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Federal Hate Crimes Statute: An Unconstitutional Exercise of Legislative Power

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Every decent person abhors violent crimes that are motivated by prejudice or bias. Thus, the case for congressional legislation that would expand federal authority that already prohibits some "hate crimes"[1] may seem compelling. But the Local Law Enforcement Hate Crimes Prevention Act of 2009 (H.R. 1913, HCPA) is based on serious analytical and constitutional flaws and would actually be counterproductive to prosecuting violent crime.

The HCPA builds off of a powerful truth: Racially motivated violence is especially repugnant. The Fourteenth Amendment was enacted to ensure that no state would deny the equal protection of its laws. Yet there is no serious argument that any particular state does not enforce its civil and criminal laws against violence in an even-handed manner today. Indeed, 45 of the 50 states have enacted "hate crimes" statutes that increase the punishment for crimes of violence and intimidation that are motivated by bias.

A broad federal "hate crimes" law, however, raises unique concerns. In addition to going well beyond punishing crimes motivated by hatred, the HCPA would federalize violent, non-economic conduct that is truly local in nature and have little or no federal nexus. However politically expedient "hate crimes" legislation might seem, Congress simply lacks the constitutional power to enact HCPA's sweeping criminal offenses, and doing so would likely undermine state enforcement efforts—unless and until the statute is struck down.

A Sweeping Scope. The two new "hate crimes" offenses that HCPA creates cover violent conduct that should be punished criminally—as indeed it is under the laws of every state. In addition to general state criminal laws, 45 states have criminal statutes that impose harsher penalties for crimes that are motivated by bias.[2] Forty-four of these states impose stiffer penalties for violent conduct related to race, religion, or ethnicity,[3] and 31 states do so for violent conduct related to sexual orientation.[4] What are the benefits and problems resulting from such motive-based statutes remains an open question, but the overwhelming trend in the states has been to increase them in number and scope.

HCPA sweeps far more broadly than many state "hate crimes" statutes because neither of the two offenses in HCPA would actually require the government to prove that the accused was motivated by bias, prejudice, or hatred. Subsection 249(a)(1) merely states that the act must be "*because of* the actual or perceived race, color, religion, or national origin *of any person*," and subsection 249(a)(2) similarly states that the act must be "*because of* the actual or perceived religion, national origin, gender, sexual orientation, gender identity, or disability *of any person*."

This amorphous standard would federalize almost all incidents of violent crime, even those that

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have nothing to do with bias, prejudice, or animus toward the victim because of his or her membership in a particular group.[5] Virtually every sexual assault, for example, is committed "because of" the gender of the victim, the gender of the perpetrator, and the perpetrator's gender preferences. Many criminals target women or those with real or perceived disabilities, believing that such victims may offer less resistance. It is even possible that a defendant could be deemed a "hate crimes" offender if he engaged in the violent conduct "because of" his *own* religion, gender, or national origin in some way. Thus an enormous proportion of local violent crime would become federal "hate crimes."

An Unconstitutional Approach. Even more so than for run-of-the-mill federal "hate crimes" legislation, HCPA's sweeping scope raises serious constitutional concerns. Congress is a body of limited, enumerated powers. Unless the Constitution has granted Congress the power to legislate in an area, it cannot do so. Because the Constitution grants the federal government no general police power, Congress lacks the power to criminalize the vast majority of the violent, non-economic activity covered by the two principal criminal offenses in the HCPA.

The constitutional bases offered by HCPA's sponsors are unconvincing. Subsection 249(a)(2) purports to rely on Congress's Commerce Clause power—i.e., the power to "regulate commerce with foreign nations and among the several states." But the offense would apply to anyone who, "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." This describes quintessentially violent, non-economic activity that has nothing to do with interstate commerce.

To be sure, all conduct has some indirect or attenuated connection to interstate commerce, but such distant links are insufficient to bring conduct within Congress's commerce power. The Supreme Court has held that violent conduct that does not target economic activity is among the types of crime that have the least connection to Congress's commerce power.[6] Yet it is precisely this sort of violent, non-economic conduct that HCPA would federalize.

In an attempt to insulate this overreaching from constitutional challenge, the 249(a)(2) offense includes a list of factors, at least one of which must be satisfied. Although each of these factors requires the violent conduct, the perpetrator, or the victim to have *something* to do with commerce or interstate travel, the final factor, which permits a conviction if the activity merely "affects interstate commerce" in any attenuated manner, eviscerates any limitation. Though some activities that would be covered by the offense could indeed involve interstate commerce in a non-trivial manner, this does not distinguish the provision from those the Supreme Court struck down in *United States v. Lopez* (1995) and *United States v. Morrison* (2000). If this approach were permissible, Congress could claim to rely on

1. *See, e.g.*, 18 U.S.C. § 245(b).
2. Anti-Defamation League, State Hate Crime Statutory Provisions, *http://www.adl.org/99hatecrime/state_hate_crime_laws.pdf* (April 28, 2009).
3. *Ibid*. According to the ADL, Utah is one of the 45 states that have "hate crimes" statutes, but its statute "ties penalties for hate crimes to violations of the victim's constitutional or civil rights."
4. *Ibid.*
5. This approach is deliberate. *See* Jordan Blair Woods, "Taking the 'Hate' out of Hate Crimes: Applying Unfair Advantage Theory to Justify the Enhanced Punishment of Opportunistic Bias Crimes," 56 UCLA L. Rev. 489 (2008); New York v. Fox, 844 N.Y.S. 2d 627, 634-35, 640 (N.Y. Sup. Ct. 2007) (upholding, despite the absence of any allegation that the defendants were motivated by bias, prejudice, or hatred, the validity and constitutionality of a prosecution under a state "hate crimes" statute).
6. HCPA as introduced included "findings" purporting to link the conduct being criminalized to interstate commerce. But as the Court explained in *Morrison*, "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.'" United States v. Morrison, 529 U.S. 598, 614 (2000) (internal quotation marks omitted).

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the Commerce Clause and legislate any criminal law it wants.[7] When it comes to criminal law, Congress would no longer be a body of limited, enumerated powers but would have plenary power to criminalize any and all conduct that is already criminalized by the states.[8]

HCPA's second criminal offense does not specify on which enumerated constitutional power the bills' sponsors rely, but the original "findings" section, as well as some supporters, suggest reliance on the enforcement clauses of one or more of the Civil War amendments. Of the three, the Fourteenth Amendment provides Congress with the greatest power, but even it only prohibits *state* action, not private conduct unrelated to state action. While Congress clearly does have authority to punish state actors for racially discriminatory conduct and pass other civil rights statutes to ensure that states do not deny citizens the equal protection of their laws, the Supreme Court held in *Morrison* that the Fourteenth Amendment did not authorize a federal tort action against private individuals, not acting under color of law, who perpetrate violence against women.[9]

The Thirteenth Amendment, which gives Congress the power to eliminate "badges, incidents, and relics" of slavery and involuntary servitude, is also unavailing. The Supreme Court has written that Congress may legislate to remove such badges and incidents of slavery[10] but has never defined the purported scope of that power. It is not serious, however, to equate all violence that involves a member of an indentifiable group or a person with certain identifiable characteristics with a badge or relic of slavery. Further, by its very terms the HCPA would apply equally to violence against a white victim if the crime occurred "because of" his race. Whatever the Court might determine is the scope of the power to remove the relics of slavery today (and this power was much easier to conceptualize in 1883 when Congress could help remove the incidents of slavery from actual freed slaves), it cannot be so broad.

Finally, in a similarly unavailing attempt to insulate the bill from constitutional attack, HCPA would require the Justice Department to "certify" that contemplated prosecutions under its "hate crimes" offenses meet certain conditions, such as that the state in which the conduct occurred does not object to the federal usurpation of state authority and jurisdiction. But the unconstitutionality of a statute cannot be "cured" by a ministerial certification or by state acquiescence to an improper assertion of federal authority. Most states joined briefs supporting the purported need for the provision in the Violence Against Women Act that the Supreme Court properly struck down. The limits on Congress's powers were designed to protect the individual rights of national citizens, not the states *qua* states. In short, a state can no more acquiesce to and thereby cure a violation of constitutional federalism than the federal courts can acquiesce to and thereby cure a President's violation of the constitutional separation of powers.

Undermining State Enforcement Efforts. Violent crime is always a serious problem, but bad federal criminal laws such as those in the HCPA detract from effective law enforcement strategies. Congress must tread very carefully when bringing federal criminal law to bear on any problem at the state and local level. Federal criminal law should be used to

7. *See* United States v. Lopez, 514 U.S. 549, 564-66 (1995) (rejecting the government's claim that its "costs of crime" and "national productivity" rationales, which relied on attenuated economic effects of school gun violence, made the Gun-Free School Zones Act of 1990 a proper exercise of Congress's commerce power); Gonzales v. Raich, 545 U.S. 1, 25 (2005) (reaffirming that, in *Lopez*, the fundamentally "noneconomic, criminal nature of the conduct at issue was central to our decision" (internal quotation marks omitted)).
8. *Lopez*, 514 U.S. at 567-58 (explaining that a holding that attenuated economic effects could serve as a basis for Congress to exercise commerce power "would require us to conclude that the Constitution's enumeration of powers does not presuppose something not enumerated...and that there never will be a distinction between what is truly national and what is truly local" (internal citation omitted)).
9. *Morrison*, 529 U.S. at 626; *ibid.,* at 620-21 ("The Fourteenth Amendment, by its very terms, prohibits only state action.").
10. Civil Rights Cases, 109 U.S. 3 (1883). *See also* Jones v. Alfred H. Mayer Co., 392 U.S. 409, 440 (1968) (involving the removal of barriers to own property).

combat only those problems reserved to the national government in the Constitution. These include offenses against the federal government or its interests, responsibilities the Constitution expressly assigns to the federal government (such as counterfeiting), and commercial crimes with a substantial multi-state or international impact.

Federalizing yet another category of truly local conduct is almost certain to accelerate the ongoing erosion of state and local law enforcement's primary role in combating common street crime. Doing so invites serious unintended consequences, including the dilution of accountability among federal, state, and local law enforcement agencies.[11] The best way to combat violent crime (regardless of to which group or groups its perpetrators and victims belong) is to adhere to federalist principles that respect the proper allocation of responsibilities among national, state, and local governments.

Punishing Violent Conduct. The fact that the federal Constitution does not authorize Congress to address particular conduct does not mean that such conduct must be left unpunished. In the case of "hate crimes," the underlying violent conduct is punishable as a crime in every state, regardless of the motivation of the perpetrator or identity of the victim. Further, almost every state has adopted criminal offenses that increase the penalty for certain violent crimes deemed to be "hate crimes." Whether or not such enhancements are needed, they do not exceed the states' authority under the Constitution to criminalize violent, non-economic activity that is truly local in nature. And they do not undermine the ultimate responsibility and accountability of state and local officials to investigate and prosecute such crime.

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11. Rachel Brand, "Making It a Federal Case: An Inside View of the Pressures to Federalize Crime," Heritage Foundation *Legal Memorandum* No. 30, August 29, 2008, p. 5, at *http://www.heritage.org/Research /LegalIssues/lm30.cfm*.