M E M O R A N D U M

TO: Members of Congress

FROM: Glen Lavy

RE: H.R. 1592

DATE: April 20, 2007

The ACLU recently sent a letter to the House of Representatives urging Representatives to sponsor the Local Law Enforcement Hate Crimes Prevention Act of 2007, H.R. 1592. In that letter the ACLU argued that federal legislation is needed because of a persistent problem of criminal civil rights violations, and asserted that H.R. 1592 provides strong protection of free speech. We strongly disagree with the ACLU's assertion that there is a persistent problem of criminal civil rights violations that needs to be addressed by federal legislation. We also disagree that the proposed legislation provides adequate protection of free speech.

As discussed below, H.R. 1592 is a discriminatory measure that criminalizes thoughts, feelings, and beliefs, and provides greater protection to some victims than others simply because of a status, whether chosen or inherent. The bill has the potential of interfering with religious liberty and freedom of speech as proposed, and creates additional risks for the future. The redundant nature of the federal "hate" crime law established by H.R. 1592 and the de minimis number of violent "hate" crimes against persons, as demonstrated below, militate against this legislation. Congress should be wary of addressing the small "problem" of "hate" crimes in view of the potential negative impact the legislation may have on religious liberty and freedom of speech.

H.R. 1592 Is a Discriminatory Measure that Targets Thoughts

H.R. 1592 discriminates unfairly on behalf of certain privileged classes of victims. It provides a federal remedy for an elderly woman who is mugged while being berated for being a Jew, but not for an elderly Muslim woman mugged a block away by the same person, without any expression of bias. It provides for federal prosecution when a man in a wheel chair is attacked by teens jeering at his disability, but not for a man who is attacked because he is bald (unless baldness has become a disability). It provides a federal remedy for a person who is attacked for promoting homosexual relationships, but not for a person who is attacked for encouraging people to stop engaging in homosexual behavior because it is physically and psychologically harmful. Worse yet, it provides for federal prosecution of a murderer who spews racial epithets at the victim, but not for a cold-blooded killer that is paid to commit the crime. There is no justification for this disparate treatment. Violent crimes should be punished regardless of the characteristics of the victim.

The emotion of hate is an unfortunate reality of the human experience. But it is not a crime unless accompanied by a criminal action – and even then it is the *action* that is within the police power of the government, not the *emotion*. The reality is that "hate" crime laws are designed to punish people for what they think, feel, or believe. That intent is diametrically opposed to the U.S. Supreme Court's statement in *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 642 (1943): "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." "Hate" crime laws are an effort to enforce the orthodoxy of political correctness.

The motive-based analysis for "hate" crimes is substantively different than the intent-based analysis for murder. The difference in first degree murder, second degree murder, voluntary manslaughter, and involuntary manslaughter has nothing to do with the way the perpetrator "thought," "felt," or "believed" about the victim – it has everything to do with whether the perpetrator intended the result.[1] In contrast, "hate" crime legislation has everything to do with what the offender thinks, feels, or believes about the victim, regardless of whether the perpetrator intended the result. For example, if three young men commit a violent crime against a Muslim whom they accuse of being a terrorist, they can be prosecuted for a federal hate crime under H.R. 1592 regardless of how badly they hurt the person or even how badly they intended to hurt the person. If the same three young men are paid to commit the same violent crime, there would be no prosecution under H.R. 1592. The only difference is how they felt about the victim.

H.R. 1592 Is an Infringement on Speech and Religious Freedom

The legitimate concern that many have regarding the creation of a federal "hate" crime law is that it may ultimately be used to punish the public expression of religious beliefs. True, the current version makes only violent crimes against persons a federal offense. However, it incorporates the definition of "hate crime" from section 280003(a) of the Violent Crime Control and Law Enforcement Act of 1994 (28 U.S.C. § 994 Note). See H.R. 1592 section 3(2). That definition

[1]If a man plans a murder, he will be guilty of first degree murder regardless of how he felt about the victim. The only way the feelings of the perpetrator – the motives – become relevant is when there is a question of whether the defendant is the person who actually committed the murder. ("Motive" is circumstantial evidence that the defendant may be the murderer.) The mental state analysis for which degree of murder is at issue is whether the person who committed the murder did so purposely, knowingly, or recklessly.

is not limited to crimes of violence. It states that a "'hate crime' means a crime in which the defendant intentionally selects a victim, or in the case of a property crime, the property that is the object of the crime, because of the actual or perceived race, color, religion, national origin, ethnicity, gender, disability, or sexual orientation of any person." There is a legitimate concern that once Congress makes any "hate" crime a federal offense, the categories of crime will expand to include speech that causes someone to "feel" intimidated, just as they have in other places such as Australia, Canada, and Sweden.[2]

Moreover, the evidentiary provision in H.R. 1592 does not necessarily preclude evidence of speech and association as "other bad acts" evidence under the Federal Rules of Evidence. New 18 U.S.C. § 249(d) would prohibit the use of evidence of expression or association as "*substantive* evidence at trial, unless the evidence specifically relates to that offense." (Emphasis added.) However, other bad acts under Federal Rule of Evidence 404(b) may not be admitted as "substantive" evidence, but may be admitted to prove "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident . . . ." In addition, prosecutors are given great

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[2]In Australia, two men were prosecuted for a "hate crime" because they held a seminar to educate Christians about Muslim beliefs. "Landmark Ruling Puts Freedom of Speech in Focus," Christianity Today, December 1, 2004 (see www.ctlibrary.com/ct/2004/decemberweb-only/12-20-33.0.html). In Canada, multiple persons have been convicted under a law criminalizing as "hate propaganda" any speech that is critical of homosexual behavior. However, extreme hostility toward religious objections to homosexual behavior are permissible. See Kevin Bourassa and Joe Varnell, "Purging Toxic Religion in Canada: Gay Marriage Exposes Faith-Based Bigotry," January 18, 2005 (see http://www.samesexmarriage.ca/equality/toxic180105.htm). And in Sweden a pastor was convicted by a trial court and sentenced to jail time for a hate crime after preaching a sermon in which he spoke of the obligation of Christians to love persons involved in the sexual immorality of homosexual behavior. "Swedish Minister Jailed for 'Anti-Gay' Speech," Catholic World News, July 6, 2004. The pastor was ultimately exonerated by the Swedish Supreme Court, but only after an extensive appeal process. (See http://www.alliancedefensefund.org/news/story.aspx?cid=3606.)

leeway in the scope of impeachment of a defendant on cross-examination. *Doyle v. Ohio*, 426 U.S. 610, 617 n.7 (1976). Therefore, it is likely that a great deal of evidence of a defendants' statements, associations, and support of organizations could be presented to a jury in connection with a prosecution under the proposed federal hate crime statute.

Despite the limitation of the new federal offenses to violent crimes against persons, H.R. 1592 could be construed not to limit federal *prosecution* to violent "hate" crimes. Although not the most likely construction, section 4 of the Act could arguably authorize the Attorney General to prosecute violations of non-violent state or local "hate" crime laws at the request of local officials.[3] That would be extremely problematic because some existing state and local "hate" crime laws make "simple assault" or "intimidation" prosecutable offenses. For example, New Jersey law makes it a "hate crime" to communicate in a manner likely to cause annoyance or alarm. N.J.S.A. §§ 2C:16-1(a), 2C:33-4. Washington law makes it a crime to "Threaten[] a specific person or group of persons and place[] that person . . . in reasonable fear of harm to person or property. . . . For purposes of this section, a 'reasonable person' is a reasonable person who is a member of the victim's [category]." R.C.W.A. 9A.36.080(1)(c).

One would not expect a reasonable person to feel threatened or feel fear of harm as the result of an innocuous communication. Nevertheless, the entire faculty at Ohio State University's Mansfield campus apparently agreed that university librarian Scott Savage was guilty of threatening

[3]The issue is whether Section 4(a)(1) requires that subsections A, B, and C all be met before a federal prosecution may be requested, or whether "a violation of the State, local, or Tribal hate crime laws" is sufficient. Section 4(a)(1)(C). Even if the current Act is not intended to permit federal prosecution of non-violent state or local "hate" crimes, the ambiguity in Section 4 could lead a court to conclude that it does.

behavior for a simple statement in 2006. His "threat"? Recommending four books for freshman reading in his role as a member of OSU Mansfield's First Year Reading Experience Committee. The four books were *The Marketing of Evil* by David Kupelian, *The Professors* by David Horowitz, *Eurabia: The Euro-Arab Axis* by Bat Ye'or, and *It Takes a Family* by Senator Rick Santorum.

Three Mansfield professors filed complaints with OSU's Office of Human Resources asserting that the suggested reading list made them feel "unsafe" on the campus. The Mansfield faculty voted without dissent to file charges of sex discrimination and harassment against Mr. Savage because they believed the recommendations constituted "anti-gay hate mongering." The charges were not dismissed until the Alliance Defense Fund came to Mr. Savage's defense. If the faculty at OSU Mansfield are reasonable people, Mr. Savage's mere suggestion that freshmen read conservative books would qualify as a "hate" crime under Washington law, and perhaps under New Jersey law. And if H.R. 1592 were to be construed to permit federal prosecution of non-violent state or local "hate" crimes, he could be prosecuted by the U.S. Attorney General for suggesting the reading list in Washington or New Jersey.

Construing H.R. 1592 to transform any violation of a state or local "hate" crime law into an offense that can be prosecuted by the federal government would subject politically incorrect speech to federal prosecution. That is of particular concern where local officials have extreme animosity toward traditional values. For example, the San Francisco Board of Supervisors is on public record as saying that efforts to reach homosexuals with a message that change is possible is an expression

of hate.[4] If San Francisco chose to define the public expression of the belief that homosexual behavior is immoral and can be changed as a "hate" crime, it would be illegal for certain organizations to advertise events there. H.R. 1592 section 4(a)(1)(C), applied to non-violent crimes, would authorize the Attorney General to prosecute Focus on the Family in federal court at the City's request if Focus on the Family advertised a "Love Won Out" event in San Francisco.[5] Given the tenor of some San Francisco City Council resolutions over the past several years, that is not an unlikely scenario.[6]

Of course, under current First Amendment jurisprudence, persons prosecuted for committing hate crimes because of innocuous statements or politically incorrect public statements of religious beliefs have a free-speech defense. But that does not prevent the arrest and prosecution of the persons. In October of 2005 a group of Christians tried to protest at an "Outfest" on public streets in Philadelphia. Despite being harassed and intimidated by "Outfest" participants, the protestors were arrested and charged under Pennsylvania's "hate" crime laws with "ethnic intimidation," "riot,"

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[4] *American Family Ass'n, Inc. v. City and County of San Francisco*, 277 F.3d 1114, 1119 (9th Cir. 2002).

[5] See http://www.lovewonout.com.

[6] The San Francisco Board of Supervisors passed a resolution asserting that several organizations that seek to minister to persons who engage in homosexual behavior were responsible for Matthew Shepard's death, despite the fact that it is unlikely that his death was related to his homosexual behavior, and despite the fact that the organizations have never advocated violence. *American Family Ass'n, Inc. v. City and County of San Francisco*, 277 F.3d 1114, 1119-20 (9th Cir. 2002); "New Details Emerge in Matthew Shepard Murder," ABC News, November 26, 2004 (see http://abcnews.go.com/2020/story?id=277685).

and "conspiracy." Although the charges were ultimately dismissed (with Alliance Defense Fund assistance), they nevertheless had to go through the ordeal of arrest and prosecution.

Jihad Daniel, a student-employee at William Patterson University in New Jersey, was not as fortunate. The chair of the department of women's studies sent a university-wide e-mail invitation to view and discuss a film described as a "lesbian relationship story." In an e-mail to the professor only, Mr. Daniel asked that he not be copied on such e-mails in the future, and described lesbian behavior as "perversions." The professor filed a complaint with the university's Office of Employment Equity and Diversity accusing Mr. Daniel of violating a nondiscrimination policy because his e-mail "sound[ed] threatening." She said that she didn't want to "feel threatened at [her] place of work when [she] send[s] out announcements about events that address lesbian issues." Although Mr. Daniel raised a free speech defense, the New Jersey Attorney General opined that "clearly speech which violates a non-discrimination policy is not protected." The university placed a letter of reprimand in Mr. Daniel's employment file because of his violation of state discrimination and harassment regulations.[7] The reprimand was removed only after months of pressure by the Foundation for Individual Rights in Education.[8]

It is obvious that freedom of speech – in particular religious expression – is already under attack across America via nondiscrimination policies and "hate" crime laws. While mere speech is not currently included as a *federal* "hate" crime in H.R. 1592, there is a valid concern that a person could nevertheless be federally prosecuted when his or her speech violates a state or local "hate"

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[7]See FIRE press release, http://thefire.org/index.php/article/6119.html.

[8]See FIRE case materials, http://www.thefire.org/index.php/case/682.html.

crime or nondiscrimination law, either under H.R. 1592 or a future extension of it. The specter of federal prosecution for politically incorrect speech may not be a mere phantom if H.R. 1592 becomes law.

H.R. 1592 Is a Solution in Search of a Problem

State attorney generals are not clamoring for "hate" crime legislation. The proponents of "hate" crime legislation have not identified any crimes covered by H.R. 1592 that are not already subject to prosecution. Criminal civil rights violations based on race are already subject to federal prosecution. The alleged "persistent problem" of "hate" crimes is minuscule in proportion to violent crimes in general. And the reality is that the number of reported "hate" crimes is decreasing rather than increasing. The small proportion of violent crimes in America that are motivated by "hate" does not justify federal intervention, or the criminalizing of thoughts, beliefs, or speech.

According to the Federal Bureau of Investigation ("FBI"), the number of reported "hate" crimes is decreasing despite an increase in the number of agencies participating in reporting them. In 2004, there were 7,649 "hate" crimes, while in 2005, with more agencies reporting and a larger population covered by the reports, 7,163 "hate" crimes were reported. In reality, those statistics greatly exaggerate the problem because the vast majority of crimes against persons are crimes of "simple assault" or "intimidation." "Simple assault," which accounted for *thirty-two percent* of reported "hate" crimes against persons in 2004, means no serious injury occurred, and no weapon was used. "Intimidation," which accounted for *fifty percent* of reported "hate" crimes against persons in 2004, is simply the use of threatening words or conduct – that is, words or conduct that the alleged victim perceived as threatening. That leaves less than eighteen percent of alleged "hate"

crimes against persons that were actually violent crimes in 2004, for a total of 774.[9] Of those, five were murders, four were forcible rape, and 765 were aggravated assaults.

In context, the violent crimes against persons allegedly because of "hate" pales in comparison to the over-all figures.[10] There were a total of 1,367,009 violent crimes against persons in 2004, of which 774 were allegedly motivated by "hate." The FBI reported 16,137 murders in 2004, of which 5 were allegedly "hate" crimes; it reported 94,635 forcible rapes, of which 4 were allegedly "hate" crimes; and it reported 854,911 aggravated assaults, of which 765 were allegedly "hate" crimes. Overall, the FBI reported that 53.8% of "hate" crimes were motivated by the race of the victim, 16.4% were motivated by the religion of the victim, 15.6% were motivated by the sexual orientation of the victim, and 13.3% were motivated by the ethnicity of the victim. If those percentages apply to violent crimes against persons, in 2004 there were 416 violent crimes based on race, 127 based on religion, 121 based on sexual orientation, and 103 were motivated by ethnicity. To the extent that

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[9]It is noteworthy that the numbers reported represent *alleged* hate crimes, not *proven* hate crimes. That means the statistics include crimes like the murder of Matthew Shepard, which according to a 2004 ABC *20/20 Report*, was related not to his sexual orientation, but to the perpetrators' interest in money and drugs. "New Details Emerge in Matthew Shepard Murder," ABC News, November 26, 2004 (see http://abcnews.go.com/2020/story?id=277685). The 2007 statistics will likely include the recent natural death of Andrew Anthos, an elderly man in Michigan. Mr. Anthos' death was initially reported to be the result of a hate crime, but was later determined by the medical examiner that conducted his autopsy to be the result of natural causes. "Medical Examiner: Spinal Disease Killed Andrew Anthos," Detroit News, March 30, 2007 (see http://www.detnews.com/apps/pbcs.dll/article?AID=/20070330/METRO/703300308/1003). "Hate" crime advocates refuse to accept the physical evidence that there was no crime. *Ibid*.

[10]One violent crime is too many, of course. But adding a federal penalty to the existing state prohibition would not prevent any crimes; it would simply create privileged classes of victims. There is no correlation between the existence of "hate" crimes legislation and the number of reported "hate" crimes. The number of reported "hate" crimes is decreasing in jurisdictions with and without legislation.

the crimes involve civil rights violations, the crimes allegedly motivated by race could have been prosecuted under federal law pursuant to 18 U.S.C. § 245(b). That leaves only 358 violent crimes against persons, allegedly motivated by hate, that clearly are not already subject to federal prosecution. That is less than one in every 3,500 violent crimes. One or two of every 3,500 violent crimes in America does not justify federal intervention.

CONCLUSION

As James Jacobs and Kimberly Potter observed in *Hate Crimes, Criminal Law, and Identity Politics*, "It would appear that the only additional purpose [for enhancing punishment of bias crimes] is to provide extra punishment based on the offender's politically incorrect opinions and viewpoints." *Ibid*. at p. 128. H.R. 1592 is redundant, unnecessary, discriminatory, and antithetical to the principles embodied in the First Amendment. It is a denial of liberty and justice for all.