Constitutional Limits on Hate Crime Legislation

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January 19, 2010

Congressional Research Service
7-....
www.crs.gov
RS22812

CRS Report for Congress
Prepared for Members and Committees of Congress

Summary

Federal and state legislators recognize the special concerns and effects of hate crimes. Although there is some federal legislation in place, many states have enacted some form of ethnic intimidation law or bias-motivated sentence-enhancement factors in attempts to curtail hate crimes. Several United States Supreme Court cases provide the framework in which states must legislate to ensure the constitutionality of hate crime legislation. After these landmark cases, the real questions for states involve identifying permissible ways to curtail hate crimes without infringing on any constitutionally protected rights. On the federal level, in light of U.S. Supreme Court cases, the question remains as to what extent Congress can broaden the classes of individuals subject to hate crime legislation. This report discusses constitutional considerations facing both individual states and Congress in enacting hate crime legislation. It will be updated as events warrant.

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Introduction

Concerns about hate crimes have become increasingly prominent among policymakers at all levels of government in recent years. A hate crime is defined as "[a] criminal offense against a person or property motivated in whole or in part by the offender's bias against a race, religion, disability, ethnic/national origin, or sexual orientation."[1] Congress has recognized the special concerns and effects of hate crimes by enacting several laws such as the Civil Rights Act of 1968,[2] the Hate Crimes Statistics Act of 1990,[3] and the Hate Crimes Sentencing Enhancement Act of 1994.[4] Current federal law permits prosecution of hate crimes committed on the basis of a person's race, color, religion, or national origin when engaging in a federally protected activity.[5] On October 28, 2009, the President signed the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act[6] into law. The law expands the scope of hate crime victims to include gender, sexual orientation, gender identity and disability. In addition, the law broadens the circumstances under which the federal government would assert jurisdiction to prosecute such crimes.[7]

In light of the United States Supreme Court decision in *United States v. Morrison*,[8] there are questions as to what underlying authority Congress may utilize to expand the scope of hate crimes to cover violence based on gender, sexual orientation, gender-identity and/or disability. The commerce clause, section 5 of the 14th Amendment, and section 2 of the 13th and 15th Amendments are the grants of power most often mentioned when discussing Congress's authority to proscribe hate crimes and to enact other forms of civil rights legislation.

Commerce Clause

Article I, Section 8, Clause 4 of the United States Constitution authorizes Congress to "regulate Commerce with foreign Nations, and among the several States." There are three categories of activities subject to congressional regulation under the commerce clause. Congress may regulate the use of the channels of interstate commerce,[9] or persons or things in interstate commerce, although the threat may come only from intrastate activities.[10] Finally, Congress may regulate those activities having a substantial relation to interstate commerce (i.e., those activities that substantially affect interstate commerce).[11]

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[1] 28 U.S.C. § 524.

[2] Codified in part at 18 U.S.C. §245 (defining "federally protected activities").

[3] 28 U.S.C. §534. This act requires the Justice Department to acquire data on hate crimes.

[4] Codified in part at 28 U.S.C. §994 (directing the United States Sentencing Commission to provide a sentencing enhancement of "not less than 3 offense levels for offenses that the finder of fact at trial determines beyond a reasonable doubt are hate crimes.").

[5] 18 U.S.C. § 245 (defining "federally protected activities" to include voting, attending school, etc.)

[6] P.L. 111-84, codified at 18 U.S.C. § 249.

[7] For an extended discussion of the law, see CRS Report RL33403, *Hate Crime Legislation*, by (name redacted).

[8] 529 U.S. 598 (2000).

[9] *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 256 (1964)(stating that "the authority of Congress to keep the channels of interstate commerce free from immoral and injurious uses has been frequently sustained.").

[10] *Southern R.Co. v. United States*, 222 U.S. 20 (1991) (upholding amendment to the Safety Appliance Act as applied to vehicles used in intrastate commerce).

[11] *See, United States v. Lopez*, 514 U.S. 549, 558-559 (1995) (citations omitted).

The Court narrowed the "affects interstate commerce" category with its decision in *Morrison* by rejecting the argument that Congress may regulate "non-economic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce."[12] In this case, the Court considered a suit brought by a former student of The Virginia Polytechnic Institute who alleged that two university football players raped her. The defendants and the university argued that the Violence Against Women Act, which allowed victims of gender-motivated violence to bring federal civil suits for damages, exceeded Congress's authority under the commerce clause. The Court agreed with the defendants despite the congressional findings that gender-motivated violence deterred interstate travel, diminished national productivity, and increased medical costs.[13] The Court concluded that upholding the Violence Against Women Act would open the door to federalization of virtually all serious crime as well as family law and other areas of traditional state regulation.[14] The Court said that Congress must distinguish between "what is truly national and what is truly local," and that its power under the commerce clause reaches only the former.[15] As such, it would appear that any attempts to broaden the scope of hate crime legislation tied to findings and the general nature and consequences of hate crimes under the commerce clause are constitutionally suspect. However, it would appear that hate crimes that involve interstate travel continue to be within the commerce clause's reach.

Reconstruction Amendments[16]

While the expansion of hate crime legislation may be suspect under the commerce clause, it may be within the scope of other legislative powers such as the legislative clauses of the 13th,[17] 14th, and 15th[18] Amendments.[19] The legislative clauses of the aforementioned amendments give Congress the power to enforce the Amendments by appropriate legislation. *Morrison* addresses the breadth of Congress's legislative power under section 5 of the 14th Amendment.[20] Under

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[12] 529 U.S. at 617 (stating that 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 he instrumentalities, channels, or good involved in interstate commerce has always been the province of the States.").

[13] *Id.* at 615.

[14] *Id.* at 615-16.

[15] *Id.* at 617-18.

[16] The Reconstruction Amendments are the 13th, 14th, and 15th Amendments to the U.S. Constitution. The 13th Amendment abolishes slavery. The 14th Amendment prohibits the states from denying equal protection of the law, due process, or the privileges and immunities of U.S. citizenship. The 15th Amendment forbids either the federal government or the states from denying or abridging the right to vote on the basis of an individual's "race, color, or previous condition of servitude."

[17] The 13th Amendment states that:

> 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.

[18] Section 1 of the 15th 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.

[19] U.S. Constitution Amendments XIII, Section 5, and XV, Section 2.

[20] Section 1 of the 14th amendment states that:

> 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 the citizens of the United States; nor

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section 5 the Congress is vested with "power to enforce, by appropriate legislation, the [Amendment's] provisions." However, in *Morrison,* the Court pointed out that state action, not private, is covered. As such, Section 5 does not authorize legislation "directed exclusively against the action of private persons, without reference to the laws of the state, or their administration by her officers."[21] Therefore, hate-driven denials by state officers or those acting under the color of law of equal protection or due process, or the right to vote fall within the scope of the legislative sections of the 14th and 15th Amendments. Conversely, it would appear that hate crimes committed by private individuals not acting under the color of law are beyond the scope of amendments.

However, Section 2 of the 13th Amendment may be a more viable option of broadening hate crime legislation. Unlike the 14th Amendment, the 13th Amendment proscribes slavery and involuntary servitude without reference to federal, state or private action. The Court has observed that "the varieties of private conduct that" Congress "may make criminally punishable ... extend far beyond the actual imposition of slavery or involuntary servitude ... Congress has the power under the 13th Amendment rationally to determine what are the badges and incidents of slavery, and the authority to translate that determination into effective legislation."[22]

Section 2 of the 13th Amendment envisions legislation for the benefit of those who bore the burdens of slavery and their descendants (race and/or color). But, it is unclear as to whether it is an appropriate authority for Congress to expand the range of victims of hate crimes (e.g., religion, national origin, etc.). Two questions come to mind: First, does violence based on bigotry constitute a "badge and/or incident of slavery?" Second, if so, must the remedial legislation be limited to the descendants of those for whose principal benefit the amendments were adopted?

In a series of cases, the Court has 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."[23] One could argue that due to the Court's decision in *Morrison* demonstrating a reluctance to expand Congress's use of the commerce clause to address gender-motivated violence, it is unclear as to whether the Court would consider the same violence as a "badge or incident of slavery" under the 13th Amendment.

However, the Court has not yet addressed the issue of how broad this congressional authority is. In construing the civil rights statutes enacted contemporaneously with the 13th, 14th, and 15th Amendments, the 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.[24] As this case addressed the issue of race, the question of whether religion can be used as a race indicator remains unanswered. In other words, would a Roman-Catholic, Methodist, or Episcopalian be

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> 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.

[21] *Id.* at 621.

[22] *Griffin v. Breckenridge*, 403 U.S. 88, 105 (1971) (quoting *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968)).

[23] *Civil Rights Cases*, 109 U.S. 3,11 (1883); *see also, Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 441 (1968) (stating that "[t]he Thirteenth 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 ..., as is enjoyed by white citizens.").

[24] *Saint Francis College v. Al-Khazraji*, 481 U.S. 604, 610-11 (1987).

considered a distinct "race" in the 19th century? As such, it is unclear as to whether this would be considered sufficient to embrace all religious discrimination.

Other Constitutional Limitations

There are other constitutional limits upon the manner in which Congress and/or states may enact hate crime legislation. The Court has considered constitutional challenges regarding state hate crime statutes under both the 1st and 6th Amendments.[25]

The 1st Amendment declares that "Congress shall make no law ... abridging the freedom of speech." The 14th Amendment's due process clause imposes the same restriction upon the states,[26] many of whose constitutions have a comparable limitation on state legislative action.[27] Under the 1st Amendment, the Court has decided several cases which provide the framework in which states must act to protect the constitutionality of hate crime legislation.

Generally, the constitutional distinction boils down to the difference between conduct and speech. If the statute's aim is to punish conduct, then it will generally be upheld;[28] however, if the intent behind the statute is to punish speech, thought, or expression, then courts are more apt to strike down the statute.[29] For example in *R.A.V. v. City of St. Paul*,[30] the Court struck down a local ordinance as being overbroad and because the regulation was "content-based," proscribing only activities which conveyed messages concerning particular topics. However, in *Wisconsin v. Mitchell*,[31] the Court found that a Wisconsin statute providing sentence enhancement for bias-motivated crimes did not violate a defendant's 1st Amendment right as the statute was directed towards the defendant's conduct and not expression. Most recently, in *Virginia v. Black*,[32] the Court found that the 1st Amendment permits a state to outlaw cross burnings done with the intent to intimidate because "burning a cross is a particularly virulent form of intimidation."[33] However, in a separate ruling, the Court found that the Virginia statute banning all cross burnings is facially invalid as it impermissibly shifts the burden of proof to the defendant to demonstrate that he or she did not intend the cross burning as intimidation.

[25] For a more extensive discussion of 1st Amendment considerations, refer to CRS Report RL34200, *Burning Crosses, Hangman's Nooses, and the Like: State Statutes That Proscribe the Use of Symbols of Fear and Violence with the Intent to Threaten*, by (name redacted) and (name redacted).

[26] *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 489 (1996); *Gitlow v. New York*, 268 U.S. 652, 666 (1925).

[27] E.g., LA. CONST. ART. I §7; MD. DECL. RTS. ART. 40.

[28] *See, Wisconsin v. Mitchell*, 508 U.S. 476 (1993) (finding that a state statute, which enhanced the punishment for an offense whenever the defendant selected the victim "because of the race, religion, color, disability, sexual orientation, national origin or ancestry" of the victim, did not violate the 1st Amendment because the statute was "aimed at conduct unprotected by the 1st Amendment.").

[29] *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992) (declaring local ordinance criminalizing the display on public or private property of an item known to arouse anger, alarm or resentment unconstitutional as it was "content based," only proscribing activities which conveyed messages concerning particular topics).

[30] *Id.*

[31] 508 U.S. 476 (1993).

[32] 538 U.S. 343 (2003).

[33] *Id.* at 363.

The 6th Amendment [34] also provides constitutional limits on hate crime statutes. The 6th Amendment provides defendants a right to a jury trial. In *Apprendi v. New Jersey*,[35] the Court struck down New Jersey's hate crime law, which allowed a judge to increase a sentence to double the statutory maximum if he or she found, by a preponderance of the evidence, that the defendant acted with a purpose to intimidate an individual or group of individuals because of race. In reversing the lower court's decision, the Court declared that the jury trial and notification clauses of the 6th Amendment and the due process clauses of the 5th and 14th Amendments embody a principle that insists that, except in the case of recidivists, a judge could not on his own findings sentence a criminal defendant to a term of imprisonment greater than the statutory maximum assigned for which he had been convicted by the jury. In other words, "other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."[36]

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Acknowledgments

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[34] The 6th Amendment states that:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

[35] 530 U.S. 466 (2000).

[36] *Id.* at 490.

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