

An hourglass-shaped graphic with a globe in the top bulb and a smaller globe in the bottom bulb. The top bulb is dark blue, and the bottom bulb is light blue. The hourglass is light gray. The globe in the top bulb is dark blue, and the globe in the bottom bulb is light blue. The hourglass is centered on the page.

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*Hate Crimes: Summary of Selected Proposals and
Congressional Authority*

Charles Doyle, American Law Division

Updated May 17, 2002

Abstract. This report is a summary and comparison of current hate crime proposals, which includes a discussion of the constitutional basis that might be claimed or challenged with respect to the federal crimes they create.

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Report for Congress

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Hate Crimes: Summary of Selected Proposals and Congressional Authority

Updated May 17, 2002

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Hate Crimes: Summary of Selected Proposals and Congressional Authority

Summary

Hate crime legislation (S. 625/H.R. 1343), comparable to a measure which passed the Senate as an amendment to the National Defense Authorization Act for Fiscal Year 2001 (but which was dropped prior to passage), has been introduced with a substantial number of cosponsors in both the House and Senate. It has been reported out of committee without change in the Senate, S.Rept. 107-147. It outlaws hate crimes, establishes a system of Justice Department and grant program assistance, and instructs the Sentencing Commission to examine adult recruitment of juveniles to commit hate crimes. An alternative (H.R. 74), more sweeping in its criminal provisions and more modest in its grant provisions, has also been proposed.

In both alternatives, the newly established federal offenses take two forms and are based on Congress' legislative authority under the commerce clause, the legislative sections of the Thirteenth, Fourteenth, and Fifteenth Amendment. One species outlaws hate crimes committed on the basis of race, color, religion, national origin, gender, sexual orientation, or disability under various commerce clause circumstances and appears consistent with the Supreme Court's pronouncements in *Lopez* and *Morrison*. The other forbids hate crimes committed on the basis of race, color, religion or national origin. Although its claim to Congressional authority seems strongest when based on the Thirteenth Amendment and proscribing violence committed on the basis of race, its hold appears otherwise more tenuous.

The text of proposed hate crime offenses, sundry federal criminal civil rights laws, as well as a summary of various state hate crime statutes are appended. An abridged version of this report, stripped of the footnotes, authorities, and appendices, is available under the title, *Hate Crimes: A Sketch of Selected Proposals and Congressional Authority*, CRS Report RS20678 (May 17, 2002); for additional related information, see Teasley, *Hate Crime Legislation: An Update*, CRS Report 98-300 (July 31, 2001).

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Hate Crimes: Summary of Selected Proposals and Congressional Authority

Introduction

S. 625, the Local Law Enforcement Enhancement Act of 2001, introduced by Senator Kennedy on March 27, 2001, has 50 cosponsors; its companion in the House, H.R. 1343, the local Law Enforcement Hate Crimes Prevention Act of 2001, introduced by Representative Conyers, has over 180 cosponsors.¹ They are virtually identical to the Kennedy hate crime amendment (Amend. 3473) to the National Defense Authorization Act for Fiscal Year 2001 (H.R. 4205) which passed the Senate during the 106th Congress but was dropped from the bill prior to final enactment. The Senate Judiciary Committee reported the bill out unchanged on May 9, 2002, S.Rept. 107-147 (2002). Representative Jackson-Lee has offered an alternative proposal (H.R. 74, the Hate Crimes Prevention Act of 2001), which closely resembles her offering in the 106th Congress (H.R. 77). A second alternative from the 106th Congress, Senator Hatch's S. 1406, has, as yet, not been proposed in this Congress. He did, however, offer a substitute for the language S. 625 in committee which called for assistance to state and local authorities and a GAO hate crime study but which was not accepted, S.Rept. 107-147, at 39-40. This is a summary and comparison of the current proposals, which includes a discussion of the constitutional basis that might be claimed or challenged with respect to the federal crimes they create.

Summary of Proposals

New Crimes

S.625/H.R.1343 creates two federal crimes, 18 U.S.C. 249 (appended). Both outlaw willfully causing physical injuries; using fire, firearms, or bombs; or attempting to do so — motivated by certain victim characteristics (whether real or perceived). Offenders are subject to imprisonment for not more than 10 years, or for any term of years or life if the crime involves attempted murder, kidnapping, attempted kidnapping, rape or attempted rape. The two offenses differ in that the first applies to crimes motivated by the victim's race, color, religion, or national origin and contains no other explicit federal jurisdictional element. The second applies to crimes motivated by the victim's gender, sexual orientation, disability, race, color, religion, or national origin and contains a series of alternative jurisdictional elements of a commerce clause stripe. Federal prosecution of either offense would require certification of a senior Department of Justice official that state

¹ The provisions also appear as title I of the omnibus S.19, Protecting Civil Rights for All Americans Act, introduced by Senator Daschle.

or local officials are unable or unwilling to prosecute, favor federal prosecution, or have prosecuted to a result that leaves the federal interest in eradicating bias-motivated violence unvindicated. H.R. 74 would establish the same two offenses, but has no certification requirement, proposed 18 U.S.C. 245(c)(appended).

Hate Statistics

The companion bills and H.R. 74 add gender to the list of predicate characteristics for hate crime statistical collection purposes, section 280003(a) of the Violent Crime Control and Law Enforcement Act of 1994, 28 U.S.C. 994 note (appended).²

Assistance to Local Law Enforcement

Unlike H.R. 74, the companion bills each call for the Justice Department to assist state and tribal law enforcement efforts to investigate and prosecute violent, felonious hate crimes, motivated by animosity towards those of the victim's race, color, religion, national origin, gender, sexual orientation, disability or other characteristic found in the state's or tribe's hate crime law. They insist that priority be given to cases in fiscally strapped rural jurisdictions and to cases involving multistate offenders.

Grants

Each of the proposals features a grant program to help the states combat hate crimes committed by juveniles, authorizing such appropriations as are necessary. S. 625 /H.R. 1343 calls for an additional extraordinary grant program available to the states and tribes to address investigative and prosecutorial needs that cannot otherwise be met. The bills authorize appropriations of \$5 million for each of fiscal years 2002 and 2003, but no individual grant may not exceed \$100,000 per year.

Sentencing Guidelines

Each proposal instructs the Sentencing Commission to study and make any appropriate adjustments in the federal sentencing guidelines concerning adult recruitment of juveniles to commit hate crimes, consistent with the other federal sentencing guidelines and being sure to avoid duplication.

Legislative Powers of Congress

Commerce Clause

Congress enjoys only those legislative powers that flow from the Constitution. U.S.Const. Amends. IX, X. The commerce clause, section 5 of the Fourteenth

² Another proposal, H.R. 682 (Hate Crime Statistics Act) (Rep. Maloney of New York), is devoted exclusively to adding information concerning gender-motivated offenses to the inventory of hate crime statistics collected by the Justice Department.

Amendment and section 2 of the Thirteenth Amendment and Fifteenth Amendment, are the grants of power most often mentioned when discussing Congress' authority to proscribe hate crimes, and to enact other forms of civil rights legislation.

Under the commerce clause, Congress is empowered "to regulate commerce with foreign nations, and among the several States, and with the Indian Tribes." U.S.Const. Art.I, §8, cl.3. The Supreme Court has recently identified the three ways in which Congress may exercise its prerogatives under the clause: "First, Congress may regulate the use of the channels of interstate commerce, *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 256 (1964) (the authority of Congress to keep the channels of interstate commerce free from immoral and injurious uses has been frequently sustained); *United States v. Darby*, 312 U.S. 100, 114 (1941). Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities. *Shreveport Rate Cases*, 234 U.S. 342, (1914); *Southern R.Co. v. United States*, 222 U.S. 20 (1911)(upholding amendments to Safety Appliance Act as applied to vehicles used in intrastate commerce); *Perez v. United States*, 402 U.S. 146, 150 (1971) (the destruction of an aircraft (18 U.S.C. 32), or . . . thefts from interstate shipments (18 U.S.C. 659)'). Finally, Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce, . . . i.e., those activities that substantially affect interstate commerce, *NLRB v. Jones & Laughlin Steel*, 301 U.S. 1, 37 (1937)." *United States v. Morrison*, 529 U.S. 598, 609 (2000), quoting, *United States v. Lopez*, 514 U.S. 549, 558-59 (1995).

The "affects interstate commerce" category can sometimes be the most difficult to define for it may embrace what appears to be purely intrastate activity. *Morrison* cited with approval the signposts of this aspect of the commerce power that *Lopez* sought in vain when examining the Gun-Free Schools Act (18 U.S.C. 922(q)(1)(A)). First, the statute had "nothing to do with commerce or any sort of economic enterprise, however broadly one might define those terms." 529 U.S. at 610; 514 U.S. at 561. Second, "the statute contained no express jurisdictional element which might limit its reach to a discrete set of firearm possessions that additionally have an explicit connection with or effect on interstate commerce." 529 U.S. at 611-12; 514 U.S. at 562. Third, neither the statute "nor its legislative history contains express congressional findings regarding the effects upon interstate commerce of gun possession in a school zone." 529 U.S. at 612; 514 U.S. at 562. Finally, the link between gun possession in a school zone and commerce interest urged by the government (the cost of violent crime and damage to national productivity caused by violent crime) was too attenuated without more to support a claim to commerce clause authority. 529 U.S. at 612-13; 514 U.S. at 563-67.

In this last regard, *Morrison* observed, "[w]e accordingly reject the argument that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce. The Constitution requires a distinction between what is truly national and what is truly local. . . . The regulation and punishment of intrastate violence that is not directed at the instrumentalities, channels, or goods involved in interstate commerce has always been the province of the States." 529 U.S. at 617.

The hate crime proposals present two, somewhat different, claims to commerce clause power. First, they create a federal crime for which an aspect of interstate commerce is an element, *i.e.*, in the case of H.R. 74: either that (a) “in connection with the offense, the defendant or the victim travels in interstate commerce or foreign commerce, uses a facility or instrumentality of interstate or foreign commerce, or engages in any activity affecting interstate or foreign commerce; or (b) the offense is in or affects interstate or foreign commerce;” and in the case of S. 625/H.R. 1343: either that (1) the offense “occurs during the course of, or as a result of, the travel of the defendant or the victim “ either (a) “across a State line or national border” or (b) “using a channel, facility, or instrumentality of interstate or foreign commerce;” or (2) the defendant uses a channel, facility, or instrumentality of interstate or foreign commerce” in the commission of the offense; or (3) in connection with the offense “the defendant employs a firearm, explosive or incendiary device, or other weapon that has traveled in interstate or foreign commerce; or (4) the offense either (a) interferes with commercial or other economic activity in which the victim is engaged at the time of the conduct; or (b) otherwise affects interstate or foreign commerce.”

Then they create a second federal crime whose claim to a commerce clause nexus must be more inferential, tied to the findings and the general nature and consequences of hate crimes.

Morrison suggests that the findings and general nature of the offenses involved are likely to be insufficient to support an assertion that the commerce clause empowers Congress to enact the provisions. *Morrison* rejected virtually the same argument with respect to a statute creating a civil remedy for the victims of gender-motivated violence. Its success here would seem to depend on convincing the Court that race-motivated, or color-motivated, or religion-motivated, or national origin-motivated violence are somehow more commercially influential than gender-motivated violence.³

Brighter seem the prospects for a judicial conclusion that the offenses that come with commerce-explicit elements come within Congress’ commerce clause powers. They have the distinct advantage of precluding conviction unless the prosecution can convince the courts of the statutory nexus between the defendant’s conduct and the commerce impacting element of the offense. Moreover, several of the elements involve preventing the channels of commerce from becoming the avenues of destructive misconduct or protecting the flow of commerce from destructive

³ “In contrast with the lack of congressional findings that we faced in *Lopez*, §13981 is supported by numerous findings regarding the serious impact that gender-motivated violence has on victims and their families. But the existence of congressional findings is not sufficient, by itself, to sustain the constitutionality of Commerce Clause legislation. As we stated in *Lopez* ‘simply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so.’ Rather, whether particular operations affect interstate commerce sufficiently to come under the constitutional power of Congress to regulate them is ultimately a judicial rather than a legislative question, and can be settled finally only by this Court.” 529 U.S. at 614.

ingredients — the mark of circumstances that indisputably fall within Congress’ authority under the commerce clause.⁴

Section 5 of the Fourteenth Amendment

Where the proposals seem beyond Congress’ reach under the commerce clause they may be within the scope of other legislative powers such as the legislative clauses of the Thirteenth, Fourteenth, and Fifteenth Amendments. *Morrison* addresses the breadth of Congress’ legislative power under section 5 of the Fourteenth Amendment. The Amendment guarantees certain civil rights often by forbidding state or federal interference.⁵ Under section 5 the Congress is vested with “power to enforce, by appropriate legislation, the [Amendment’s] provisions.” *Morrison* pointed out that *United States v. Harris*, 106 U.S. 629, 640 (1883), held that section 5 did not vest Congress with the power to enact a statute “directed exclusively against the action of private persons, without reference to the laws of the

⁴ As noted earlier, “First, Congress may regulate the use of the channels of interstate commerce. Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities.” *United States v. Morrison*, 529 U.S. at 609, quoting, *United States v. Lopez*, 514 U.S. 549, 558-59 (1995)(internal citations omitted).

⁵ “Section. 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

“Section. 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

“Section. 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

“Section. 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.” U.S.Const. Amend. XIV, §§1 to 4.

state, or their administration by her officers,” 529 U.S. at 621. And in *Civil Rights Cases*, 109 U.S. at 1, 11 (1883), “we held that the public accommodation provisions of the Civil Rights Act of 1875, which applied to purely private conduct, were beyond the scope of the §5 enforcement power. . . . The force of the doctrine of stare decisis behind these decisions stems not only from the length of time they have been on the books, but also from the insight attributable to the Members of the Court at that time . . . [who] obviously had intimate knowledge and familiarity with the events surrounding the adoption of the Fourteenth Amendment,” 529 U.S. at 621-22.

The statute in *Morrison* created a cause of action against private individuals who perpetrated gender-motivated violence enacted in the face of evidence that the states often failed to adequately investigate and prosecute such crimes. The authority under section 5, however, extends only to state action including the enactment of a “remedy corrective in its character, adapted to counteract and redress the operation of such prohibited state laws or proceedings of state officers.” The *Morrison* statute rested on the wrong side of the divide, for its remedy fell not upon wayward state officials, but upon private individuals. 529 U.S. At 624-25.

The hate crime proposals seem perilously comparable at best. They turn upon private misconduct, not the deficiencies of state action.⁶

Section 2 of the Thirteen Amendment

The companion bills and H.R. 74 each stake a claim to the legislative authority in section 2 of the Thirteen Amendment within their findings.⁷

⁶ The Fifteenth Amendment states that, “The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.” U.S.Const. Amend. XV, §1. It too has a legislative section: “The Congress shall have power to enforce this article by appropriate legislation.” U.S.Const. Amend. XV, §2. The suggestion that it applies to private as well as state and federal action is fragile at best. The references to “badges and incidents of slavery” in the findings indicate that proponents seem have to relied more squarely upon the legislative authority granted by the Thirteenth Amendment from whose jurisprudence that term of art springs.

⁷ H.R. 74 finds that “violence motivated by bias that is a relic of slavery can constitute badges and incidents of slavery.” The companion bill findings are even more explicit, “(10) For generations, the institutions of slavery and involuntary servitude were defined by the race, color, and ancestry of those held in bondage. Slavery and involuntary servitude were enforced, both prior to and after the adoption of the 13th amendment to the Constitution of the United States, through widespread public and private violence directed at persons because of their race, color, or ancestry, or perceived race, color, or ancestry. Accordingly, eliminating racially motivated violence is an important means of eliminating, to the extent possible, the badges, incidents, and relics of slavery and involuntary servitude. (11) Both at the time when the 13th, 14th, and 15th amendments to the Constitution of the United States were adopted, and continuing to date, members of certain religious and national origin groups were and are perceived to be distinct `races.’ Thus, in order to eliminate, to the extent possible, the badges, incidents, and relics of slavery, it is necessary to prohibit assaults on the basis of real or perceived religions or national origins, at least to the extent such religions or national origins were regarded as races at the time of the adoption of the 13th, 14th, and 15th amendments to the Constitution of the United States.”

The *Civil Rights Cases*, considered so instructive with respect to Congressional powers under the Fourteenth Amendment, also afforded the Court its first opportunity to construe section 2 of the Thirteenth Amendment. Unlike, the Fourteenth, it speaks not of state action, but declares “Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.” U.S.Const. Amend. XIII, §1. It finishes with the stipulation that “Congress shall have power to enforce this article by appropriate legislation.” U.S.Const. Amend. XIII, §2.

The *Civil Rights Cases* observed that section 2 “clothes Congress with power to pass all laws necessary and proper for abolishing all *badges and incidents of slavery* in the United States.” This power it concluded, however, reached “those fundamental rights which appertain to the essence of citizenship” and but not the “social rights” (access lodging, transportation, and entertainment) that Congress had by statute endeavored to protect from racial discrimination. 109 U.S. at 28-30 (emphasis added).

The Court said little of section 2 for nearly a century thereafter until *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968), which found that Congress might ban racial discrimination from real estate transactions under the section. Almost in passing, *Jones* dismissed without repudiating the social rights distinction: “Whatever the present validity of the position taken by the majority on that issue—a question rendered largely academic by Title II of the Civil Rights Act of 1964, 78 Stat. 243 (see *Heart of Atlanta Motel v. United States*, 379 U.S. 241; *Katzenbach v. McClung*, 379 U.S. 294 [confirming the Title’s validity as an exercise of commerce clause power])—we note that the entire Court agreed upon at least one proposition: The Thirteen Amendment authorizes Congress not only to outlaw all forms of slavery and involuntary servitude but also to eradicate the last vestiges and incidents of a society half slave and half free, by securing to all citizens, of every race and color, the same right to make and enforce contracts, to sue, be parties, give evidence, and to inherit, purchase, lease, sell and convey property, as is enjoyed by white citizens.” 392 U.S. at 441.

Three years later the Court confirmed that 42 U.S.C. 1985(3)(relating to conspiracies in deprivation of the rights of citizenship) was within the scope of section 2 authority. *Griffin v. Breckenridge*, 403 U.S. 88 (1971). *Griffin* opined that “Not only may Congress impose such liability, but the varieties of private conduct that it may make criminally punishable or civilly remediable extend far beyond the actual imposition of slavery or involuntary servitude. By the Thirteenth Amendment, we commit ourselves as a Nation to the proposition that the former slaves and their descendants should be forever free. To keep that promise, Congress has the power under the Thirteenth Amendment rationally to determine what are the badges and incidents of slavery, and the authority to translate that determination into effective legislation. We can only conclude that Congress as wholly within its powers under §2 of the Thirteen Amendment in creating a statutory cause of action for Negro citizens who have been the victims of conspiratorial, racially discriminatory private action aimed at depriving them of the basis rights that the law secures to all free men.” 403 U.S. at 105.

Section 2 envisions legislation for the benefit of those who bore the burdens slavery and their descendants (race, color), but does it contemplate a wider range of beneficiaries (*e.g.*, religion, national origin)? The hate crime proposals would have encloused groups subject to classification by “race, color, religion, or national origin.” In construing the civil rights statutes enacted contemporaneously with the Thirteenth, Fourteenth and Fifteenth Amendment, the Supreme Court held that Arabs and Jews would have been considered distinct “races” at the time the statutes were passed and the Amendments drafted, debated and ratified.⁸ Whether this would be considered sufficient to embrace all religious discrimination is another question. Would Roman Catholics or Methodists, for example, have been considered distinct “races” even in the Nineteenth Century?

Of course, even this expansion of beneficiaries does not ensure that the Court would consider violence a badge or incident of slavery. Although commenting on its irrelevancy in light of Congress’ use of the commerce clause, even *Jones* did not go so far as to reject the fundamental versus the social rights distinction of the *Civil Rights Cases*. Perhaps more to the point, the anxiety of *Morrison* and *Lopez* lest an overly generous commerce clause construction swallow all state criminal jurisdiction over violence might argue against the prospect of the Court embracing violence as a badge or incident of slavery for purposes of Congress’ legislative authority under section 2 of the Thirteenth Amendment.

Appendices

Hate Crime Proposals New Federal Crimes

S. 625/H.R. 1343 (Section 7) S.19 (Section 107)

18 U.S.C. 249. Hate crime acts

(a) IN GENERAL—

(1) OFFENSES INVOLVING ACTUAL OR PERCEIVED RACE, COLOR, RELIGION, OR NATIONAL ORIGIN— Whoever, whether or not acting under color of law, willfully causes bodily injury to any person, or through the use of fire, a firearm, or an explosive or incendiary device, attempts to cause bodily injury to any person because of the actual or perceived race, color, religion, or national origin of any person —

⁸ *Saint Francis College v. Al-Khazraji*, 481 U.S. 604, 610-11 (1987)(“In the middle years of the 19th century, dictionaries commonly referred to race as a continued series of descendants from a parent who is called the stock . . . the descendants of a common ancestor; a family, tribe, people or nation, believed or presumed to belong to the same stock. . . . The . . . Encyclopedia . . . Britannica also referred to Arabs, Jews, and other ethnic grounds such as Germans, Hungarians, and Greeks, as separate races”); *see also, Shaare Tefila Congregation v. Cobb*, 481 U.S. 615, 617 (1987).

(A) shall be imprisoned not more than 10 years, fined in accordance with this title, or both; and

(B) shall be imprisoned for any term of years or for life, fined in accordance with this title or both, if—

(i) death results from the offense; or

(ii) the offense includes kidnaping or an attempt to kidnap, aggravated sexual abuse or an attempt to commit aggravated sexual abuse, or an attempt to kill.

(2) OFFENSES INVOLVING ACTUAL OR PERCEIVED RELIGION, NATIONAL ORIGIN, GENDER, SEXUAL ORIENTATION, OR DISABILITY— (A) IN GENERAL— Whoever, whether or not acting under color of law, in any circumstance described in subparagraph (B), willfully causes bodily injury to any person, or through the use of fire, a firearm, or an explosive or incendiary device, attempts to cause bodily injury to any person because of the actual or perceived religion, national origin, gender, sexual orientation, or disability of any person—

(i) shall be imprisoned not more than 10 years, fined in accordance with this title, or both; and

(ii) shall be imprisoned for any term of years or for life, fined in accordance with this title or both, if—

(I) death results from the offense; or

(II) the offense includes kidnaping or an attempt to kidnap, aggravated sexual abuse or an attempt to commit aggravated sexual abuse, or an attempt to kill.

(B) CIRCUMSTANCES DESCRIBED—For purposes of subparagraph (A), the circumstances described in this subparagraph are that—

(i) the conduct described in subparagraph (A) occurs during the course of, or as the result of, the travel of the defendant or the victim—

(I) across a State line or national border; or

(II) using a channel, facility, or instrumentality of interstate or foreign commerce;

(ii) the defendant uses a channel, facility, or instrumentality of interstate or foreign commerce in connection with the conduct described in subparagraph (A);

(iii) in connection with the conduct described in subparagraph (A) the defendant employs a firearm, explosive or incendiary device, or other weapon that has traveled in interstate or foreign commerce; or

(iv) the conduct described in subparagraph (A)—

(I) interferes with commercial or other economic activity in which the victim is engaged at the time of the conduct; or

(II) otherwise affects interest or foreign commerce.

(b) CERTIFICATION REQUIREMENT—No prosecution of any offense described in this subsection may be undertaken by the United States, except under the certification in writing of the Attorney General, the Deputy Attorney General, the Associate Attorney General, or any Assistant Attorney General specifically designated by the Attorney General that—

(1) he or she has reasonable cause to believe that the actual or perceived race, color, religion, national origin, gender, sexual orientation, or disability of any person was a motivating actor underlying the alleged conduct of the defendant; and

(2) he or his designee or she or her designee has consulted with State or local law enforcement officials regarding the prosecution and determined that—

(A) the State does not have jurisdiction or does not intend to exercise jurisdiction;

(B) the State has requested that the Federal Government assume jurisdiction;

(C) the State does not object to the Federal Government assuming jurisdiction; or

(D) the verdict or sentence obtained pursuant to State charges left demonstratively unvindicated the Federal interest in eradicating bias-motivated violence.

(c) DEFINITIONS—In this section—

(1) the term “explosive or incendiary device” has the meaning given the term in section 232 of this title; and

(2) the term “firearm” has the meaning given the term in section 921(a) of this title.

H.R. 74 (Section 4)
(Amending 18 U.S.C. 245)
(Provisions added in Italics)

18 U.S.C. 245. Federally protected activities

(a)(1) Nothing in this section shall be construed as indicating an intent on the part of Congress to prevent any State, any possession or Commonwealth of the United States, or the District of Columbia, from exercising jurisdiction over any offense over which it would have jurisdiction in the absence of this section, nor shall anything in this section be construed as depriving State and local law enforcement authorities of responsibility for prosecuting acts that may be violations of this section and that are violations of State and local law. No prosecution of any offense described in this section shall be undertaken by the United States except upon the certification in writing of the Attorney General, the Deputy Attorney General, the Associate Attorney General, or any Assistant Attorney General specially designated by the Attorney General that in his judgment a prosecution by the United States is in the public interest and necessary to secure substantial justice, which function of certification may not be delegated.

(2) Nothing in this subsection shall be construed to limit the authority of Federal officers, or a Federal grand jury, to investigate possible violations of this section.

(b) Whoever, whether or not acting under color of law, by force or threat of force willfully injures, intimidates or interferes with, or attempts to injure, intimidate or interfere with--

(1) any person because he is or has been, or in order to intimidate such person or any other person or any class of persons from--

(A) voting or qualifying to vote, qualifying or campaigning as a candidate for elective office, or qualifying or acting as a poll watcher, or any legally authorized election official, in any primary, special, or general election;

(B) participating in or enjoying any benefit, service, privilege, program, facility, or activity provided or administered by the United States;

(C) applying for or enjoying employment, or any perquisite thereof, by any agency of the United States;

(D) serving, or attending upon any court in connection with possible service, as a grand or petit juror in any court of the United States;

(E) participating in or enjoying the benefits of any program or activity receiving Federal financial assistance; or

(2) any person because of his race, color, religion or national origin and because he is or has been--

(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, or any perquisite thereof, by any private employer or any agency of any State or subdivision thereof, or joining or using the services or advantages of any labor organization, hiring hall, or employment agency;

(D) serving, or attending upon any court of any State in connection with possible service, as a grand or petit juror,

(E) traveling in or using any facility of interstate commerce, or using any vehicle, terminal, or facility of any common carrier by motor, rail, water, or air;

(F) enjoying the goods, services, facilities, privileges, advantages, or accommodations of any inn, hotel, motel, or other establishment which provides lodging to transient guests, or of any restaurant, cafeteria, lunchroom, lunch counter, soda fountain, or other facility which serves the public and which is principally engaged in selling food or beverages for consumption on the premises, or of any gasoline station, or of any motion picture house, theater, concert hall, sports arena, stadium, or any other place of exhibition or entertainment which serves the public, or of any other establishment which serves the public and (i) which is located within the premises of any of the aforesaid establishments or within the premises of which is physically located any of the aforesaid establishments, and (ii) which holds itself out as serving patrons of such establishments; or

(3) during or incident to a riot or civil disorder, any person engaged in a business in commerce or affecting commerce, including, but not limited to, any person engaged in a business which sells or offers for sale to interstate travelers a substantial portion of the articles, commodities, or services which it sells or where a substantial portion of the articles or commodities which it sells or offers for sale have moved in commerce; or

(4) any person because he is or has been, or in order to intimidate such person or any other person or any class of persons from--

(A) participating, without discrimination on account of race, color, religion or national origin, in any of the benefits or activities described in subparagraphs (1)(A) through (1)(E) or subparagraphs (2)(A) through (2)(F); or

(B) affording another person or class of persons opportunity or protection to so participate; or

(5) any citizen because he is or has been, or in order to intimidate such citizen or any other citizen from lawfully aiding or encouraging other persons to participate, without discrimination on account of race, color, religion or national origin, in any of the benefits or activities described in subparagraphs (1)(A) through (1)(E) or subparagraphs (2)(A) through (2)(F), or participating lawfully in speech or peaceful assembly opposing any denial of the opportunity to so participate--

shall be fined under this title, or imprisoned not more than one year, or both; and if bodily injury results from the acts committed in violation of this section or if such acts include the use, attempted use, or threatened use of a dangerous weapon, explosives, or fire shall be fined under this title, or imprisoned not more than ten years, or both; and if death results from the acts committed in violation of this section or if such acts include kidnapping or an attempt to kidnap, aggravated sexual abuse or an attempt to commit aggravated sexual abuse, or an attempt to kill, shall be fined under this title or imprisoned for any term of years or for life, or both, or may be sentenced to death. As used in this section, the term “participating lawfully in speech or peaceful assembly” shall not mean the aiding, abetting, or inciting of other persons to riot or to commit any act of physical violence upon any individual or against any real or personal property in furtherance of a riot. Nothing in subparagraph (2)(F) or (4)(A) of this subsection shall apply to the proprietor of any establishment which provides lodging to transient guests, or to any employee acting on behalf of such proprietor, with respect to the enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of such establishment if such establishment is located within a building which contains not more than five rooms for rent or hire and which is actually occupied by the proprietor as his residence.

(c)(1) Whoever, whether or not acting under color of law, willfully causes bodily injury to any person or, though the use of fire, a firearm, or explosive device, attempts to cause bodily injury to any person, because of the actual or perceived race, color, religion, or national origin of any person—

(A) shall be imprisoned not more than 10 years, or fined in accordance with this title, or both; and

(B) shall be imprisoned for any term of years or for life, or fined in accordance with this title, or both if—

(i) death results from the acts committed in violation of this paragraph; or

(ii) the acts committed in violation of this paragraph include kidnapping or an attempt to kidnap, aggravated sexual abuse or an attempt to commit aggravated sexual abuse, or an attempt to kill.

(2)(A) Whoever, whether or not acting under color of law, in any circumstance described in subparagraph (B), willfully causes bodily injury to any person or, though the use of fire, a firearm, or explosive device, attempts to cause bodily injury to any person, because of the actual or perceived race, color, religion, or national origin of any person—

(i) shall be imprisoned not more than 10 years, or fined in accordance with this title, or both; and

(ii) shall be imprisoned for any term of years or for life, or fined in accordance with this title, or both if—

(I) death results from the acts committed in violation of this paragraph; or

(II) the acts committed in violation of this paragraph include kidnapping or an attempt to kidnap, aggravated sexual abuse or an attempt to commit aggravated sexual abuse, or an attempt to kill.

(B) For purposes of subparagraph (A), the circumstances described in this subparagraph are that

(i) in connection with the offense, the defendant or victim travels in interstate or foreign commerce, or engages in any activity affecting interstate or foreign commerce; or

(ii) *the offense is in or affects interstate or foreign commerce.*

(d) ~~(e)~~ Nothing in this section shall be construed so as to deter any law enforcement officer from lawfully carrying out the duties of his office; and no law enforcement officer shall be considered to be in violation of this section for lawfully carrying out the duties of his office or lawfully enforcing ordinances and laws of the United States, the District of Columbia, any of the several States, or any political subdivision of a State. For purposes of the preceding sentence, the term “law enforcement officer” means any officer of the United States, the District of Columbia, a State, or political subdivision of a State, who is empowered by law to conduct investigations of, or make arrests because of, offenses against the United States, the District of Columbia, a State, or a political subdivision of a State.

(e) ~~(d)~~ For purposes of this section, the term “State” includes a State of the United States, the District of Columbia, and any commonwealth, territory, or possession of the United States.

Selected Federal Civil Rights Crimes

18 U.S.C. 245. Federally protected activities

(a)(1) Nothing in this section shall be construed as indicating an intent on the part of Congress to prevent any State, any possession or Commonwealth of the United States, or the District of Columbia, from exercising jurisdiction over any offense over which it would have jurisdiction in the absence of this section, nor shall anything in this section be construed as depriving State and local law enforcement authorities of responsibility for prosecuting acts that may be violations of this section and that are violations of State and local law. No prosecution of any offense described in this section shall be undertaken by the United States except upon the certification in writing of the Attorney General, the Deputy Attorney General, the Associate Attorney General, or any Assistant Attorney General specially designated by the Attorney General that in his judgment a prosecution by the United States is in the public interest and necessary to secure substantial justice, which function of certification may not be delegated.

(2) Nothing in this subsection shall be construed to limit the authority of Federal officers, or a Federal grand jury, to investigate possible violations of this section.

(b) Whoever, whether or not acting under color of law, by force or threat of force willfully injures, intimidates or interferes with, or attempts to injure, intimidate or interfere with--

(1) any person because he is or has been, or in order to intimidate such person or any other person or any class of persons from--

(A) voting or qualifying to vote, qualifying or campaigning as a candidate for elective office, or qualifying or acting as a poll watcher, or any legally authorized election official, in any primary, special, or general election;

(B) participating in or enjoying any benefit, service, privilege, program, facility, or activity provided or administered by the United States;

(C) applying for or enjoying employment, or any perquisite thereof, by any agency of the United States;

(D) serving, or attending upon any court in connection with possible service, as a grand or petit juror in any court of the United States;

(E) participating in or enjoying the benefits of any program or activity receiving Federal financial assistance; or

(2) any person because of his race, color, religion or national origin and because he is or has been--

(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, or any perquisite thereof, by any private employer or any agency of any State or subdivision thereof, or joining or using the services or advantages of any labor organization, hiring hall, or employment agency;

(D) serving, or attending upon any court of any State in connection with possible service, as a grand or petit juror,

(E) traveling in or using any facility of interstate commerce, or using any vehicle, terminal, or facility of any common carrier by motor, rail, water, or air;

(F) enjoying the goods, services, facilities, privileges, advantages, or accommodations of any inn, hotel, motel, or other establishment which provides lodging to transient guests, or of any restaurant, cafeteria, lunchroom, lunch counter, soda fountain, or other facility which serves the public and which is principally engaged in selling food or beverages for consumption on the premises, or of any gasoline station, or of any motion picture house, theater, concert hall, sports arena, stadium, or any other place of exhibition or entertainment which serves the public, or of any other establishment which serves the public and (i) which is located within the premises of any of the aforesaid establishments or within the premises of which is physically located any of the aforesaid establishments, and (ii) which holds itself out as serving patrons of such establishments; or

(3) during or incident to a riot or civil disorder, any person engaged in a business in commerce or affecting commerce, including, but not limited to, any person engaged in a business which sells or offers for sale to interstate travelers a substantial portion of the articles, commodities, or services which it sells or where a substantial portion of the articles or commodities which it sells or offers for sale have moved in commerce; or

(4) any person because he is or has been, or in order to intimidate such person or any other person or any class of persons from--

(A) participating, without discrimination on account of race, color, religion or national origin, in any of the benefits or activities described in subparagraphs (1)(A) through (1)(E) or subparagraphs (2)(A) through (2)(F); or

(B) affording another person or class of persons opportunity or protection to so participate; or

(5) any citizen because he is or has been, or in order to intimidate such citizen or any other citizen from lawfully aiding or encouraging other persons to participate, without discrimination on account of race, color, religion or national origin, in any of the benefits or activities described in subparagraphs (1)(A) through (1)(E) or subparagraphs (2)(A) through (2)(F), or participating lawfully in speech or peaceful assembly opposing any denial of the opportunity to so participate--

shall be fined under this title, or imprisoned not more than one year, or both; and if bodily injury results from the acts committed in violation of this section or if such acts include the use, attempted use, or threatened use of a dangerous weapon,

explosives, or fire shall be fined under this title, or imprisoned not more than ten years, or both; and if death results from the acts committed in violation of this section or if such acts include kidnapping or an attempt to kidnap, aggravated sexual abuse or an attempt to commit aggravated sexual abuse, or an attempt to kill, shall be fined under this title or imprisoned for any term of years or for life, or both, or may be sentenced to death. As used in this section, the term “participating lawfully in speech or peaceful assembly” shall not mean the aiding, abetting, or inciting of other persons to riot or to commit any act of physical violence upon any individual or against any real or personal property in furtherance of a riot. Nothing in subparagraph (2)(F) or (4)(A) of this subsection shall apply to the proprietor of any establishment which provides lodging to transient guests, or to any employee acting on behalf of such proprietor, with respect to the enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of such establishment if such establishment is located within a building which contains not more than five rooms for rent or hire and which is actually occupied by the proprietor as his residence.

(c) Nothing in this section shall be construed so as to deter any law enforcement officer from lawfully carrying out the duties of his office; and no law enforcement officer shall be considered to be in violation of this section for lawfully carrying out the duties of his office or lawfully enforcing ordinances and laws of the United States, the District of Columbia, any of the several States, or any political subdivision of a State. For purposes of the preceding sentence, the term “law enforcement officer” means any officer of the United States, the District of Columbia, a State, or political subdivision of a State, who is empowered by law to conduct investigations of, or make arrests because of, offenses against the United States, the District of Columbia, a State, or a political subdivision of a State.

(d) For purposes of this section, the term “State” includes a State of the United States, the District of Columbia, and any commonwealth, territory, or possession of the United States.

18 U.S.C. 241. Conspiracy against rights

If two or more persons conspire to injure, oppress, threaten, or intimidate any person in any State, Territory, Commonwealth, Possession, or District in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same; or

If two or more persons go in disguise on the highway, or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured--

They shall be fined under this title or imprisoned not more than ten years, or both; and if death results from the acts committed in violation of this section or if such acts include kidnapping or an attempt to kidnap, aggravated sexual abuse or an attempt to commit aggravated sexual abuse, or an attempt to kill, they shall be fined under this title or imprisoned for any term of years or for life, or both, or may be sentenced to death.

18 U.S.C. 242. Deprivation of rights under color of law

Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any person in any State, Territory, Commonwealth, Possession, or

District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalties, on account of such person being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined under this title or imprisoned not more than one year, or both; and if bodily injury results from the acts committed in violation of this section or if such acts include the use, attempted use, or threatened use of a dangerous weapon, explosives, or fire, shall be fined under this title or imprisoned not more than ten years, or both; and if death results from the acts committed in violation of this section or if such acts include kidnapping or an attempt to kidnap, aggravated sexual abuse, or an attempt to commit aggravated sexual abuse, or an attempt to kill, shall be fined under this title, or imprisoned for any term of years or for life, or both, or may be sentenced to death.

18 U.S.C. 247. Damage to religious property; obstruction of persons in the free exercise of religious beliefs

(a) Whoever, in any of the circumstances referred to in subsection (b) of this section--

(1) intentionally defaces, damages, or destroys any religious real property, because of the religious character of that property, or attempts to do so; or

(2) intentionally obstructs, by force or threat of force, any person in the enjoyment of that person's free exercise of religious beliefs, or attempts to do so; shall be punished as provided in subsection (d).

(b) The circumstances referred to in subsection (a) are that the offense is in or affects interstate or foreign commerce.

(c) Whoever intentionally defaces, damages, or destroys any religious real property because of the race, color, or ethnic characteristics of any individual associated with that religious property, or attempts to do so, shall be punished as provided in subsection (d).

(d) The punishment for a violation of subsection (a) of this section shall be--

(1) if death results from acts committed in violation of this section or if such acts include kidnapping or an attempt to kidnap, aggravated sexual abuse or an attempt to commit aggravated sexual abuse, or an attempt to kill, a fine in accordance with this title and imprisonment for any term of years or for life, or both, or may be sentenced to death;

(2) if bodily injury results to any person, including any public safety officer performing duties as a direct or proximate result of conduct prohibited by this section, and the violation is by means of fire or an explosive, a fine under this title or imprisonment for not more than 40 years, or both;

(3) if bodily injury to any person, including any public safety officer performing duties as a direct or proximate result of conduct prohibited by this section, results from the acts committed in violation of this section or if such acts include the use, attempted use, or threatened use of a dangerous weapon, explosives, or fire, a fine in accordance with this title and imprisonment for not more than 20 years, or both; and

(4) in any other case, a fine in accordance with this title and imprisonment for not more than one year, or both.

(e) No prosecution of any offense described in this section shall be undertaken by the United States except upon the certification in writing of the Attorney General

or his designee that in his judgment a prosecution by the United States is in the public interest and necessary to secure substantial justice.

(f) As used in this section, the term “religious real property” means any church, synagogue, mosque, religious cemetery, or other religious real property, including fixtures or religious objects contained within a place of religious worship.

(g) No person shall be prosecuted, tried, or punished for any noncapital offense under this section unless the indictment is found or the information is instituted not later than 7 years after the date on which the offense was committed.

18 U.S.C. 248. Freedom of access to clinic entrances

(a) Prohibited activities.--Whoever--

(1) by force or threat of force or by physical obstruction, intentionally injures, intimidates or interferes with or attempts to injure, intimidate or interfere with any person because that person is or has been, or in order to intimidate such person or any other person or any class of persons from, obtaining or providing reproductive health services;

(2) by force or threat of force or by physical obstruction, intentionally injures, intimidates or interferes with or attempts to injure, intimidate or interfere with any person lawfully exercising or seeking to exercise the First Amendment right of religious freedom at a place of religious worship; or

(3) intentionally damages or destroys the property of a facility, or attempts to do so, because such facility provides reproductive health services, or intentionally damages or destroys the property of a place of religious worship, shall be subject to the penalties provided in subsection (b) and the civil remedies provided in subsection (c), except that a parent or legal guardian of a minor shall not be subject to any penalties or civil remedies under this section for such activities insofar as they are directed exclusively at that minor.

(b) Penalties.--Whoever violates this section shall--

(1) in the case of a first offense, be fined in accordance with this title, or imprisoned not more than one year, or both; and

(2) in the case of a second or subsequent offense after a prior conviction under this section, be fined in accordance with this title, or imprisoned not more than 3 years, or both;

except that for an offense involving exclusively a nonviolent physical obstruction, the fine shall be not more than \$10,000 and the length of imprisonment shall be not more than six months, or both, for the first offense; and the fine shall, notwithstanding section 3571, be not more than \$25,000 and the length of imprisonment shall be not more than 18 months, or both, for a subsequent offense; and except that if bodily injury results, the length of imprisonment shall be not more than 10 years, and if death results, it shall be for any term of years or for life.

(c) Civil remedies. . . .

(d) Rules of construction.--Nothing in this section shall be construed--

(1) to prohibit any expressive conduct (including peaceful picketing or other peaceful demonstration) protected from legal prohibition by the First Amendment to the Constitution;

(2) to create new remedies for interference with activities protected by the free speech or free exercise clauses of the First Amendment to the Constitution, occurring

outside a facility, regardless of the point of view expressed, or to limit any existing legal remedies for such interference;

(3) to provide exclusive criminal penalties or civil remedies with respect to the conduct prohibited by this section, or to preempt State or local laws that may provide such penalties or remedies; or

(4) to interfere with the enforcement of State or local laws regulating the performance of abortions or other reproductive health services.

(e) Definitions.--As used in this section:

(1) Facility.--The term "facility" includes a hospital, clinic, physician's office, or other facility that provides reproductive health services, and includes the building or structure in which the facility is located.

(2) Interfere with.--The term "interfere with" means to restrict a person's freedom of movement.

(3) Intimidate.--The term "intimidate" means to place a person in reasonable apprehension of bodily harm to him- or herself or to another.

(4) Physical obstruction.--The term "physical obstruction" means rendering impassable ingress to or egress from a facility that provides reproductive health services or to or from a place of religious worship, or rendering passage to or from such a facility or place of religious worship unreasonably difficult or hazardous.

(5) Reproductive health services.--The term "reproductive health services" means reproductive health services provided in a hospital, clinic, physician's office, or other facility, and includes medical, surgical, counselling or referral services relating to the human reproductive system, including services relating to pregnancy or the termination of a pregnancy.

(6) State.--The term "State" includes a State of the United States, the District of Columbia, and any commonwealth, territory, or possession of the United States.

42 U.S.C. 3631. Violations; penalties

Whoever, whether or not acting under color of law, by force or threat of force willfully injures, intimidates or interferes with, or attempts to injure, intimidate or interfere with--

(a) any person because of his race, color, religion, sex, handicap (as such term is defined in section 3602 of this title), familial status (as such term is defined in section 3602 of this title), or national origin and because he is or has been selling, purchasing, renting, financing, occupying, or contracting or negotiating for the sale, purchase, rental, financing or occupation of any dwelling, or applying for or participating in any service, organization, or facility relating to the business of selling or renting dwellings; or

(b) any person because he is or has been, or in order to intimidate such person or any other person or any class of persons from--

(1) participating, without discrimination on account of race, color, religion, sex, handicap (as such term is defined in section 3602 of this title), familial status (as such term is defined in section 3602 of this title), or national origin, in any of the activities, services, organizations or facilities described in subsection (a) of this section; or

(2) affording another person or class of persons opportunity or protection so to participate; or

(c) any citizen because he is or has been, or in order to discourage such citizen or any other citizen from lawfully aiding or encouraging other persons to participate, without discrimination on account of race, color, religion, sex, handicap (as such term is defined in section 3602 of this title), familial status (as such term is defined in section 3602 of this title), or national origin, in any of the activities, services, organizations or facilities described in subsection (a) of this section, or participating lawfully in speech or peaceful assembly opposing any denial of the opportunity to so participate--

shall be fined under Title 18 or imprisoned not more than one year, or both; and if bodily injury results from the acts committed in violation of this section or if such acts include the use, attempted use, or threatened use of a dangerous weapon, explosives, or fire shall be fined under Title 18 or imprisoned not more than ten years, or both; and if death results from the acts committed in violation of this section or if such acts include kidnapping or an attempt to kidnap, aggravated sexual abuse or an attempt to commit aggravated sexual abuse, or an attempt to kill, shall be fined under Title 18 imprisoned for any term of years or for life, or both.

United States Sentencing Guidelines. §3A1.1. Hate Crime Motivation or Vulnerable Victim

(a) If the finder of fact at trial or, in the case of a plea of guilty or nolo contendere, the court at sentencing determines beyond a reasonable doubt that the defendant intentionally selected any victim or any property as the object of the offense of conviction because of the actual or perceived race, color, religion, national origin, ethnicity, gender, disability, or sexual orientation of any person, increase by 3 levels.

(b)(1) If the defendant knew or should have known that a victim of the offense was a vulnerable victim, increase by 2 levels.

(2) If (A) subdivision (1) applies; and (B) the offense involved a large number of vulnerable victims, increase the offense level determined under subdivision (1) by 2 additional levels.

(c) Special Instruction

(1) Subsection (a) shall not apply if an adjustment from s 2H1.1(b)(1) applies.

COMMENTARY

Application Notes

1. Subsection (a) applies to offenses that are hate crimes. Note that special evidentiary requirements govern the application of this subsection.

Do not apply subsection (a) on the basis of gender in the case of a sexual offense. In such cases, this factor is taken into account by the offense level of the Chapter Two offense guideline. Moreover, do not apply subsection (a) if an adjustment from s 2H1.1(b)(1) applies.

2. For purposes of subsection (b), “vulnerable victim” means a person (A) who is a victim of the offense of conviction and any conduct for which the defendant is accountable under 1.3 (Relevant Conduct); and (B) who is unusually vulnerable due to age, physical or mental condition, or who is otherwise particularly susceptible to the criminal conduct.

Subsection (b) applies to offenses involving an unusually vulnerable victim in which the defendant knows or should have known of the victim's unusual vulnerability. The adjustment would apply, for example, in a fraud case in which the defendant marketed an ineffective cancer cure or in a robbery in which the defendant selected a handicapped victim. But it would not apply in a case in which the defendant sold fraudulent securities by mail to the general public and one of the victims happened to be senile. Similarly, for example, a bank teller is not an unusually vulnerable victim solely by virtue of the teller's position in a bank.

Do not apply subsection (b) if the factor that makes the person a vulnerable victim is incorporated in the offense guideline. For example, if the offense guideline provides an enhancement for the age of the victim, this subsection would not be applied unless the victim was unusually vulnerable for reasons unrelated to age.

3. The adjustments from subsections (a) and (b) are to be applied cumulatively. Do not, however, apply subsection (b) in a case in which subsection (a) applies unless a victim of the offense was unusually vulnerable for reasons unrelated to race, color, religion, national origin, ethnicity, gender, disability, or sexual orientation.

4. If an enhancement from subsection (b) applies and the defendant's criminal history includes a prior sentence for an offense that involved the selection of a vulnerable victim, an upward departure may be warranted.

Background: Subsection (a) reflects the directive to the Commission, contained in Section 280003 of the Violent Crime Control and Law Enforcement Act of 1994, to provide an enhancement of not less than three levels for an offense when the finder of fact at trial determines beyond a reasonable doubt that the defendant had a hate crime motivation (i.e., a primary motivation for the offense was the race, color, religion, national origin, ethnicity, gender, disability, or sexual orientation of the victim). To avoid unwarranted sentencing disparity based on the method of conviction, the Commission has broadened the application of this enhancement to include offenses that, in the case of a plea of guilty or nolo contendere, the court at sentencing determines are hate crimes.

Subsection (b)(2) implements, in a broader form, the instruction to the Commission in section 6(c)(3) of Public Law 105-184.

28 U.S.C. 534 note [(Hate Crime Statistics: Pub.L. 101-275, Apr. 23, 1990, 104 Stat. 140, as amended Pub.L. 103-322, Title XXXII, § 320926, Sept. 13, 1994, 108 Stat. 2131; Pub.L. 104-155, §7, July 3, 1996, 110 Stat. 1394, provided:

“That (a) this Act [this note] may be cited as the ‘Hate Crime Statistics Act’.

“(b)(1) Under the authority of section 534 of title 28, United States Code [this section], the Attorney General shall acquire data, for each calendar year, about crimes that manifest evidence of prejudice based on race, religion, disability, sexual orientation, or ethnicity, including where appropriate the crimes of murder, non-negligent manslaughter; forcible rape; aggravated assault, simple assault, intimidation; arson; and destruction, damage or vandalism of property.

“(2) The Attorney General shall establish guidelines for the collection of such data including the necessary evidence and criteria that must be present for a finding of manifest prejudice and procedures for carrying out the purposes of this section.

“(3) Nothing in this section creates a cause of action or a right to bring an action, including an action based on discrimination due to sexual orientation. As used in this section, the term ‘sexual orientation’ means consensual homosexuality or

heterosexuality. This subsection does not limit any existing cause of action or right to bring an action, including any action under the Administrative Procedure Act [5 U.S.C.551 et seq., 701 et seq.] or the All Writs Act [28 U.S.C. 1651].

“(4) Data acquired under this section shall be used only for research or statistical purposes and may not contain any information that may reveal the identity of an individual victim of a crime.

“(5) The Attorney General shall publish an annual summary of the data acquired under this section.

“(c) There are authorized to be appropriated such sums as may be necessary to carry out the provisions of this section through fiscal year 2002.

“Sec. 2. (a) Congress finds that--

“(1) the American family life is the foundation of American Society,

“(2) Federal policy should encourage the well-being, financial security, and health of the American family,

“(3) schools should not de-emphasize the critical value of American family life.

“(b) Nothing in this Act [this note] shall be construed, nor shall any funds appropriated to carry out the purpose of the Act [this note] be used, to promote or encourage homosexuality.”

20 U.S.C. 7133. Hate crime prevention

(a) Grant authorization

From funds made available to carry out this subpart under section 7104(1) of this title the Secretary may make grants to local educational agencies and community-based organizations for the purpose of providing assistance to localities most directly affected by hate crimes.

(b) Use of funds

(1) Program development

Grants under this section may be used to improve elementary and secondary educational efforts, including--

(A) development of education and training programs designed to prevent and to reduce the incidence of crimes and conflicts motivated by hate;

(B) development of curricula for the purpose of improving conflict or dispute resolution skills of students, teachers, and administrators;

(C) development and acquisition of equipment and instructional materials to meet the needs of, or otherwise be part of, hate crime or conflict programs; and

(D) professional training and development for teachers and administrators on the causes, effects, and resolutions of hate crimes or hate-based conflicts.

(2) In general

In order to be eligible to receive a grant under this section for any fiscal year, a local educational agency, or a local educational agency in conjunction with a community-based organization, shall submit an application to the Secretary in such form and containing such information as the office may reasonably require.

(3) Requirements

Each application under paragraph (2) shall include--

(A) a request for funds for the purposes described in this section;

(B) a description of the schools and communities to be served by the grants; and

(C) assurances that Federal funds received under this section shall be used to supplement, not supplant, non-Federal funds.

(4) Comprehensive plan

Each application shall include a comprehensive plan that contains--

(A) a description of the hate crime or conflict problems within the schools or the community targeted for assistance;

(B) a description of the program to be developed or augmented by such Federal and matching funds;

(C) assurances that such program or activity shall be administered by or under the supervision of the applicant;

(D) proper and efficient administration of such program; and

(E) fiscal control and fund accounting procedures as may be necessary to ensure prudent use, proper disbursement, and accurate accounting of funds received under this section.

(c) Award of grants

(1) Selection of recipients

The Secretary shall consider the incidence of crimes and conflicts motivated by bias in the targeted schools and communities in awarding grants under this section.

(2) Geographic distribution

The Secretary shall attempt, to the extent practicable, to achieve an equitable geographic distribution of grant awards.

(3) Dissemination of information

The Secretary shall attempt, to the extent practicable, to make available information regarding successful hate crime prevention programs, including programs established or expanded with grants under this section.

(d) Reports

The Secretary shall submit to the Congress a report every two years which shall contain a detailed statement regarding grants and awards, activities of grant recipients, and an evaluation of programs established under this section.

State Criminal Hate Crime Statutes⁹

Alabama: Ala.Code §13A-5-13 (establishes additional penalties for offenses motivated by the victim's actual or perceived race, color, religion, national origin, ethnicity, or physical or mental disability);

Alaska: Alaska Stat. §12.55.155(c)(22) (fact that the offense was committed because of the victim's race, sex, color, creed, physical or mental disability, ancestry, or national origin must be considered when imposing a felony sentence);

Arkansas: Ark.Code Ann. §16-90-804(d)(2)(B)(aggravating sentencing factors include the fact that the offender should have known the victim was vulnerable or incapable of resistance due to disability or ill health);

⁹ Every state, under one name or another, outlaws murder, assault, rape, kidnapping, arson, and property damage regardless of the motive for which it is committed; most also proscribe attempts and conspiracies these offenses. The citations here refer to those additional measures enacted to penalize hate crimes specifically.

By virtue of *Apprendi v. New Jersey*, 530 U.S. 466 (2000), any fact (such as racial animus) other than recidivism necessary to enhance an offender's sentence beyond the maximum sentence prescribed for the crime absent that fact (e.g., murder, assault, or arson) must be presented to the jury and proved beyond a reasonable doubt.

Arizona: Ariz.Rev.Stat. Ann. §§13-702.C.14; 41-1750.A.3 (the fact the defendant committed the crime out of malice towards the victim's race, color, religion, national origin, sexual orientation, gender or disability is an aggravating factor for sentencing purposes);

Ariz.Rev.Stat. Ann. §13-1604 (aggravated criminal damage includes desecration in a cemetery, mortuary or other burial or memorial facility);

California: Cal.Penal Code §§422.6, 422.7 (outlaws the use of force to injure, intimidate, threaten, or the damage the property of another in the exercise of federal rights because of the victim's actual or perceived race, color, religion, ancestry, national origin, disability, gender, or sexual origination);

Cal.Penal Code §§422.75 (outlaws commission of a felony based on the victim's actual or perceived race, color, religion, nationality, country of origin, ancestry, disability, gender, or sexual orientation)

Cal.Penal Code §11413 (proscribes bombing or burning public or private property because of the race, color, religion, ancestry, national origin, disability, gender, or sexual orientation of the occupant or owner);

Cal.Penal Code §1170.75 (declares commission or attempted commission of a felony because of the actual or perceived race, color, religion, ancestry, national origin, disability, gender, or sexual orientation of the victim an aggravating circumstances for sentencing purposes);

Colorado: Colo.Rev.Stat. Ann. §18-9-121 (bans ethnic intimidation, i.e., causing or threatening to cause bodily injury or property damage because of the victim's actual or perceived race, color, ancestry, religion, or national origin);

Connecticut: Conn.Gen.Stat. Ann. §53-37b (condemns the use of force or threat for the purpose of depriving another of the equal protection, privileges and immunities of federal or state law);

Delaware: Del.Code Ann. tit. 11 §1304 (enhances the penalties imposed for offenses committed because of the victim's race, religion, color, disability, sexual orientation, national origin, or ancestry);

Florida: Fla.Stat. Ann. §775.085 (enhances the penalties imposed for offenses committed because of the victim's race, color, ancestry, ethnicity, religion, sexual orientation, national origin, mental or physical disability, or advanced age);

Georgia: Ga.Code Ann. §17-10-17 (enhances the penalties imposed for offenses motivated by bias or prejudice);

Hawaii: Haw. Rev.Stat. §706-662 (the fact the victim of a crime of violence is blind, a paraplegic or a quadriplegic is an aggravating factor for sentencing purposes);

Haw.Rev.Stat. §711-1107 (prohibits desecration of a place of worship or burial);

Idaho: Idaho Code §18-7902 (criminalizes causing or threatening to cause bodily injury or property damage because of the victim's race, color, religion, ancestry, or national origin);

Illinois: Ill.Comp.Stat. Ann. ch.720, §5/¶12-7.1 (outlaws hate crimes, i.e., the commission of any a specified list of crimes of violence committed by reason of the victim's actual or perceived race, color, creed, religion, ancestry, gender, sexual orientation, physical or mental disability, or national origin);

Ill.Comp.Stat. Ann. ch.730, §5/¶5-5-3.2 (classifications as an aggravating factor for sentencing purposes the fact that a crime was committed by reason of another's actual or perceived race, color, creed, religion, ancestry, gender, sexual orientation, physical or mental disability, or national origin);

Indiana: Ind.Code Ann. §35-38-1-7.1 (the fact that the victim was mentally or physically infirm is an aggravating factor for sentencing purposes);

Ind.Code Ann. §35-43-1-2 (prohibits desecration of a place of worship or burial);

Iowa: Iowa Code Ann. §§729A.2, 712.9, 708.2C, 716.6A (establishes enhanced penalties for arson, assault or criminal mischief committed because of the victim's race, color, religion, ancestry, national origin, political affiliation, sex, sexual orientation, age, or disability);

Kansas: Kan.Stat.Ann. §44-1027 (forbids the use of force or the threat of force to injure, intimidate or interfere with another because of the victim's race, religion, color, sex, disability, familial status, national origin, or ancestry);

Kan.Stat.Ann. §21-4003 (prohibits the denial of another's civil rights because of the victim's race, color, ancestry, national origin or religion);

Kan.Stat.Ann. §21-4716 (includes among the aggravating factors that may be considered at sentencing include the fact that the offense was motivated by the victim's race, color, religion, ethnicity, national origin or sexual orientation);

Kentucky: Ky.Rev.Stat.Ann. §532.031 (creates a hate crime offense punishable when one of a designated list of violent felonies is committed because of the victim's race, color, religion, sexual orientation, or national origin);

Louisiana: La.Rev.Stat.Ann. §14:107.2 (proscribes the commission of any of list of specifically identified violent felonies based on the victim's actual or perceived race, age, gender, religion, color, creed, disability, sexual orientation, national origin, ancestry, or organizational affiliations);

Maine: Me.Rev.Stat.Ann. tit.17 §§2931, 2932 (it is unlawful to use force or the threat of force to injure, intimidate or interfere with another's exercise of any right of privilege secured by federal or state law);

Me.Rev.Stat.Ann. tit.17-A §1151.8.B (the fact a victim was select for the commission of an offense because of the victim's race, color, religion, sex, ancestry, national origin, physical or mental disability or sexual orientation is an aggravating factor for sentencing purposes);

Maryland: Md.Code Ann. art.27, §37 (outlaws the use of force to injure, intimidate, or threaten another because of the victim's race, color, religion, sex, disability, marital status, familial status, or national origin);

Md.Code Ann. art.27, §470A (outlaws the destruction of property motivated by animosity towards the victim's race, color, religious beliefs, or national origin);

Massachusetts: Mass.Gen.Laws Ann. c.265 §39 (condemns assault, battery or property destruction committed with the intent to intimidate because of the victim's race, color, religion, national origin, sexual orientation, or disability);

Mass.Gen.Laws Ann. c.265 §37 (proscribes the use of force or threat of force to injury, intimidate, or interfere with another's exercise of rights or privileges under federal or state law);

Michigan: Mich.Comp.Laws Ann. §750.147b (makes ethnic intimidation a crime when the offender injures, threatens or damages the property of another because of the victim's race, color, religion, gender, or national origin);

Minnesota: Minn.Stat.Ann. §§609.2231, 609.595 (sets the penalties for assaults and property damage higher when those offenses are committed because of the victim's race, color, religion, sex, sexual orientation, disability, age, or national origin);

Mississippi: Miss.Code Ann. §99-19-307 (increases the penalties for crimes committed by reason of the actual or perceived race, color, ancestry, ethnicity, religion, national origin or gender of the victim);

Missouri: Mo.Ann.Stat. §557.035 (creates a separate offense for various violent felonies motivated by the race, color, religion, national origin, sex, sexual orientation, or disability of the victim);

Montana: Mont.Code Ann. §§45-5-221, 45-5-222 (outlaws malicious intimidation or harassment relating to civil or human rights, i.e., committed because of the victim's race, creed, religion, color, national origin, or involvement in civil rights or human rights activities; and otherwise provides for a sentence enhancement for crimes committed because of the victim's race, creed, religion, color, national origin, or involvement in civil rights or human rights activities);

Nebraska: Neb.Rev.Stat. §28-111 (punishes more severely any of group of specifically designated crimes when committed because of the victim's race, color, religion, ancestry, national origin, gender, sexual orientation, age, disability);

Nevada: Nev.Rev.Stat. §§193.1675, 207.185 (supplements additional penalties for any of a list of violent felonies when committed because of the victim's race, color, religion, national origin, physical or mental disability or sexual orientation);

New Hampshire: N.H.Rev.Stat. Ann. §354-B:4 (violation of an order enjoining civil rights violations is a class A misdemeanor);

New Jersey: N.J.Stat. Ann. §2C:44-3 (authorizes an extended term of imprisonment if the defendant's crime was committed to intimidate an individual or group of individuals because of race, color, gender, handicap, religion, sexual orientation, or ethnicity);

New Mexico: N.Mex.Stat. Ann. §30-15-4 (prohibits desecration of a church);

New York: N.Y.Penal Law §§240.31, 240.30 (punishes as aggravated harassment in the first degree harassment motivated by the victim's race, color, religion, or national origin);

North Carolina: N.C.Gen.Stat. §14-401.14 (causing injury or damage or threatening to do so because of the victim's race, color, religion, nationality, or country of origin is a class 1 misdemeanor);

N.C.Gen.Stat. §14-3 (increases the penalty classification for crimes committed because of the victim's race, color, religion, nationality, or country of origin);

N.C.Gen.Stat. §15A-1340.16 (commission of an offense because of the victim's race, color, religion, nationality, or country of origin is an aggravating factor that may provide a basis from the presumed sentence under the sentencing guidelines);

North Dakota: N.D.Cent.Code §12.1-14-05 (outlaws hindering or preventing another's exercise of his civil rights);

Ohio: Ohio Rev.Code Ann. §2927.12 (makes the commission of various designated offenses by reason of the victim's race, color, religion, or national origin punishable at next higher degree of the predicate offense);

Oklahoma: Okla.Stat. Ann. tit.21 §850 (malicious intimidation because of race, color, religion, ancestry, national origin or disability is a misdemeanor offense);

Oregon: Ore.Rev.Stat. §§166.155, 166.165 (proscribes injuries, property damage, or threats motivated by the victim's perceived race, color, religion, national origin, or sexual orientation);

Pennsylvania: Pa.Stat. Ann. tit.18 §2710 (bans ethnic intimidation that involves the commission of various property damage or harassment offenses because of the victim's race, color, religion, or national origin);

Rhode Island: R.I.Gen.Laws §12-19-38 (the Hate Crime Sentencing Act increases the penalties for offenses attributable to the animus toward the victim's actual or perceived disability, religion, color, race, national origin or ancestry, sexual orientation, or gender);

South Carolina: S.C.Code Ann. §16-5-10 (condemns civil rights conspiracies committed with the intent to injure, oppress, or violate the person or property of another because of the victim's political opinion or express or to otherwise hinder or prevent the victim from the free exercise or enjoyment of any right secured by federal or state law);

South Dakota: S.D.Cod.Laws Ann. §22-19B-1 (forbids causing injury or damage or threatening to do so with the intent to intimidate or harass another because of the victim's race, color, religion, ancestry, or national origin);

Tennessee: Tenn.Code Ann. §39-17-309 (bans civil rights intimidation: intimidating others from exercising their civil rights by force, threat or property damage);

Texas: Tex.Penal Code Ann. §12.47, Tex.Code Crim.P. Ann. art. 42.014 (increases the penalties for crimes committed because of the defendant's bias or prejudice against a group);

Utah: Utah Code Ann. §76-3-203.3 (makes it a separate crime to commit of the specifically identified offenses with the intent to intimidate or terrorize another to discourage the victim's exercise of a right secured by state or federal law);

Vermont: Vt.Stat. Ann. tit.13 §1455 (enhances the penalties for offenses committed motivated by the victim's actual or perceived race, color, religion, national origin, sex, ancestry, age, service in the armed forces of the United States, handicap, sexual orientation, or gender identity);

Virginia: Va.Code Ann. §§18.2-57, 18.2-121 (increases the penalties for assault and battery and entry with intent to do property damage if committed because of the race, religious conviction, color or national origin of the victim);

Washington: Wash.Rev.Code Ann. §9A.36.080 (bans causing injury, property damage, or threats because of a perception of the victim's race, color, religion, ancestry, national origin, gender, sexual orientation, or mental, physical, or sensory handicap);

West Virginia: W.Va.Code §61-6-21 (proscribes the use of force or threat of force to injury, intimidate, or interfere with another's exercise of rights or privileges under federal or state law);

Wisconsin: Wis.Stat. Ann. §939.645 (makes it a separate crime to commit any of list of designated offenses because of victim's actual or perceived race, religion, color, disability, sexual orientation, national origin, or ancestry);

Wyoming: Wyo.Stat. §6-9-102 (outlaws denial of the right to life, liberty, pursuit of happiness, or the necessities of life because of race, color, sex, creed, or national origin).