

Testimony of
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June 25, 2009

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On Behalf of
Anti-Defamation League
and
The Leadership Conference on Civil Rights

Senate Committee on the Judiciary
Regarding S. 909
The Matthew Shepard Hate Crimes Prevention Act
June 25, 2009

On behalf of the Anti-Defamation League and the Leadership Conference on Civil Rights, I am pleased to provide testimony as the Senate Judiciary Committee conducts hearings on S. 909, the Matthew Shepard Hate Crimes Prevention Act (HCPA). This necessary legislation, long championed by Senator Edward Kennedy, with 43 current cosponsors, would eliminate gaps in federal authority to investigate and prosecute bias-motivated crimes. The House of Representative approved its very similar version of this legislation, H.R. 1913, the Local Law Enforcement Hate Crime Prevention Act, on April 29 by a vote of 249-175.

The Anti-Defamation League

Since 1913, the mission of ADL has been to "stop the defamation of the Jewish people and to secure justice and fair treatment to all citizens alike." Dedicated to combating anti-Semitism, prejudice, and bigotry of all kinds, defending democratic ideals and promoting civil rights, ADL is proud of its leadership role in the development of innovative materials, programs, and services that build bridges of communication, understanding, and respect among diverse racial, religious, and ethnic groups.

Over the past decade, the League has been recognized as a leading resource on effective responses to violent bigotry, conducting an annual Audit of Anti-Semitic Incidents, drafting model hate crime statutes for state legislatures, and serving as a principal resource for the FBI in developing training and outreach materials to assist in the implementation of the Hate Crime Statistics Act (HCSA), which requires the Justice Department to collect statistics on hate violence from law enforcement officials across the country.

The Leadership Conference on Civil Rights

LCCR is the nation's oldest, largest, and most diverse coalition of civil and human rights organizations. Founded in 1950 by A. Philip Randolph, Arnold Aronson, and Roy Wilkins,

LCCR works in support of policies that further the goal of equality under law through legislative advocacy and public education. Today the LCCR consists of more than 200 organizations representing persons of color, women, children, organized labor, persons with disabilities, the elderly, gays and lesbians, and major religious groups.

I. DEFINING THE ISSUE

1) The Impact of Hate Violence

All Americans have a stake in effective response to violent bigotry. These crimes demand priority attention because of their special impact. Bias crimes are designed to intimidate the victim and members of the victim's community, leaving them feeling fearful, isolated, vulnerable, and unprotected by the law. Failure to address this unique type of crime could cause an isolated incident to explode into widespread community tension. The damage done by hate crimes, therefore, cannot be measured solely in terms of physical injury or dollars and cents. By making members of minority communities fearful, angry, and suspicious of other groups - and of the power structure that is supposed to protect them - these incidents can damage the fabric of our society and fragment communities.

2) The Nature and the Magnitude of the Hate Crime Problem in America in 2009

The FBI has been tracking and documenting hate crimes reported from federal, state, and local law enforcement officials since 1991 under the Hate Crime Statistics Act of 1990 (HCSA). Though clearly incomplete, the Bureau's annual HCSA reports provide the best national snapshot of bias-motivated criminal activity in the United States. In 2007, the most recent report available, the FBI documented 7,624 hate crimes reported by over 13,200 law enforcement agencies across the country - nearly one hate crime every hour of every day. The importance of the Hate Crime Statistics Act and the findings of the Bureau's 2007 HCSA report are discussed more fully below. Last week, the Leadership Conference on Civil Rights Education Fund released a new report, *Confronting the New Faces of Hate: Hate Crimes in America 2009*. This report, included as Appendix A to this testimony, is comprehensive and excellent - the single best environmental scan of the issue available.

The report makes it clear that violence committed against individuals because of their race, religion, ethnicity, national origin, gender, gender identity, or sexual orientation remains a serious problem - and highlights a number of disturbing trends:

? The number of hate crimes committed against Hispanics and those perceived to be immigrants has increased each of the past four years for which FBI data is available - and hate crimes committed against individuals because of their sexual orientation has increased to its highest level in five years;

? The election of the first African-American President, a deep economic crisis, a broken immigration system, and faster, better means of communication among like-minded individuals comprise a perfect storm of grievances for extremists and hate group organizing;

? There has been an increase in harsh, hateful rhetoric against Hispanics, immigrants, and those who look like immigrants - and some in the mainstream media have contributed to the spreading of inflammatory anti-immigrant messages;

? The number of organized hate groups in America, including the increased use of the Internet and social networking sites to recruit new members continues to grow; and

? The governmental response to increasing bias crimes in other countries has been inadequate,

and the United States can play an important role internationally as a leader in crafting effective responses and prevention strategies.

The report emphasizes the importance of enactment of the Matthew Shepard Hate Crime Prevention Act and contains a series of recommendations for action by public officials, civic leaders, and the public.

3) Punishing Bias-Motivated Violence: The Framework for Hate Crime Laws

Criminal activity motivated by bias is distinct and different from other criminal conduct. These crimes occur because of the perpetrator's bias or animus against the victim on the basis of actual or perceived status - the victim's race, color, religion, national origin, sexual orientation, gender, gender identity, or disability is the reason for the crime. In the vast majority of these crimes, but for the victim's personal characteristic, no crime would occur at all.

Analogous to anti-discrimination civil rights laws. Hate crime laws are best viewed as a criminal justice system parallel to the thousands of federal, state, and local laws that prohibit invidious discrimination because of race or other identifying characteristic. In language, structure, and application, the majority of the nation's hate crime laws are directly analogous to anti-discrimination civil rights laws.

For example, Title VII of the Civil Rights Act of 1964, as amended, prohibits various discriminatory employment actions "because of" the employee or prospective employee's race, color, religion, sex, or national origin. One relevant section of the Fair Housing Act, 42 U.S.C. §3604 (a), prohibits interference with housing choices "because of [the victim's] race, color, religion, sex, familial status, or national origin." Further, a number of current federal criminal laws punish intentional discrimination on the basis of race, religion, or other characteristic. For example, by enacting 18 U.S.C. §242, the Reconstruction Era Congress made it a crime to deprive a person of constitutional rights "by reason of his color, or race" 18 U.S.C. § 245 makes it a crime to intentionally injure, intimidate, or interfere with any person's enjoyment of a federal right or benefit (or attempt to do so) "because of his race, color, religion, or national origin" and because the person is engaged in an enumerated federally-protected activity.

Like workplace and housing civil rights laws, the prohibited conduct under hate crime laws is the intentional selection of the victim for targeted, discriminatory behavior on the basis of the victim's personal characteristics.

Comparable to other status crimes. Many federal and state criminal laws provide different penalties for crimes depending on the victim's particular status. Virtually every criminal code provides enhanced penalties for crimes directed at the elderly, or the very young, or teachers on school grounds, or law enforcement officials. Legislators have legitimate and neutral justifications for selective protection of certain categories of victims - and enhanced criminal penalties - based on their judgment of the social harm these crimes cause.

Consistent with the First Amendment. The First Amendment does not protect violence - and it does not prevent the government from imposing criminal penalties for violent discriminatory conduct directed against victims on the basis of their personal characteristics. Hate crime laws do not punish speech. Americans are free to think, say, and believe whatever they want. It is only when an individual commits a crime because of those biased beliefs and intentionally targets

another for violence or vandalism that a hate crime statute can be triggered. In *Wisconsin v. Mitchell*, 508 U.S. 476 (1993), the U.S. Supreme Court unanimously upheld the constitutionality of the Wisconsin penalty-enhancement statute - effectively removing any doubt that state legislatures may properly increase the penalties for criminal activity in which the victim is intentionally targeted because of his/her race, religion, sexual orientation, gender, or ethnicity.

Deterrent Impact. Law enforcement officials have come to recognize that strong enforcement of these laws can have a deterrent impact and can limit the potential for a hate crime incident to explode into a cycle of violence and widespread community disturbances. In partnership with human rights groups and civic leaders, law enforcement officials have found they can advance police-community relations by demonstrating a commitment to be both tough on hate crime perpetrators and sensitive to the special needs of hate crime victims.

Punishment to fit the crime. Laws shape attitudes. Bigotry cannot be outlawed, but hate crime laws demonstrate an important commitment to confront and deter criminal activity motivated by prejudice. Hate crime laws - like anti-discrimination laws in the workplace - are color-blind mechanisms which allow society to redress a unique type of wrongful conduct in a manner that reflects that conduct's seriousness. Since hate violence has a uniquely serious impact on the community, it is entirely appropriate for legislators to acknowledge that this form of criminal conduct merits more substantial punishment.

II. THE CASE FOR S. 909, THE MATTHEW SHEPARD HATE CRIME PREVENTION ACT

1) Deficiencies in Existing Federal Criminal Civil Rights Statutes

S. 909, the Matthew Shepard Hate Crimes Prevention Act (HCPA), would establish a new federal criminal code provision, 18 U.S.C. §249. This section would complement an existing statute, 18 U.S.C. §245 - one of the primary statutes used to combat racial and religious bias-motivated violence. Enacted in 1968, 18 U.S.C. §245 prohibits intentional interference, by force or threat of force, with the enjoyment of a federal right or benefit (such as voting, going to school, or working) on the basis of race, color, religion, or national origin.

Under current law, the government must prove both that the crime occurred because of a person's membership in a protected group, such as race or religion, and because (not while) he/she was engaging in a federally protected activity. This unwieldy, overly-burdensome dual jurisdictional requirement has prevented the government from investigating and prosecuting a significant number of cases. In addition, federal authorities are currently unable to involve themselves in cases involving death or serious bodily injury resulting from crimes directed at individuals because of their sexual orientation, gender, gender identity, or disability.

The HCPA addresses both of these deficiencies. First, the legislation would eliminate the overly restrictive obstacles to federal involvement by permitting prosecutions without having to prove that the victim was attacked because he/she was engaged in a federally protected activity. Second, it would provide new authority for federal officials to work in partnership with state and local law enforcement authorities to investigate and prosecute cases in which the bias violence occurs because of the victim's actual or perceived sexual orientation, gender, gender identity, or disability.

The bill would give local law enforcement officials important tools to combat violent, bias-motivated crime. Federal support - through training or direct assistance grants - will help ensure that bias-motivated violence is effectively investigated and prosecuted. The legislation would also facilitate federal investigations and prosecutions when local authorities are unwilling or unable to act.

State and local authorities investigate and prosecute the overwhelming majority of hate crime cases - and will continue to do so after the HCPA is enacted. From 1991- 2007, for example, the FBI documented over 129,000 hate crimes. During that period, however, the Justice Department brought fewer than 170 cases under 18 U.S.C. § 245. Some crimes do merit federal involvement - for exactly the same reasons that Congress in 1968 determined that certain crimes directed at individuals because of "race, color, religion or national origin" required a federal remedy.

2) An Inadequate Patchwork of Laws: State and Federal Hate Crime Statutes

A. State Hate Crime Statutes

At present, forty-five states and the District of Columbia have enacted hate crime penalty-enhancement laws, many based on an ADL model statute drafted in 1981.

Currently, however, only thirty states and the District of Columbia include sexual orientation-based crimes in their hate crimes statutes; only twenty-six states and the District of Columbia include coverage of gender-based crimes; only twelve states and the District of Columbia include coverage of gender-identity based crimes, and only thirty states and the District of Columbia include coverage for disability-based crimes. And five states - Arkansas, Georgia, Indiana, South Carolina, and Wyoming - have no hate crime statute at all. A chart of state hate crimes statutory provisions is included at Appendix B.

The inability of the federal government to investigate some hate crime cases - or provide forensic expertise or other aid - has resulted in unequal justice and unequal access to federal investigative and prosecutorial assistance.

Three examples:

? In Greenville, South Carolina on May 21, 2007, Sean Kennedy, a gay man, died of injuries sustained after he was attacked outside a bar. While making derogatory comments regarding Kennedy's sexual orientation, the assailant beat and punched him until he fell, hitting his head on the pavement. The killer was originally charged with murder, but his charge was reduced to involuntary manslaughter. He was sentenced to five years in prison, which was suspended to only three years with credit for the seven months he had already served. He was also ordered to attend both anger management and drug/alcohol management classes. South Carolina is one of five states with no hate crime statute - and the Federal government had no authority to investigate whether justice was served in this sexual orientation hate crime case.

? The June, 1998 bias-motivated murder of James Byrd, Jr in Texas, and the October, 1998 bias-motivated murder of Matthew Shepard in Wyoming sparked national outrage and concern. The Federal government had jurisdiction to assist in the investigation of the race-based murder of James Byrd, Jr, (because the crime had occurred on a road used in interstate commerce) - and

appropriately provided over \$250,000 in Byrne Grants to assist in the case. Federal authorities, however, could not provide similar assistance for the sexual orientation-based murder of Matthew Shepard. According to the chief investigator in the case, the small Albany County Sheriff's Department was forced to furlough five law enforcement employees in order to pay for costs associated with the successful investigation and prosecution of that high-profile case.

? In September, 2003, Billy Ray Johnson, a mentally disabled black man, was taken to a party, ridiculed, called racial slurs, knocked unconscious, and then dumped by the side of the road by four white men. Johnson suffered permanent brain damage from the attack. Predominantly white juries acquitted the defendants of all serious charges. Three of the perpetrators received 30-day sentences, and the fourth received a 60-day sentence. The Southern Poverty Law Center brought a civil suit of behalf of Johnson against two of the perpetrators and won a \$9 million damage award in April, 2007. It is arguable that a federal criminal jury might have returned a guilty verdict had federal jurisdiction permitted such a prosecution.

The availability of expert federal hate crime assistance should not depend on the vagaries of the facts of a case, such as whether the attack occurs on a public highway, rather than in the private parking lot across the street.

B. Federal Hate Crime Statutes

In recent years, Congress has provided broad, bipartisan support for several federal initiatives to address hate violence. These initiatives have led to significant improvements in the response of the criminal justice system to bias-motivated crime. The HCPA builds on the foundation of these existing laws.

The Hate Crime Statistics Act (HCSA) (28 U.S.C. § 534)

Though a number of private groups and state law enforcement agencies track incidents of hate violence, the HCSA now provides the best national picture of the magnitude of the hate violence problem in America -- though still clearly incomplete. Enacted in 1990, the HCSA requires the Justice Department to acquire data on crimes which "manifest prejudice based on race, religion, sexual orientation, or ethnicity" from law enforcement agencies across the country and to publish an annual summary of the findings. President George H.W. Bush's signing statement for the Act from April 23, 1990 is eloquent:

Enacting this law today helps move us toward our dream: a society blind to prejudice, a society open to all. Until we reach that day when the bigotry and hate of mail bombings, and the vandalisms of the Yeshiva school and the Catholic churches we've seen recently, and so many other sad, sad incidents are no more -- until that day, we must remember: For America to continue to be a good place for any of us to live, it must be a good place for all of us to live.

http://bushlibrary.tamu.edu/research/public_papers.php?id=1791&year=1990&month=all

In the Violent Crime Control and Law Enforcement Act of 1994 (Public Law 103-322 September 13, 1994), Congress expanded coverage of the HCSA to require FBI reporting on crimes based on "disability."

Hate Crime Sentencing Enhancement Act (28 U.S.C § 994 Note)

Substantial opposition to the HCPA over the years has been based on the fact that the bill will expand federal criminal civil rights laws to include protection for crimes in which the victim is attacked because of his or her sexual orientation, gender, gender, identity, or disability. Yet the federal criminal code already contains an inclusive federal counterpart to state hate crime penalty-enhancement laws. These provisions, enacted as the Hate Crime Sentencing Enhancement Act, require the United States Sentencing Commission to increase the penalties for crimes in which the victim was selected "because of the actual or perceived race, color, religion, national origin, ethnicity, gender, disability, or sexual orientation of any person." This measure, while important, has limited utility, since it applies only to federal crimes, such as bias-motivated violence or vandalism that occurs on federal property, such as national parks.

The Church Arson Prevention Act (CAPA) (Public Law 104-155 July 3, 1996)

This measure was drafted to amend 18 U.S.C. § 247, a 1988 statute designed to provide federal jurisdiction for religious vandalism cases. Similar to the HCPA, a broad coalition of civil rights and religious groups and federal, state, and local law enforcement officials testified that the statute's restrictive interstate commerce requirement and its relatively significant damages threshold had been obstacles to federal prosecutions. Following hearings that documented a disturbing series of arsons at places of religious worship - especially African-American congregations - Congress unanimously voted to expand federal criminal jurisdiction to investigate and prosecute attacks against houses of worship, increase the penalties for these crimes, and authorized additional FBI and BATF investigators, DOJ prosecutors, and community conciliators.

3) Limited Jurisdiction for Federal Hate Crime Prosecutions

As drafted, the HCPA contains a number of appropriate, significant limitations on prosecutorial discretion. First, the bill's requirement of actual injury, or, in the case of crimes involving the use of fire, a firearm, a dangerous weapon, or any explosive device, an attempt to cause bodily injury, limits the federal government's jurisdiction to the most serious crimes of violence against individuals - not property crimes.

Second, for the proposed new categories - gender, gender identity, sexual orientation, and disability - federal prosecutors will have to prove an interstate commerce connection with the crime -- similar to the constitutional basis relied upon for the Church Arson Prevention Act in 1997.

Third, like 18 U.S.C. § 245, the HCPA contains a restrictive certification requirement:

“(b) Certification Requirement-

“(1) IN GENERAL- 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, or his designee, that--

“(A) the State does not have jurisdiction;

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

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

(D) a prosecution by the United States is in the public interest and necessary to secure substantial justice.

Federal prosecutors can be expected to continue to defer to state authorities under its expanded authority - a fact that has led virtually every major law enforcement organization in the country and the National District Attorneys Association to support this bill. But the HCPA will permit prosecutions of bias-motivated violence that might not otherwise receive the attention they deserve. Supporters of the HCPA know well that new federal criminal civil rights jurisdiction to address crimes directed at individuals because of their gender, gender identity, sexual orientation, or disability will not result in the elimination of these crimes. But the possibility of federal involvement in select cases, the impact of FBI investigations in others, and partnership arrangements with state and local investigators in still other cases, should prompt more effective state and local prosecutions of these crimes.

4) The Disturbing Prevalence of Hate Violence

In 2007 (the most current data available) there were 7,624 reported bias-motivated criminal incidents. Of the 7,624 total incidents, 3,870 were motivated by racial bias; 1,265 by sexual orientation bias; 1,007 by ethnicity/national origin bias; and 79 were reported to have occurred against disabled individuals. 1,400 (18.3%) of all reported crimes were motivated by religious bias. Of the incidents motivated by religious bias in 2007, 969 (69.2%) were directed against Jews and Jewish institutions. They accounted for 12.7% of the total number of reported hate crimes in 2007.

This data almost certainly understates the true number of hate crimes committed in our nation. Only 13,241 of the 17,000 law enforcement agencies in the United States participated in this data collection effort. And of those participating agencies, only 15.3% reported even a single hate crime.

Of special concern is the fact that reported crimes directed against Hispanics increased markedly - in a report in which virtually every other category of crime decreased. In fact, as previously mentioned, 2007 was the fourth straight year the FBI documented increased reported hate crimes against Hispanics. ADL recently documented a disturbing increase in the number of violent assaults against Hispanics, legal, and undocumented immigrants - and those perceived to be immigrants - by white supremacists and other far-right extremists in our report, "Extremists Declare 'Open Season' on Immigrants: Hispanics Target of Incitement and Violence." That report is available here: http://www.adl.org/main/Extremism/immigration_extremists.htm

Clearly these hate crime numbers do not speak for themselves. Behind each and every one of these statistics is an individual or a community targeted for violence for no other reason than race, religion, sexual orientation, disability, or national origin.

The FBI's 2007 HCSA report is available here:

<http://www.fbi.gov/ucr/hc2007/index.html>. A chart which compiles and details the findings from the annual FBI HCSA reports from 1997-2007 is included as Appendix C.

The HCSA has proved to be a powerful, if incomplete, mechanism to confront violent bigotry against individuals on the basis of their race, religion, sexual orientation, or ethnicity. For that

reason, the Anti-Defamation League and the Leadership Conference on Civil Rights especially welcome provisions in S. 909 that would mandate additional reporting requirements for hate crimes directed at individuals on the basis of their gender and gender identity - and for crimes committed by and against juveniles.

Very few states systematically collect statistics on these categories of hate crimes. Studies have demonstrated that victims are more likely to report a hate crime if they know a special reporting system is in place. Yet, studies by the National Organization of Black Law Enforcement Executives (NOBLE) and others have revealed that some of the most likely targets of hate violence are the least likely to report these crimes to the police. In addition to cultural and language barriers, some immigrant victims, for example, fear reprisals or deportation if incidents are reported. Many new Americans come from countries in which residents would never call the police -- especially if they were in trouble. Gay, lesbian, and transgender victims, facing hostility, discrimination, and, possibly, family pressures, may also be reluctant to come forward to report these crimes.

The history of the FBI's fine implementation of the HCSA, however, demonstrates that data collection efforts can spark increased public awareness of the problem and improvements in the local response of police and the criminal justice system to these crimes.

The legislation's proposed new data collection requirement for juvenile hate crime perpetrators and victims is also very important. There is a paucity of published information about juvenile hate crime offenders. The annual HCSA report does not provide specific information about either juvenile hate crime offenders or victims. An October 2001 report by the Justice Department's Bureau of Justice Statistics, however, provided disturbing information about the too-frequent involvement of juveniles in hate crime incidents.

This report, <http://www.ojp.usdoj.gov/bjs/abstract/hcrn99.htm> which carefully analyzed nearly 3,000 of the 24,000 hate crimes to the FBI from 1997 to 1999, revealed that a disproportionately high percentage of both the victims and the perpetrators of hate violence were young people under 18 years of age:

? 33% of all known hate crime offenders were under 18; 31% of all violent crime offenders and 46% of the property offenders.

? Another 29% of all hate crime offenders were 18-24.

? 30% of all victims of bias-motivated aggravated assaults and 34% of the victims of simple assault were under 18.

? 34% of all persons arrested for hate crimes were under 18; 28% of the violent hate crimes and 56% of the bias-motivated property crimes.

? Another 27% of those arrested for hate crimes were 18-24.

5) Support From a Very Broad Coalition of Groups

This legislation has been endorsed by more than 300 civil rights, professional, civic, educational, and religious groups, twenty-six state Attorneys General, former US Attorney General Dick Thornburgh, and virtually every major national law enforcement organizations in America, including:

- ? Federal Law Enforcement Officers Association
- ? Hispanic American Police Command Officers Association
- ? Hispanic National Law Enforcement Association
- ? International Association of Chiefs of Police
- ? International Brotherhood of Police Officers
- ? Major Cities Chiefs Association
- ? National Asian Peace Officers Association
- ? National Black Police Association
- ? National Center for Women & Policing
- ? National Coalition of Public Safety Officers
- ? National District Attorneys Association
- ? National Latino Police Officers Association
- ? National Organization of Black Law Enforcement Executives
- ? Police Executive Research Forum
- ? Police Foundation

The Committee has also received supportive sign-on letters from 44 women's organizations, 64 disability rights organizations associated with the Consortium for Citizens with Disabilities, and 47 religious and faith organizations.

Conclusion

The fundamental cause of bias-motivated violence in the United States is the persistence of racism, bigotry, homophobia, and anti-Semitism. Unfortunately, there are no quick, complete solutions to these problems. Complementing state hate crime laws and prevention initiatives, the federal government has an essential leadership role to play in confronting criminal activity motivated by prejudice and in promoting prejudice reduction initiatives for schools and the community. And effective responses to hate violence by public officials and law enforcement authorities can play an essential role in deterring and preventing these crimes. Ultimately, the impact of all bias crime initiatives will be measured in the response of the criminal justice system to the individual act of hate violence.

We urge the Senate to approve this important, long-delayed legislation as soon as possible.