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THE IMPACT OF HATE CRIMES LAWS UPON RELIGIOUS ORGANIZATIONS AND CLERGY

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This memorandum addresses the impact of various attempts to add “sexual orientation” or “gender identity” to Hate Crimes legislation. Hate Crimes bills have been attempted as amendments to Defense Spending bills, Habeas Corpus procedure bills and even Child Safety legislation. Whatever the form of the Hate Crimes bill, the addition of “sexual orientation,” “gender identity” or similar provisions to hate crimes would have a detrimental effect on religious organizations and clergy. The need for Hate Crimes legislation is addressed in Section I. The immediate impact of such a law on religious organizations and clergy is addressed below in Section II. Hate Crimes legislation elevates sexual orientation to a protected status - a step never before been taken in federal law. The implication of elevating sexual orientation to a protected status is discussed in greater detail below. The immediate impact also contains possibilities for conspiracy prosecutions and increased federal involvement in hate crimes prosecutions against religious organizations and clergy. The long term impact of Hate Crimes legislation is addressed below in Section III.

The religious organizations and clergy that would be impacted by this Bill are those who have a sincere belief that homosexuality, lesbianism, transgenderism and bisexuality violate their religious tenets. This encompasses a wide group of religions and religious beliefs.¹ Those religions that

¹ The Bible states in Leviticus 18:22 , “Do not lie with a man as one lies with a woman; that is detestable.” Also, Romans 1:27 states, “In the same way the men also abandoned natural relations with women and were inflamed with lust for one another. Men committed indecent acts with other men, and received in themselves the due penalty for their perversion.”

For Islamic followers, the Koran states, “We also sent Lut : He said to his people : ‘Do ye commit lewdness such as no people in creation (ever) committed before you? For ye practice your lusts on men in preference to women: ye are indeed a people transgressing beyond bounds.’” Qur'an 7:80-81 Also, the Koran states, “What! Of all creatures do ye come unto the males, and leave the wives your Lord created for you? Nay, but ye are forward folk.” Qur'an 26:165

believe these alternative lifestyles are wrong are compelled by their religious beliefs to speak out and to actively oppose the promotion of such lifestyles. Therefore, the Hate Crimes Bill must be viewed from the perspective of those who believe they must actively oppose the homosexual lifestyle. Care should be taken to distinguish those who advocate bodily harm and even death for those who participate in the homosexual lifestyle from those who hold a sincere religious belief that they can do nothing to promote or accept the homosexual lifestyle, and indeed, must actively, though legally, oppose such lifestyles. The latter, and not the former are the subject of this memorandum as it is never justifiable to inflict bodily harm on another especially if the only justification for the harm is simply because an individual does not agree with another's lifestyle. The Hate Crimes Bill must be assessed in its legal impact on this latter group who attempt to peacefully and lawfully live out their religious beliefs and advocate against what their religious beliefs prohibit.

I. THE LACK OF NEED FOR HATE CRIMES LEGISLATION

Hate Crimes legislation generally is intended to provide assistance, grants and personnel to local authorities to investigate and prosecute hate crimes. Such bills prohibit certain hate crimes under federal law under a presupposition that Hate Crimes based on sexual orientation pose a serious national problem, that federal law is inadequate to address this problem and that the problem of hate crimes is sufficiently serious to warrant Federal assistance to States and local jurisdictions.²

This presupposition of the need for hate crimes legislation is in doubt and is dubious at best. Over reporting of hate crimes and mis reporting are rampant and have skewed the numbers involved.³ Hate crimes are not of such national import as to justify federal intervention and it is incorrect to say that local law enforcement is not adequately prosecuting the individuals involved in whatever hate crimes do occur. Indeed, in several highly publicized "hate crimes," local law enforcement acted quickly and efficiently to punish the offenders involved. As an example, all three defendants in the highly publicized beating and dragging death of James Byrd in Jasper, Texas were swiftly convicted. Two were sentenced to death and the third was given life in prison.⁴ The local authorities vigorously prosecute hate crimes.

Statistical evidence demonstrates, however, that hate crimes are generally declining and have been for several years. In 2003, there were over 11 million "non-hate" crimes reported and 1.4 million of those were reported as "violent crimes." By contrast, there were only 7,489 "hate crime

Other religions such as Baha'i, Buddhism, Scientology and Zoroastrianism also teach that homosexuality is to be avoided by its followers. (For examples, see http://www.religioustolerance.org/hom_chur.htm#other).

² This is a dubious proposition at best. As addressed below, it is impossible to term Hate Crimes as a "serious national problem" when they have steadily declined and when they represent only a minute fraction of all crimes reported nationwide.

³ See *Hate Crimes and Virtual Reality--the Incidence of Hate Crimes*, (unpublished) by Leah Farish, 2000 (page 21 of this document).

⁴ See http://www.courttv.com/trials/berry/111899_sentence_ctv.html.

incidents” and of that number only 1,239 were attributed to “sexual orientation” bias.⁵ This number was a decline from 1,244 reported “hate crime incidents” based on “sexual orientation” in 2002 and 1,393 such incidents reported in 2001. Additionally, according to FBI statistics, only five of the 93,433 forcible rapes reported in 2003 were classified as “hate crimes.”⁶ Also, of the 16,503 criminal homicides reported in 2003, only 14 were classified as “hate crimes” with six of that number said to be based on “sexual orientation” and five of that number based on racial bias. The reporting of “hate crimes” is subject to questioning, thereby lending less credibility to the numbers of reported “hate crimes.”⁷

Further, any discussion of the necessity for hate crimes legislation must take into account the undeniable evidence that many “hate crimes” based on “sexual orientation” are faked. The following list is just a sampling of the “hate crimes” that have been proven falsely reported:

- At the University of Georgia, a homosexual resident assistant reported that he had been victimized in nine hate crimes, including three supposed incidents of arson. When police questioned him, he admitted to performing the acts himself. *See* John Leo, “Faking the Hate,” *U.S. News & World report*, June 5, 2000, p.22.
- A homosexual student at the College of New Jersey, Edward Drago, was arrested for sending death threats to himself and a homosexual student group in which he served as treasurer. Before Drago confessed to committing the crimes himself, a large student rally was held, complete with faculty support and pink ribbons. Drago was suspended pending a disciplinary hearing in court. *See* “Gay Student Faked Hate E-Mail Campaign,” <http://www.le-national.com/Worldnat/gay-faked-emails.htm>.
- A lesbian student at St. Cloud State University in Minnesota slashed her own face and falsely claimed that two men shouted anti-homosexual remarks and attacked her. Students raised almost \$12,000 as a reward for information about her "attackers." *See* Leo, *op. cit.*
- At Eastern New Mexico University, a lesbian student claimed that she had been attacked after her name was posted on an anti-homosexual "hit list" at a local coin laundry. Police arrested her after a surveillance camera showed her posting the list. *Id.*
- A lesbian in South Carolina was charged in 2001 with giving false information to a police officer, saying that she had been beaten. Police contend that she hired a man

⁵ *See Hate Crimes Laws: An Assault on Freedom, available at* <http://www.cwfa.org/articles/2575/CFI/papers/index.htm>.

⁶ *See Lesbian, Gay, Bisexual and Transgender Domestic Violence: 2003 Supplement, An Update from the National Coalition of Anti-Violence Programs,* http://www.ncavp.org/common/document_files/Reports/2003NCAVPDVRpt.pdf

⁷ *See Hate Crimes and Virtual Reality - The Incidence of Hate Crimes,* attached hereto as Exhibit “A”.

to beat her so that she could report it as a hate crime. See Lisa Chiu, "Hate Crime Report a Hoax," *azcentral.com*, October 2, 2001.

- In Mill Valley, California, a 17-year-old female wrestler at a local high school faked a series of "gay-bashing" incidents that prompted a police investigation. She claimed that she was the target of hateful language, i.e. anti-homosexual epithets on her car and school locker, and was pelted with eggs outside her home. The teenager was the leader of her school's Gay-Straight Alliance and later admitted to authorities that she perpetrated all of the incidents. See "Girl Admits She Faked Gay-Bashing Incidents," *Los Angeles Times*, May 9, 2005.

Certain crimes are sometimes portrayed in the media as a "hate crime" based on "sexual orientation" when in reality the crime was not motivated by bias at all. Perhaps the most widely-publicized incident involved the beating death of homosexual student Matthew Shepard. The media widely reported that Mr. Shepard was beaten to death because he was homosexual. However, we now know that Mr. Shepard was beaten to death because of drugs and money and the crime was not based on his "sexual orientation."⁸

Given the mis reporting of "hate crimes," the false reporting of "hate crimes" and the fact that hate crimes in general make up such a small percentage of all crimes nationwide, have in fact been declining over the last several years and there is no evidence that "hate crimes" go unpunished by the local law enforcement authorities, the need for hate crimes legislation is simply not present.

II. THE IMMEDIATE IMPACT OF THE BILL

A. Elevation Of Sexual Orientation To A Protected Status

Hate Crimes legislation elevates sexual orientation to a protected status. The importance of this step by the federal government cannot be underscored sufficiently. There is no federal law that elevates sexual orientation to a protected status or in any way gives sexual orientation special privileges and benefits. Hate Crimes legislation would be the first law by the federal government that in any way gives special protection or benefits to the special status of sexual orientation.⁹ The Hate Crimes Bill takes sexual orientation and places it next to the traditionally protected categories of race, religion, sex and national origin. These are the categories that Title VII of the Civil Rights Act of 1964 protects. Sexual orientation is added to this list as a protected class. The natural progression

⁸ See "Killers Talk About Crime That Shocked the Nation," <http://www.abcnews.go.com/2020/print?id+277685>.

⁹ The Supreme Court case of *Romer v. Evans*, 517 U.S. 620 (1996) did not elevate sexual orientation to a protected status. That case decided the constitutionality of Colorado's Amendment 2 which prohibited government from affording any special protection at all to the sexual orientation class. Instead, the Supreme Court held that the Amendment was unconstitutional not because sexual orientation was a protected class but because the Amendment "impose[d] a special disability upon these persons alone. Homosexuals are forbidden the safeguards that others enjoy or may seek without constraint." *Id.* at 631.

once special status is afforded to a class is to afford all protection to that class, rather than just some. Because sexual orientation is placed in a protected status under the Hate Crimes Bill alongside the traditional categories protected by Title VII, it is just a short and insignificant step to the enactment of an Employment Non-Discrimination Act that includes sexual orientation.

Indeed, should a Hate Crimes Bill be enacted, the agent for the extension of other benefits and protections to the class of sexual orientation would not necessarily be the legislature. One need look no farther than Justice Stevens' dissent in the case of *Boy Scouts of America v. Dale*, 120 S. Ct. 2446 (2000). In his dissent, Justice Stevens makes it clear that he would support the granting of special protections and rights to the class of sexual orientation. The dissent states:

The only apparent explanation for the majority's holding, then, is that homosexuals are simply so different from the rest of society that their presence alone--unlike any other individual's--should be singled out for special First Amendment treatment. Under the majority's reasoning, an openly gay male is irreversibly affixed with the label "homosexual." That label, even though unseen, communicates a message that permits his exclusion wherever he goes. His openness is the sole and sufficient justification for his ostracism. **Though unintended, reliance on such a justification is tantamount to a constitutionally prescribed symbol of inferiority.** As counsel for the Boy Scouts remarked, Dale "put a banner around his neck when he ... got himself into the newspaper He created a reputation. ... He can't take that banner off. He put it on himself and, indeed, he has continued to put it on himself." See Tr. of Oral Arg. 25.

Id. at 2476 (Stevens, J., dissenting) (emphasis added). Justice Stevens, in discussing the constitutionally prescribed symbol of inferiority placed on James Dale cites with approval to an article that argues for heightened constitutional protection for gays.¹⁰ Justice Stevens then goes on to explain that the attitude toward homosexuals is changing, in part due to governmental recognition of sexual orientation as a protected class. Justice Stevens states:

Unfavorable opinions about homosexuals "have ancient roots." *Bowers v. Hardwick*, 478 U.S. 186, 192, 106 S.Ct. 2841, 92 L.Ed.2d 140 (1986). Like equally atavistic opinions about certain racial groups, those roots have been nourished by sectarian doctrine. *Id.*, at 196-197, 106 S.Ct. 2841 (Burger, C. J., concurring); *Loving v. Virginia*, 388 U.S. 1, 3, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967). See also *Mathews v. Lucas*, 427 U.S. 495, 520, 96 S.Ct. 2755, 49 L.Ed.2d 651 (1976) (STEVENS, J., dissenting) ("Habit, rather than analysis, makes it seem acceptable and natural to distinguish between male and female, alien and citizen, legitimate and illegitimate; for too much of our history there was the same inertia in distinguishing between black and white"). Over the years, however, interaction with real people, rather than mere adherence to traditional ways of thinking about members of unfamiliar classes, have modified those opinions. A few examples: The American Psychiatric Association's and the American Psychological Association's removal of "homosexuality" from their lists of mental disorders; a move toward greater

¹⁰ See Yoshino, *Suspect Symbols: The Literary Argument for Heightened Scrutiny for Gays*, 96 COLUM. L.REV. 1753, 1781-1783 (1996).

understanding within some religious communities; Justice Blackmun's classic opinion in *Bowers*; Georgia's invalidation of the statute upheld in *Bowers*; and New Jersey's enactment of the provision at issue in this case. Indeed, the past month alone has witnessed some remarkable changes in attitudes about homosexuals.

Id. at 2477-78 (Stevens, J., dissenting). Therefore, it is clear that, given the chance, some members of the Court would seize the opportunity to provide greater protections to the class of sexual orientation. A Hate Crimes Bill would provide evidence that the legislature is also willing to extend these benefits and protections to the class of sexual orientation as well.

B. Conspiracy Prosecutions For Religious Organizations And Clergy

If Hate Crimes legislation is adopted, the immediate impact could prove disastrous for religious ministers and organizations who advocate peacefully against the homosexual lifestyle. Currently, every State has conspiracy laws that prohibit conspiracy to commit crimes. It is conceivable that preaching or teaching against homosexual conduct could be prosecuted as conspiracy to commit a hate crime. For instance, a minister could preach a sermon that urges those listening to "actively oppose the promotion or acceptance of the homosexual lifestyle in their community." An individual who hears this message and applies it in a way prohibited by a Hate Crimes Bill could be prosecuted under the law and the minister could also be prosecuted for conspiracy.

One frightening example is the so-called "Philadelphia 11" case. Eleven Christians were arrested in Philadelphia for signing and preaching in a public park at a homosexual street festival. Five of them were held and charged with crimes that were based upon Pennsylvania's hate crimes law and could have totaled a possible 47 years in prison. The charges hung over these individuals for months until a judge finally dismissed them. Hate Crimes laws can and will be used to silence those who are peacefully opposed to the homosexual lifestyle.

For instance, many gay activists accused Christian conservatives of causing the death of Matthew Shepard. On the Today Show on October 12, 1998, shortly after the murder of Matthew Shepard, reporter Katie Couric stated:

Some gay-rights activists have said that some conservative Christian political organizations, like the Christian Coalition, the Family Research Council and Focus on the Family are contributing to this anti-homosexual atmosphere by having an ad campaign saying, "If you're a homosexual, you can change your orientation." That prompts people to say, "If I meet someone who's homosexual, I'm going to take action and try and convince them or try to harm them." Do you believe that such groups are contributing to this climate?¹¹

Wyoming Governor Jim Geringer, who was asked the question, stated in reply that he would not "trade one type of stereotype or hate for another" and that listeners shouldn't "categorize people unfairly." *Id.*

¹¹ See www.freerepublic.com/forum/a3628536b3717.htm.

Matt Foreman, executive director of the National Gay and Lesbian Task Force stated in a press release that he blamed conservative Christians for what he termed was a “spike” in hate crimes against homosexuals in 2003 and 2004. The press release stated:

The leaders of America’s anti-gay industry are directly responsible for the continuing surge in hate violence against lesbian, gay, bisexual and transgender (LGBT) people. ... The right went into demonic, anti-gay hyperdrive following the Supreme Court's *Lawrence v. Texas* decision in July of 2003. Since then, church pews have been awash in ugly, anti-gay rhetoric and fear-mongering. ... The literal blood of thousands of gay people physically wounded by hatred during 2004 is on the hands of Jerry Falwell, James Dobson, Tony Perkins and so many others who spew hate for partisan gain and personal enrichment.¹²

As a further example by a governmental body in this country, the City and County of San Francisco sent a letter of condemnation to several conservative Christian organizations denouncing their role in the death of Matthew Shepard. The letter states:

I am writing at the direction of the Board of Supervisors concerning hate crimes which was discussed at their meeting of October 13, 1998. Supervisor Leslie Katz denounces your hateful rhetoric against gays, lesbians and transgendered people. What happened to Matthew Shepard is in part due to the message being espoused by your groups that gays and lesbians are not worthy of the most basic equal rights and treatments. It is not an exaggeration to say that there is a direct correlation between these acts of discrimination, such as when gays and lesbians are called sinful and when major religious organizations say they can change if they tried, and the horrible crimes committed against gays and lesbians.¹³

Here we have a governmental body stating there is a direct correlation between the speech of a conservative Christian organization and hate crimes committed against homosexuals. This surely could form the basis for a prosecution for conspiracy. The city and county of San Francisco followed up their letter with a resolution condemning the Christian organizations for introducing an ad that advocated homosexuals could change and linked those ads directly with hate crimes against homosexuals.¹⁴ The resolution states:

WHEREAS, A coalition of religious political conservative organizations have introduced a nation-wide television advertisement campaign to encourage gays and lesbians to change their sexual orientation; and,

¹² See "Task Force Calls Rise in Anti-Gay Crime a Product of America’s Anti-Gay Industry," Statement from Matt Foreman, Executive Director, National Gay and Lesbian Task Force, April 26, 2005, <http://www.thetaskforce.org/media/release.cfm?releaseID=815>.

¹³ See Letter from Gloria L. Young to various organizations (available upon request).

¹⁴ See Resolution No. 873-98, City and County of San Francisco, 10/13/98 (available upon request).

WHEREAS, This coalition includes the Family Research Council, the Concerned Women for America, and the Center for Reclaiming America; and,

WHEREAS, The aforementioned organizations promote an agenda which denies basic equal rights for gays and lesbians and routinely state their opposition to toleration of gay and lesbian citizens; and,

WHEREAS, The radical religious political conservative coalition previously introduced a printed advertisement campaign which a prominent San Francisco newspaper chose to accept and publish; and,

WHEREAS, The vast majority of medical, psychological, and sociological evidence supports the conclusion that sexual orientation can not be changed; and,

WHEREAS, Advertising campaigns which insinuate sexual orientation can be changed by conversion therapy or other means are erroneous and full of lies; and,

WHEREAS, Advertising campaigns which insinuate a gay or lesbian orientation is immoral and undesirable create an atmosphere which validates oppression of gays and lesbians and encourages maltreatment of gays and lesbians; and,

WHEREAS, There is a marked increase in anti-gay violence which coincides with defamatory and erroneous campaigns against gays and lesbians; and,

WHEREAS, An unfortunate, extreme result of these anti-gay campaigns is violence and even death; now, therefore, be it

RESOLVED, That the Board of Supervisors of the City and County of San Francisco urges local television stations not to broadcast advertising campaigns aimed at “converting” homosexuals.

It is not far-fetched or unreasonable to assume that the law will be taken to the greatest extent possible. Those organizations and even governmental entities who believe that religious speech advocating changes in the gay lifestyle is directly linked with hate crimes against homosexuals will take whatever opportunity they can to silence that religious speech, even if that includes a prosecution for conspiracy to commit a hate crime.

The possibility for a conspiracy prosecution is even more possible in states with expansive definitions of conspiracy that only require agreement to pursue an objective that may be lawful (i.e. opposition to the homosexual lifestyle) in an unlawful manner and that the crime committed was a natural and foreseeable consequence of the agreement. It is conceivable that a minister who preaches a strong sermon against the homosexual lifestyle and urges his or her congregation to do whatever necessary to oppose the lifestyle could be prosecuted for conspiracy if a member of the congregation who hears the sermon misinterprets it and commits an offense covered by a Hate Crimes law. This could occur even though the minister never intended or even dreamed that violence would be used as a result of his or her sermon on the issue but had merely chose his or her words carelessly or in a way that could have been misinterpreted. As long as a jury could find that there was an agreement to oppose the homosexual lifestyle (a lawful objective) and that the crime (unlawful means of

pursuing the objective) was a natural and foreseeable consequence of the sermon, the minister could be convicted.

For sure, the situation described above should be distinguished from the minister who actively advocates and urges his or her congregation to commit bodily harm against homosexuals. Such an advocate would certainly and rightfully be held accountable. However, a minister who perhaps carelessly chooses his words but has the purest of motives could be prosecuted. Such an outcome should not be left to the discretion of a prosecutor or judge who may have a personal agenda to promote or to a jury inflamed by public opinion.

Surely the possibility of prosecution, even remote, could have a chilling effect on lawful free speech by ministers or religious organizations. Organizations and ministers would be forced, in an abundance of caution, to so water down their message, or to refuse to give it altogether to prevent an individual from misapplying or misconstruing their call to action. This chilling effect on lawful free speech should be avoided at all costs. While it is difficult to peer into the future and predict whether this type of situation will happen for a certainty, it is abundantly clear that the possibility exists for prosecution of ministers or religious organizations for their lawful speech based upon their sincere religious opposition to homosexuality.

The chilling effect would be immediate on ministers and religious organizations who would feel the necessity to tone down or to discontinue their opposition to homosexuality. This chilling effect is sufficient justification to prevent the Hate Crimes Bill from proceeding to a final vote in the legislature.

C. Increased Federal Involvement In Prosecution Of Hate Crimes

Hate Crimes legislation authorizes increased federal involvement in investigation and prosecution of hate crimes. Hate Crimes is typically given an expansive definition. Some definitions are adopted from 28 U.S.C. § 994 which defines hate crimes as, “[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.” This expansive definition covers any crime that is based on the actual *or perceived* sexual orientation of the victim. This definition, therefore, does not limit federal involvement in investigation and prosecution of hate crimes to just those crimes that involve bodily injury or death. Therefore, any crime that is because of the sexual orientation or the perceived sexual orientation¹⁵ of the victim could be subject to federal involvement. Under Hate Crimes legislation, the Attorney General is left free to provide **any** assistance in the prosecution of these crimes. This means that federal prosecutorial staff may be used in the prosecution, federal investigative staff may be used, as well as any assistance deemed necessary by the Attorney General. Essentially, the Hate Crimes Bill provides for a “pass through” prosecution by the federal

¹⁵ The language in the Hate Crimes Bill that punishes crimes based on the perceived sexual orientation of the victim is especially troubling. A prosecution on the basis that an individual perceived something necessarily includes an inquiry into their thoughts and opens up inquiry into the statements the individual made, the literature the individual read, and the influences the individual was subjected to. This could lead to increased vilification and possibly even prosecution of religious organizations and clergy who are lawfully exercising their right to free speech.

government where federal personnel and resources are used to prosecute state hate crimes. It is as if the federal government recognizes that it cannot prosecute these crimes itself, but is willing to do it by proxy through the state.

This increased federal involvement is not limited. Under current state hate crimes laws, prosecution is available for any crime motivated by sexual orientation bias. It is conceivable, then that an individual who passionately argues with another at close range that their lifestyle is wrong and puts that individual in fear or apprehension of bodily harm could be prosecuted for assault and have the penalties enhanced for participating in a hate crime. An individual could conceivably feel a threat of imminent bodily harm from the preaching or teaching of a religious organization or clergy member and a prosecution for assault could follow. Indeed, the Hate Crimes Reporting Act of 1990 mandated that the FBI include intimidation in its reporting of statistics on hate crimes. *See* 28 U.S.C. § 534. Therefore, intimidation can also be considered a hate crime. This leads to the conclusion that ministers or religious organizations who speak out against homosexuality can be labeled with a hate crime. While the possibility for prosecution may be remote at this point, it is very real and foreseeable that increased federal involvement in hate crimes will lead to increased extension of the hate crimes laws of the States to encompass actions which are lawful and protected.

Again, this expansion leads to a chilling effect on free speech that cannot be simply brushed aside as implausible. Religious organizations and clergy may choose to take the path of least resistance by either watering down or discontinuing their messages against homosexuality even though they have a sincere religious belief that it is wrong. This impact is very real and increasingly dangerous as increased federal involvement pushes the envelope of hate crimes into proscribing the religious activities of ministers and religious organizations.

Incidentally, it is doubtful that these individuals could make a claim that such a law violates their freedom of religion after the Supreme Court's decision in *Employment Division v. Smith*, 494 U.S. 872 (1990). Criminal laws may be characterized as neutral laws of general applicability so as to foreclose a religious freedom claim. While the possibility exists for a free speech claim by the minister or religious organization, it is doubtful such a claim would survive after the Supreme Court's decision in *Wisconsin v. Mitchell*, 508 U.S. 476 (1993), which held that a Wisconsin ordinance that is substantially similar to the definition of hate crimes contained in 28 U.S.C. § 994, did not violate an individual's right to free speech and was merely motive evidence that could be permissibly considered for enhancement of criminal penalties.

III.

THE FUTURE IMPACT OF HATE CRIMES LEGISLATION

The future impact of Hate Crimes legislation is more far-reaching and potentially damaging for ministers and religious organizations. The enactment of the Hate Crimes Bill is an incremental step down the road to devastating results for free speech and freedom of religion of religious organizations and clergy.

The importance of the Hate Crimes Bill cannot be underestimated. This would be the first law by the federal government that, if enacted, would elevate sexual orientation to a protected status. No other federal law exists that gives special benefits or protections to sexual orientation as a class of people. The Hate Crimes Bill, however, provides for enhanced penalties for hate crimes

committed because of an individual's actual or perceived sexual orientation. Federal law has never before extended any special status or protection to sexual orientation. This would be the first federal law to do so. The consequence of elevating sexual orientation to a protected status or giving special recognition or protection to sexual orientation is foreseeable and foreboding to ministers and religious institutions.

One need not look far to see the incremental steps related to protecting sexual orientation and their effects. Two examples serve to show how incrementalism can lead to results that are far reaching and disastrous for ministers and religious organizations.

The Vermont Supreme Court recognized that same-sex couples deserve the same benefits and protections as married couples and mandated that the legislature enact laws to provide these benefits and protections. *See Baker v. State*, 744 A.2d 864 (Vt. 1999). In the case, the argument was made that the Court need not extend protection to same sex couples because the state had a long history of official intolerance of same sex relationships. *Id.* at 885. The Court found that argument to be unpersuasive. One of the reasons the Court found as it did was because the Court recognized that "Sexual Orientation is among the categories specifically protected against hate-motivated crimes in Vermont," thus belying the fact that the state frowns upon same sex marriages. *Id.* The Court further noted that Vermont had also enacted statewide legislation prohibiting discrimination on the basis of sexual orientation and have removed barriers to adoption by same-sex couples as well as extending legal rights and protections to couples who dissolve their "domestic relationship." *Id.* at 885-86. This discourse clearly underscores and illustrates the incremental steps the State of Vermont took over the years that led the Vermont Supreme Court to conclude that Vermont had abandoned its longstanding disapproval of same sex relationships and therefore, there existed no barrier to the creation of a civil union that extended the benefits and protections of marriage to same sex couples. The incremental step began as early as 1991 when Vermont included in their code a provision prohibiting discrimination on the basis of sexual orientation. Slowly, over the years, Vermont began to extend protections little by little for causes that seemed "worthwhile" at the time, but led nine years later to the Vermont Supreme Court's conclusion that the state no longer had a history of disapproving same sex relationships.

It is not a far stretch for the same result to occur at the federal level in this case. Allowing the Hate Crimes Bill to proceed would swing the door open for an incremental progression away from the federal government's long-standing disapproval of same sex relationships. As stated, no federal statute confers any benefits or rights or protections on the basis of the sexual orientation of an individual. Allowing the Hate Crimes Bill to proceed would be the first step, just like Vermont took nine years ago, in a full acceptance and demand for tolerance of the homosexual relationship. The impact of this mandated acceptance of the homosexual relationship is explained more fully below.

As a further example of an incremental progression starting slowly and ending up in full mandated acceptance of the homosexual relationship, the paper given by Kees Waaldijk, a professor from the Netherlands who wrote the Netherlands' same sex marriage statute, demonstrates how incremental steps led to the Dutch same-sex marriage bill.¹⁶ The article describes how there is

¹⁶ *See* The "Law of Small Change": How the Road to Same-Sex Marriage Got Paved in the Netherlands by Kees Waaldijk (Faculty of Law, Universiteit Leiden, the Netherlands) 19 June 1999, paper for: Legal Recognition of Same-Sex partnerships: a Conference on National, European, and

currently legislation pending in the Netherlands to legalize same-sex marriage. In describing how this change came about from no recognition of same-sex relationships to full recognition of same-sex marriages, Professor Waaldjik explains as follows:

If you look at the legislative history of the recognition of homosexuality in European countries it seems that this process is governed by certain “laws of nature.” At least there is a clear pattern of steady progress according to standard sequences. Whether there is a “law of steady progress” is debatable, but certainly since the 1960's hardly any European country ever introduced new anti-homosexual legislation. On the contrary, in almost all European countries, legislative progress was made in the legal recognition of homosexuality. And where progress did take place, it seems to be following what I would call the “law of standard sequences.” Legislative recognition of homosexuality starts with decriminalization, followed or sometimes accompanied by the setting of an equal age of consent, after which anti-discrimination legislation can be introduced, before the process is finished with legislation recognizing same-sex partnership and parenting.

The “law of standard sequences” implies... that... each step seems to operate as a stimulating factor for the next step. For example, once a legislature has enacted that it is wrong to treat someone differently because of his or her homosexual orientation, it becomes all the more suspect that the same legislature is preserving rules of family law that do precisely that.

Professor Waaldjik then goes on to explain the “extremely gradual and almost perversely nuanced (but highly successful) process of legislative recognition of same sex partnership in the Netherlands.” His explanation is worth quoting at length to demonstrate the steady and incremental progression associated with recognition of same sex relationships. He states:

Since the 1970's and 1980's Dutch cohabiting couples have increasingly been given similar legal rights and duties as married couples. One after the other changes were introduced in rent law, in social security and income tax, in the rules on immigration, state pensions, and death duties, and in many other fields. And in none of these fields any distinction was made between heterosexual and homosexual cohabitation. There was never a “law on same-sex cohabitation.” All recognition was given in the context of a more general overhaul of the rules of a specific field. Simultaneously cohabitation contracts and partner testaments became common, and were fully recognized by the courts. This evolution was more or less completed when it was made illegal for any employer and for any provider of goods or services, to distinguish between married and unmarried couples. . . .

In the 1970's fostering became a possibility for gay and lesbian and other unmarried couples. Having a homosexual orientation or relationship stopped being a bar to keeping (access to) your children after a divorce. And the newer form of de facto parenting by same sex couples, artificial insemination by women in lesbian relationships was never banned in the Netherlands. . . . On 1 January 1998 legislation came into force making joint authority [over children] also available to same sex

International Law, King's College, University of London, 1 to 3 July 1999.

couples. . . .

So what to mankind, and to all its representatives at this conference, may seem a giant step - the opening up of the institution of marriage to same-sex couples - will, for the Dutch, only be another small change law.

Based on this discussion, there is clearly a law of incrementalism where changes in the law tend to happen at a slow, incremental pace. This is not a foreign concept in the United States as the common law has been developing in England, and then in this Country since our inception. What is interesting and extremely important to note is that the changes that occur incrementally in the laws of this country happen sometimes through the legislature, but more often through the court system in the deciding of case law the builds precedent for future decisions. This is extremely important to note for the present issue because this means the incremental changes are mostly out of the hands of the legislature. One needs only look at Vermont to see how the legislature in that case was “mandated” by the Supreme Court to provide the benefits and protections of marriage to its citizens.

Because judges are most often the agents for incremental change, the legislature must be extremely careful in giving judges the justification to act upon and extend the law into areas not envisioned by the legislature. It is true that the legislature has the ultimate authority to enact legislation that would overturn the precedent set by a particular case. However, this makes the legislature a reactive agent. One also wonders whether the legislature will notice the changes at all if the changes are so incremental. It has already been illustrated that the United States Supreme Court believes itself the final interpreter of the United States Constitution. Therefore, if the Supreme Court believes the Constitution means a certain thing, legislation will do no good to override it. The clearest example of this was the Supreme Court’s overturning of the Federal Religious Freedom Restoration Act in *City of Boerne v. Flores*, 521 U.S. 507 (1997). The legislature disagreed with the Supreme Court’s interpretation of the First Amendment and attempted to react by enacting the Religious Freedom Restoration Act. The Supreme Court promptly struck the Act down as beyond Congress’ authority to act. The Court stated, “Legislation which alters the meaning of the Free Exercise Clause cannot be said to be enforcing the Clause. Congress does not enforce a constitutional right by changing what the right is. It has been given the power ‘to enforce,’ not the power to determine what constitutes a constitutional violation.” *Id.* at 519. Therefore, Congress may not react after the “right” that has been established by years of incremental change is now a constitutional right.

Opening the door in this case by passing the Hate Crimes Bill would be a step down the road of incrementalism that would result in the finished product of full mandated acceptance of same sex relationships. As many ministers and religious organizations disagree and believe their faith requires them to actively oppose the same sex lifestyle, their rights would be subordinated to the changes that have occurred.

It is therefore useful to explore what would occur to ministers and religious organizations along the road of incrementalism.

A. Sexual Orientation Anti-Discrimination Laws And Their Effect On Religious Organizations And Clergy

Many jurisdictions now have laws that prohibit discrimination on the basis of sexual

orientation or gender identity.¹⁷ The effect of these laws on religious organizations and clergy is clearly seen and felt.

Anti-discrimination ordinances in other countries have also been a source of increasing difficulties for religious organizations and clergy. For instance, Canada has a very broad anti-discrimination provision in its Charter of Rights and Freedoms. *See* Canadian Charter of Rights and Freedoms § 15(1). This provision has been interpreted to prohibit discrimination on the basis of sexual orientation. The implications of this interpretation are troubling for religious organizations and clergy. For instance, Dr. Laura Schlessinger, the widely publicized talk show host, was rebuked by Canada's Broadcast Standards Council for her stance on homosexuality.¹⁸ The Council stated that Dr. Laura's views on homosexuality required Canadian broadcasters who carry her show to make an announcement about the Council's ruling before the show is aired.

Additionally, Dr. Jerry Falwell's Old Time Gospel Hour program, which has aired in Canada for more than thirty years, must be edited so as to exclude any negative mention of homosexuality or partial birth abortion. The same program Dr. Falwell airs in the United States may not air in Canada because of the anti-discrimination provisions in that country. Other Christian broadcasters such as Dr. James Dobson also must go through the same editing process.

A ruling handed down by British Columbia's highest court upheld the British Columbia College of Teachers' (BCCT) decision to temporarily suspend the teaching license of Chris Kempling for writing allegedly discriminatory letters to the editor of a local publication. In 2001, while off duty, Mr. Kempling entered as a practicing Christian into the burgeoning political and social debate surrounding homosexuality and gay "marriage." He defended the traditional Christian understanding of the social, physical, and moral evils of homosexual behavior in a local newspaper. Kempling was subsequently cited for professional misconduct by the College of Teachers after a panel determined that his writings were discriminatory against homosexuals. He was disciplined with a temporary suspension of his license. Mr. Kempling fought the ruling and took the case to the Supreme Court, which upheld the school board decision.¹⁹

In 1997 three gay men in Saskatchewan, Canada filed complaints with the Board of Inquiry alleging that an advertisement run by the largest newspaper in the province violated the Human Rights Code. The advertisement was placed by a prison guard, Hugh Owens. It offered for sale bumper stickers that displayed, on its left side, references to four Bible passages that condemn homosexuality. In the middle was an equal sign, and on the right side was a picture of two stick

¹⁷ Ten states now have laws prohibiting discrimination on the basis of sexual orientation. CT, HI, MD, MA, NJ, NV, NH, NY, VT and WI all have laws prohibiting discrimination on the basis of sexual orientation. Six states, CA, IL, ME, MN, NM and RI, and the District of Columbia have laws prohibiting discrimination on the basis of sexual orientation or gender identity.

¹⁸ *See* www.wbz.com/now/story/0,1597,194454-364,00.shtml.

¹⁹ *See* "Canadian Courts Approve Suspension of Teacher who Criticized Homosexuality in Letter to Editor," LifeSite, June 14, 2005, at <http://www.lifesite.net/ldn/2005/jun/05061408.html> (last visited June 17, 2005).

figures holding hands with the "prohibited symbol"--a red circle with a diagonal bar--on top. The Board held that the advertisement exposed the complainants to hatred and ridicule and was an affront to their dignity based on their sexual orientation, contrary to § 14(1). It concluded:

The use of the circle and the slash combined with the passages of the Bible herein make the meaning of the advertisement unmistakable. It is clear that the advertisement is intended to make the group depicted appear to be inferior or not wanted at best. When combined with the Biblical quotations, the advertisement may result in a much stronger meaning. It is obvious that certain of the Biblical quotations suggest more dire consequences and there can be no question that the advertisement can objectively be seen as exposing homosexuals to hatred or ridicule.

The Board also concluded that none of the free speech protections of the Canadian Charter of Rights and Freedoms protected Owens' speech. The Board prohibited both Owens and the newspaper from publishing or displaying the stickers in question and ordered each to pay damages of \$1,500 to each of the three complainants. On appeal the Saskatchewan Court of Queen's Bench upheld the Board's decision.²⁰

The Prairie Regional Council of the Canadian Broadcast Standards Council in 1997 responded to public complaints against "Homosexuality: Fact or Fiction?," a particular radio broadcast of Focus on the Family. It argued that FOF attributed to the gay movement a malevolent, insidious and conspiratorial purpose, a so-called "agenda," which, in the view of the Council, constitutes abusively discriminatory comment on the basis of sexual orientation, contrary to the provisions of Clause 2 of the CAB Code of Ethics. As a result, the Council ordered the offending radio stations to air, during prime time, a statement saying, in part, that the program in question violated the CAB Code of Ethics for the reasons above.²¹

In 2003 a Protestant minister in Sweden was the first to be prosecuted and sentenced under a constitutional provision including sexual orientation in a list of groups protected from "unfavorable speech." For publishing a sermon in his local newspaper that described homosexuality as "abnormal, a horrible cancerous tumor in the body of society" and homosexuals as "perverts, whose sexual drive the Devil has used as his strongest weapon against God," Pastor Ake Green received a one-month prison sentence. In another portion of his sermon, Green tempered his message by stating that "[w]hat these people need, who live under the slavery of sexual immorality, is an abundant grace. . . . We cannot condemn these people. Jesus never belittled anyone. He offered them grace." The prosecutor stated during Green's trial that "[c]ollecting Bible [verses] on this topic . . . makes this hate speech."²²

²⁰ See Hans Clausen, *the "Privilege of Speech" in a "Pleasantly Authoritarian Country": How Canada's Judiciary Allowed Laws Proscribing Discourse Critical of Homosexuality To Trump Free Speech and Religious Liberty*, 38 Vand. J. Transnat'l. Law 443 (2005).

²¹ See *id.*

²² See Dale Hurd, Swedish Pastor Sentenced for "Hate Speech," Christian World News, Sept. 10, 2004, at <http://www.cbn.com/CBNNews/CWN/091004sweden.asp> (last visited Jan. 31, 2005); Swedish Minister Jailed for "Anti-Gay" Speech, Cath. World News, at <http://www.cwnews.com/news/viewstory.cfm?recnum=30655> (last visited Feb. 14, 2005); Censoring the Bible, Nat'l Post, Aug. 23, 2004. *Id.*

In 2002, street preacher Harry Hammond was convicted in Britain, fined £300, and required to pay court costs of £350 for violating the Public Order Act of 1986 by publicly displaying a placard with the words "Stop immorality. Stop homosexuality, Stop lesbianism." In 2003, London police engaged in a formal hate-crimes inquiry against a Christian pastor for his view that homosexuals can change their sexual orientation with therapy.²³

A complaint was filed against a mayor in Canada who refused to declare Gay Pride Week.²⁴ The New Brunswick Human Rights Commission found the mayor in violation of Canada's Human Rights Act and ordered him to proclaim Gay Pride Week.²⁵

Recently, a broadcaster in the United Kingdom known as the "God Channel" was fined £20,000 for an ad that described homosexuality as an abomination. The Communications Commission in the United Kingdom ruled that the ad violated several provisions of the advertising code and fined the broadcaster.²⁶

In a widely publicized incident, a complaint was filed in a Dutch court against Pope John Paul, II for his statement that "homosexual acts are contrary to the laws of nature." Dutch homosexuals filed the complaint which was later dropped after the Dutch court ruled that the Pope's status as a leader of the Roman Catholic church and the Vatican state afforded him immunity from prosecution.²⁷ However, anti-discrimination laws were the basis for the complaint against the Pope.

Lest one think that these incidents only occur in foreign countries, a judge recently ruled that the City of San Francisco had a duty to remove advertisements from Christian organizations that advocated for homosexuals to change their lifestyle. The judge ruled that the city had removed the ads to address concerns for public safety and therefore, was only doing its duty.²⁸

Overall, it is clear that anti-discrimination laws have a major impact on the free exercise of religion and free speech rights of ministers and religious organizations around the world and also in this country. The incrementalism that leads to anti-discrimination laws being enacted is begun in the Hate Crimes Bill. This incrementalism leads down the road to anti-discrimination laws and the burdensome and prohibitive impact on ministers and religious organizations.

²³ See *Hans, supra*.

²⁴ See www.religioustolerance.org/hom_0060.htm.

²⁵ See www.egale.ca/legal/hillbrew.txt

²⁶ See London Sunday Telegraph 1/16/00.

²⁷ See http://ananova.com/news/story/sm_10909.html;
See also www.pillarmag.com/world/stories/965538405

²⁸ See www.family.org/cforum/fnif/news/A0011944.html

B. Domestic Partnership Recognition or Same Sex Marriage

A further step down the road of incrementalism is for the government to recognize domestic partnerships or same-sex marriages. The clearest example of this step on ministers and religious organizations is seen in Vermont under the civil unions scheme in that state. In Vermont, same sex couples are entitled to have a civil union that carries most of the traditional benefits and protections of marriage. The Civil Unions Bill requires the town clerks of the State of Vermont to issue civil unions licenses. Several town clerks have objected to this requirement as a violation of their sincere religious beliefs. The town clerks unsuccessfully filed suit to have this requirement removed claiming that it violated their right to religious freedom. *See Brady v. Dean*, Case No. 308-5-00WHCV, Washington County Superior Court.

It is but a small step from requiring the issuance of civil unions licenses to requiring the performing of solemnization ceremonies by ministers. A claim could conceivably be made that if a same sex couple asked for a minister to solemnize their civil union and he or she refused citing religious beliefs, then the minister could be liable under the state's anti-discrimination law. There is no need to mention the devastating impact this would have on religious freedom. Further, if there is a religious organization that refuses to hire a homosexual or refuses to rent space or to provide services to a same-sex couple, then the organization could also be subjected to anti-discrimination laws.

In short, as the recognition and legal barriers are removed from same sex relationships, it naturally follows that the flip side of the coin, mandated acceptance of the relationship, will be instituted through anti-discrimination laws and penalties for discrimination on the basis of sexual orientation. Such a result clearly has a disastrous impact on ministers and religious organizations.

CONCLUSION

Freedom of religion and freedom of speech are distinctively American. These two principles, among others, are what set us apart from the rest of the world as a beacon of freedom. These two freedoms are the most cherished freedoms. Indeed, they are the basis of a democratic society. Freedom cannot flourish if speech and religion are squelched and set aside in the name of tolerance and acceptance. A free citizenry is essential to the good-working of government. While the purpose behind the Hate Crimes Bill may be admirable, the immediate impact on ministers and religious organizations as described above as well as the future impact of the Bill justify its defeat. Because Americans hold freedom of religion and freedom of speech so dearly, and because they form the basis for democracy, every effort must be taken to guard against even the slightest threat to their full and unhindered existence. The Hate Crimes Bill, while admirable in purpose is duplicative of local laws, intrusive into local law enforcement processes, unnecessary, and is a threat to ministers and religious organizations in the ways described above. Religious individuals are normally the first to stand and decry acts of violence and murder no matter the motivation behind the act. This is even true when it is clear that the motivation for the act is based upon sexual orientation. The government should not enact a law that would cause these individuals to make a choice between following their religious beliefs or following the governmental laws. Punishing hate crimes is good and has been accomplished since the beginning of civilization through general criminal principles. Hate Crimes legislation is unnecessary and dangerous in its implications to religious organizations and clergy.