge to spare Shepard's murderers from the death penalty. There is also no evidence that federalizing hate crimes would effectively deter them.

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<sup>2</sup> FBI 2007 Hate Crime, Incidents and Offenses. <http://www.fbi.gov/ucr/hc2007/incidents.htm>. Oct 2008

<sup>3</sup> FBI 2007 Crime in the United States. [http://www.fbi.gov/ucr/cius2007/data/table\\_01.html](http://www.fbi.gov/ucr/cius2007/data/table_01.html). Sept. 2008

## Threat to the First Amendment

Violent attacks upon people or property are already illegal, regardless of the motive behind them. With "hate crime" laws, however, people are essentially given one penalty for the actions they engaged in, and an *additional* penalty for the particular (and highly selective) attitudes and thoughts that allegedly motivated those actions.

Motive-based analysis and intent-based analysis are not the same thing. For example, with the crime of manslaughter, intent based analysis looks at whether the perpetrator intended the result. Hate crime legislation takes into account what the offender thinks, feels, or believes about the victim, regardless of whether the perpetrator intended the result.<sup>4</sup> This is why hate crimes can be referred to as "thought crimes."

H.R. 1913 authorizes the U.S Attorney General to assist in the investigation of any felony that is motivated by "prejudice based on the actual or perceived race, color, religion, national origin, gender, sexual orientation, gender identity, or disability of the victim" or is a violation of any state, local, or tribal hate crime laws (Sec 3:a:1:C). While the bill only authorizes direct federal prosecution in the case of violent crime, the ability of the government to intervene in any violation of state or local hate crime laws opens the door to federal involvement in prosecuting "hate speech."

As previously mentioned, 44 states plus the District of Columbia have hate crime laws already in place. Many of these states include acts of intimidation or perceived intimidation in the categories permissible to prosecute. New Jersey, for example, makes it a hate crime merely to communicate in a manner likely to cause annoyance or alarm.<sup>5</sup>

The definition of "hate crimes" in section 280003(a) of the Violent Crime Control and Law Enforcement Act of 1994, which is incorporated into H.R 1913, does not limit hate crimes to crimes of violence. This definition paves the way for future amendments to the law under which people could be prosecuted for speech that causes others to feel intimidated. This has already happened in Canada. In 1997, the Canadian Broadcast Standards Commission, a broadcasting watchdog endorsed by the Canadian Radio-Television and Telecommunications Commission (equivalent to the FCC), ruled a Focus on the Family broadcast on the issue of homosexuality was an "abusively discriminatory comment on the basis of sexual orientation contrary to the provisions of Clause 2 of the *CAB Code of Ethics*."<sup>6</sup> The Criminal Code in Canada states "everyone who, by communicating statements in any public place, incites hatred against any identifiable group where such incitement is likely to lead to a breach of the peace" and "everyone who, by communicating statements, other than in private conversation, willfully

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<sup>4</sup> Alliance Defense Fund, Memorandum to Members of Congress. Glen Lavy, April 20, 2007 pg. 3

<sup>5</sup> N.J.S.A 2C:16-1(a),2C:33-4

<sup>6</sup> CBSC Decision 96/97-0155, <http://www.cbsc.ca/english/decisions/decisions/1997/971216i.htm>

promotes hatred against any identifiable group” is liable for up to two years imprisonment.<sup>7</sup>

Canada’s identifiable groups are very similar to the groups identified in H.R 1913 as far as race, religion, ethnic origin or sexual orientation is concerned. It is not hard to see the possible implications of hate crime legislation being enacted in the United States. A profound concern is the implication that “thought crime” laws will have for religious freedom.

Our country guarantees religious freedom under the First Amendment. However, “thought crime” legislation will pave the way for religious persecution. The Supreme Court has “already decided that hate crimes laws are constitutional under the First Amendment, and upheld the criminal conviction of a person for hate speech when coupled with a violent act committed by other persons” (*Wisconsin v. Mitchell*, 508 U.S. 476 1993).

H.R 1913 does not preclude using evidence of speech and associations as “other bad acts” under the Federal Rules of Evidence. Under section 404(b) of the Federal Rules of Evidence, bad acts can be admitted to prove “motive, opportunity, intent, preparation, plan, knowledge, and identity.”<sup>8</sup> Pastors in their pulpit can be accused of being accomplices to hate crimes because their speech is deemed hateful towards an identified group, if a parishioner (or other listener or reader) who misconstrues religious teachings decides to commit a violent crime against a member of an identified group.

At the state level, the inclusion of "intimidation" in hate crime legislation has already been broadly interpreted to include the public criticism of homosexuality, as in the case of 11 Christian protesters charged under a Pennsylvania "ethnic intimidation" law on October 10, 2004. The defendants were charged for peacefully protesting at a "gay pride" rally and faced imprisonment and huge fines before their case was dismissed. Homosexuality is defined in the Bible as a sin, and Christians have the right to peacefully speak out against sin, as guaranteed by the freedom of religion. If Congress were to pass H.R. 1913, it would be effectively labeling biblically and other religious or morally based views disapproving of homosexual conduct as a form of “hate,” whether prosecutions ensue or not.

The testimony against hate crime legislation in the previous Congress is still relevant to H.R. 1913. Brad Dacus, the President of the Pacific Justice Institute, brought up the potential for “well-intentioned hate crime legislation to squelch free speech, particularly religious free speech.”<sup>9</sup> A subjective sense of fear and or apprehension is not sufficient

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<sup>7</sup> Canada Criminal Code 318:4 and 319:1 [http://laws.justice.gc.ca/en/showdoc/cs/C-46//20090623/en?command=search&caller=SI&fragment=Hate%20Crime&search\\_type=all&day=23&month=6&year=2009&search\\_domain=cs&showall=L&statuteyear=all&lengthannual=50&length=50](http://laws.justice.gc.ca/en/showdoc/cs/C-46//20090623/en?command=search&caller=SI&fragment=Hate%20Crime&search_type=all&day=23&month=6&year=2009&search_domain=cs&showall=L&statuteyear=all&lengthannual=50&length=50)

<sup>8</sup> Federal Rules of Evidence 2009 edition. Cornell Law. <http://www.law.cornell.edu/rules/fre/rules.htm>

<sup>9</sup> Congressional Testimony of Brad Dacus before Subcommittee on Crime Terrorism and Homeland Security. Headline: Hate Crime. April 17, 2007.

justification to quash the right to freedom of expression. Some people claim to experience such negative feelings when exposed to religious speech against homosexuality. Dacus listed several examples in California where students were threatened with suspension for peacefully speaking out against homosexuality. In one instance, the student was beaten. In another the student was told that “he should leave his faith in the car while at school, in order to not offend homosexual students.” The courts ruled against these students, finding that their speech amounted to a form of psychological assault that was just as harmful as physical. Judge Gould of the Ninth Circuit in California related it to a call for genocide.

In San Francisco, officials took action to ban religious organizations from advertising on TV because the content was deemed “hate speech,” and thus a crime. In some cases, religious dialogue is being viewed as a hate crime. A pastor named Audie Yancey was summoned before a Human Relations Task Force and charged with hate speech against Muslims. Dacus urged Congress “not to allow natural feelings of sympathy for crime victims to lead you to enact sweeping legislation which will sacrifice fundamental constitutional rights on the altar of political expediency.”<sup>10</sup>

## **Inequality**

Thought crime laws favor some victims of violent crimes over other victims of equally violent crimes, which violates the core principle guaranteed by the 14<sup>th</sup> Amendment to the U.S. Constitution and is even carved above the entrance to the Supreme Court (“Equal Justice Under Law”). Two identical violent crimes—one a “random” act of violence and another a “hate-motivated” act of violence—will be treated unequally even though the impact on the victims is indistinguishable (or even conceivably worse for the victim and family members who are denied enhanced federal protection, solely because their distinguishing characteristic was not named in the thought crime statute).<sup>11</sup>

Granting greater protection to some victims than others based on a status, whether chosen or inherent, is of great concern to everyone who supports the premise of equality under the law.

Family Research Council has a particular concern regarding such laws, however, when they include “sexual orientation” and “gender identity” (a reference to cross-dressing and sex-change operations) among the categories of protection. This sends the false message that deviant sexual behaviors are somehow equivalent to other categories of protection such as race or sex. In fact, the very term “hate crime” is offensive in this context, in that it implies that mere disapproval of sexually extreme behavior constitutes a form of “hate” equivalent to racial bigotry.

Sexual orientation and gender identity are not defined in the bill. As such, it is not clear from this lack of definition what the bill authors intend for sexual orientation and gender

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<sup>10</sup> Ibid

<sup>11</sup> Republican Study Committee. Rep. Jeb Hensarling, Chairman. May 3, 2007

identity to mean or how these terms should be construed in law.<sup>12</sup> Since these terms are not defined by the bill itself, it is possible that someone could claim protection for their “sexual orientation” based on participation in one of the 30 paraphilias listed in the current *Diagnostic and Statistical Manual of Mental Disorders*,<sup>13</sup> which include pedophilia and bestiality.

Congress should stand together to support equal protection under the law and not allow for preferred protected status only for certain privileged groups.

H.R. 1913 is not only unnecessary and ultimately ineffective, but it would put freedom of speech, religious liberty, and equal protection under the law at risk.

I urge you to reject the Local Law Enforcement Hate Crimes Prevention Act of 2009.

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<sup>12</sup> Republican Study Committee. Rep. Jeb Hensarling, Chairman. May 3, 2007

<sup>13</sup> Diagnostic and Statistical Manual of Mental Disorders. Sexual Orientations. 4<sup>th</sup> Edition. American Psychiatric Association. Pp 566-582. 2000