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The “Hate Crimes” Bill

H.R. 1913, the "Local Law Enforcement Hate Crimes Prevention Act of 2009"

By: Shawn D. Akers¹

I. Characteristics

- A. “ This bill **would create a federal offense imposing federal criminal penalties – potentially in addition to criminal penalties imposed under state law**” – on any defendant who chooses his victim in whole or in part because of the victim’s “actual or perceived race, color, religion, or national origin” or “**actual or perceived religion, national origin, gender, sexual orientation, gender identity, or disability.**” “Violations would be punishable by **criminal fines and imprisonment of up to 10 years, or imprisonment for life** if the offense results in death or ‘includes kidnapping [sic] or an attempt to kidnap, aggravated sexual abuse or an attempt to commit aggravated sexual abuse, or **an attempt to kill.**’” *See Legislation Detail* <http://www.overcriminalized.com/LegislationDetail.aspx?id=441>.
- B. The bill includes the terms “**Gender, Sexual Orientation, and Gender Identity**” – **ambiguous terms that the drafters of the bill have refused to define**. It places those descriptions on par with race, color, religion and nationality.
- C. As a matter of mechanics, the bill provides financial grants to state and local entities, provides additional personnel for investigation and prosecution, creates new federal criminal offenses, and creates a new evidentiary rule (no evidence of speech or associations is admissible to prove motive of defendant unless the speech or association is “specifically related” to the “hate crime”).
- D. The bill is couched in terms of providing assistance to state, local, and Indian governments but it reserves the right to act if they fail to exercise their jurisdiction, or leave “demonstrably un-vindicated the federal interest in eradicating bias-motivated violence.”

II. Status

- A. The version of the bill titled HR 1913 RH passed out of Judiciary Committee on a 15-12 vote. It appears that the only change from the prior version, HR 1913 IH, was the dropping of the original section 2 – the findings section which included exaggerated figures of so-called hate crimes and included the interstate commerce language.

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- B. At committee markup, Steve King, Bob Goodlatte, and others offered and argued persuasively for several amendments all of which were defeated. One that was particularly interesting was Steve King's amendment to merely exclude pedophiles from the protected class based on "sexual orientation" – it was voted down 13-10.
- C. HR 1913 RH went to the floor, and the House adopted the bill on a 249-175 vote. <http://clerk.house.gov/evs/2009/roll223.xml>
- D. A companion bill, S.909, has now been introduced into Senate.

III. Major Concerns

While the bill's supporters have very effectively framed the bill as one that will protect victims from criminal acts, the bill actually has very little to do with protection. Indeed, if the bill's drafters and supporters are to be believed, the bill only becomes relevant after a criminal has committed an already illegal act. On closer analysis, the bill does not merely provide stiffer penalties for certain crimes but, rather, represents a substantive and fundamental shift away from the American ideas of free speech and God given immutable equality and toward the European ideas of state approved speech, state endorsed morality, state-given equality. The particular concerns with the bill are numerous, but a few of the most troublesome are listed below.

A. Unequal Protection of Laws Under 14th Amendment

1. The 14th Amendment to the Constitution requires that all citizens be extended equal protection under the law. HR 1913 in effect creates two classes of victims, i.e. those who are a member of the preferred and protected class created by the bill and those who are not. Inclusion in the preferred class is to a great extent based not on immutable characteristics but on the class member's choice of sexual conduct, subjective gender, and subjective gender self-identity. For further discussion, see the excellent article *Separate But Unequal Protection*, by Matt Barber. (<http://www.onenewsnow.com/Perspectives/Default.aspx?id=498106>).
2. The practical effect of the carrot and the stick of federal funds, federal promotion, and federal oversight, is the promotion of the preferred class and the neglect of non-class members. Specifically, local and state law enforcement would have the incentive of federal funds to prosecute cases involving these preferred victims to the exclusion and neglect of less valuable victims. Additionally, with federal funds available when the requisite "hate" connection can be alleged, the bill creates a powerful incentive to force cases into the "hate crimes" mold. This heavily incentivized increase in reported "hate crimes" would artificially inflate the number and apparent prevalence of so called "hate crimes." The natural and very political result of such a perceived increase in "hate crimes" would undoubtedly be an increase in the political influence of the preferred class, and as night follows day, a corresponding increase and expansion of even more intrusive "hate crime" and "hate speech" legislation to address the perceived crisis.

B. Punishes Thought (Potentially Religious or Political Thought) Rather than Mere Intent To Commit a Crime.

1. Ironically hate is not even an element of a "hate crime" in the bill. Rather, the definition of a "hate crime" is borrowed from the Violent Crime Control and Law

Enforcement Act of 1994 – requiring only that the defendant selects a victim because of the membership or perceived membership in one of these proposed protected classes. Proponents of the bill argue that the criminal is being punished for his or her intent to terrorize an entire class of people (i.e. all homosexuals) but no such intent to terrorize is actually required. Indeed, despite the framing of the term “hate crime,” the bill does not even require a showing of animus toward the victim or the preferred class. Under existing law, the criminal would be punished if he or she possessed the requisite intent to commit the act. The additional criminal fines and prison sentences that would be created by HR 1913 are based not on whether the defendant intended to commit the act but on whether the defendant considered the victim’s membership in the preferred class in choosing the victim. In other words, because penalties already exist for those who commit criminal acts, HR 1913 serves only to punish individuals for the beliefs, opinions, or convictions held at the time an act is committed. As such, HR 1913 does not punish criminal intent, but criminalizes thought.

- C. **Wider Immediate Application Than Claimed**: This bill will certainly be construed in light of existing federal law including specifically United States Code Title 18, Section 2 that says: “Whoever commits an offense against the United States or aids, abets, counsels, commands, **induces** or procures its commission, is punishable as a principal.” (emphasis added). This is the feared immediate nexus between the speech of a pastor or radio commentator and the actions of a deranged parishioner or listener. Proponents of the bill argue that it clearly, under its own language, applies only to acts of violence. This argument is misleading and naïve in that it implies that criminal liability would be available only for the person physically committing the violent act, while ignoring completely the likelihood that courts, especially ideologically driven, activist courts, will impose criminal liability on those deemed complicit in the violent act whether or not they physically contributed to the act.
- D. **Federal Power Grab** – The bill, if passed into law, would as a practical matter federalize virtually every sexual crime in the United States. This federalization would occur even in the absence of any evidence of failure by states and municipalities to prosecute. Under the bill, membership in one of the preferred classes does not have to be the impetus for the criminal act but merely a factor in the defendant’s selection of his victim. This is almost always the case. Muggers invariably choose little old ladies as victims precisely because they are little old ladies and unlikely to be able to fend them off. Under the bill, consideration of the gender of the victim effectively creates the potential for federal jurisdiction. Considering both the extreme breadth of the bill and the built-in incentives to bring crimes under the bill, the likely result is the practical federalization of large swaths of state and local criminal law.
- E. **Trend of Nationalization of State and Local Law and the Internationalization of Federal Law; And a Corresponding Rise in Anti-Semitic and Anti-Christian activity.**
1. The recent report by the Department of Homeland Security widely increased the number of people who may be classified as “extremists” or potential terrorists and who almost by definition would be members of hate groups. Under the HR 1913, the speech of a criminal defendant and the mere membership of the defendant in a given

group may be used as evidence of his or her biased motive so long as a prosecutor can show that the speech or association was “specifically related” to the criminal act.

2. Substance and methods similar to that offered in the DHS report have recently been echoed by the Southern Poverty Law Center. That group provides influential lists of hate groups relied upon by state and federal law enforcement. The reports have begun to blend among its lengthy list of true hate-based groups such as neo-Nazi groups and the Ku Klux Klan, other organizations based on little more than their opposition to homosexuality. The effect of listing a pro-family organization along side several neo-Nazi groups is to create guilt by the artificial manufactured appearance of association.
3. Additionally the appointment of Harold Koh and the rise of acceptability of his stance that international laws should be used to interpret American laws, even among such figures as certain United States Supreme Court Justices, creates the danger and likelihood that judicial activism would further increase the power, reach, and tyrannical effect of HR 1913 by bringing its application in line with its counterparts in Canada, the Netherlands, Brazil, etc.
4. Proponents of HR 1913 argue or imply that the law would provide greater protection for members of all faiths, presumably including Judaism and Christianity. The application of hate crimes laws in the countries in which they are most prevalent (and the countries Harold Koh would likely look to for interpretive guidance), produce exactly the opposite result. The application of hate crimes laws in countries experiencing the increased influence of Shariah, (Islamic religious law) such as the Netherlands, is patently and consistently anti-Semitic. The most concrete example of this is the stark contrast in the Netherlands of the application of hate crimes laws to those who criticize Shariah and those who call for violence against Israel and the Jewish people. For instance Geert Wilders who produced *Fitna* a 17 minute film critical of Shariah is being vigorously prosecuted under the Netherlands’ hate crimes laws. At the same time, the blatant and violent anti-Semitism of others such as Dutch MP Harry van Bommel who called for intifada against Israel earlier this year and Doekle Terpstra who sponsored an “Olive Tree Campaign” rally in Amsterdam where the participants chanted “ Hamas, Hamas Jews to the Gas!” are apparently immune from hate crimes laws.
5. The same is likely true of the UN Anti-Blasphemy measures which realistically can be seen only to forbid criticism of Shariah while allowing wholesale anti-Semitism.
6. Christians who vocally oppose homosexuality and the state endorsement of homosexuality in Holland, Canada, and Brazil routinely receive similar treatment, finding themselves on the prosecuted and persecuted end of hate crimes legislation while the anti-Christian actions of other groups are ignored.
7. Historically an increase in Shariah influence and/or a rise in economic problems have consistently shown a corresponding rise in anti-Semitism. The growing national and international acceptance and preferential treatment of the pro-homosexual movement has likewise shown a similar increase in anti-Christian activity (such as the threats of violence against Proposition 8 supporters in California

and the recent attack launched by homosexual activist Perez Hilton against a contestant in the Miss USA competition). Were the United States, under the leadership of Harold Koh, Janet Napolitano, etc., to follow the hate crimes trends and precedents established in the international community, the actual application of HR 1913 and its inevitable hate crimes and hate speech progeny is likely to be to the detriment of Christian and Jewish citizens.

F. **Incremental Move Toward Making Speech a federal crime.**

1. All of the above can reasonably be expected to lead to a quickly spawned progeny of hate crime legislation demanding greater and greater control of thought, expression and association. This is the pattern in the international community. HR 1913 would firmly brand one's thoughts on the issues of human sexuality as potentially criminal activity. The logical next step is to recognize the "harmful impact of hateful speech" on preferred classes and to begin outlawing speech that would communicate what members of preferred classes find offensive. Proponents of HR 1913 have argued that this is preposterous but tellingly, in the April 23, 2009 Judiciary Committee hearings on HR 1913, Representative Sheila Jackson-Lee (D-TX) said unequivocally that "We need to protect victims **against hateful words**, hateful acts and even violent acts." (emphasis added).

IV. Action

1. Encourage constituents to participate in immediate, continued, and persistent contact with both personal senators and congressmen and those of other districts and states.
2. Support, promote and demand a filibuster if the measure reaches the floor of the Senate.
3. Record and hold to account every member supporting the bill in the coming elections.
4. Actively oppose the confirmation of Harold Koh.
5. Vigorously hold Janet Napolitano responsible for the libelous report issued by the DHS, and support the efforts of those calling for the resignation of Janet Napolitano.