



## **RELIGIOUS SPEECH AND “HATE CRIMES”**

*What your Church Needs to Know about the “Hate Crimes” Law*

On October 28, 2009, President Obama signed into law the “Mathew Shepard and James Byrd, Jr. Hate Crimes Prevention Act.” Many churches and pastors are concerned about the impact of this law on free speech and the free exercise of religion. While the passage of the “hate crimes” law signals a long term threat to religious freedom, pastors and churches should continue to speak the Truth boldly without concern and should not fear any immediate application of the “hate crimes” law to their speech.

### **1. Does the “Hate Crimes” Law Apply to a Pastor’s Sermon about Homosexual Behavior?**

No. The “hate crimes” law does not prohibit or censor a pastor’s speech. <sup>1</sup>By its terms, the law only applies to “hate crimes,” and it does not classify speech as a hate crime. The “hate crimes” law prohibits violence “because of the actual or perceived religion, national origin, gender, sexual orientation, gender identity, or disability of any person.” <sup>2</sup>Specifically, the law states:

Whoever . . . willfully causes bodily injury to any person or, through the use of fire, a firearm, a dangerous weapon, or an explosive or incendiary device, attempts to cause bodily injury to a person, because of the actual or perceived religion, national origin, gender, sexual orientation, gender identity, or disability of any person. . . <sup>3</sup>

The Hate Crimes Act goes on to define the term “bodily injury” by stating that, “the term ‘bodily injury’ has the meaning given such term in section 1365(h)(4) of this title, but *does not include solely emotional or psychological harm* to the victim.” <sup>4</sup>

The definition of bodily injury in 18 U.S.C. 1365(h)(4) states, “the term ‘bodily injury’ means-- (A) a cut, abrasion, bruise, burn, or disfigurement; (B) physical pain; (C) illness; (D) impairment of the function of a bodily member, organ, or mental faculty; or (E) any other injury to the body, no matter how temporary.” <sup>5</sup>This definition requires some form of physical trauma to the person and, coupled with the definition of bodily injury in the Hate Crimes Act, makes it clear that no prosecution will exist for any alleged injury that is merely psychological or emotional and is unaccompanied by any physical trauma.

In the long term, pastors and churches must be vigilant against attempts to expand the reach of the Hate Crimes Act to prohibit “bodily injury” that is really no injury at all. For example, an

---

<sup>1</sup> This would include not only speech from the pulpit, but also any witnessing opportunities an individual might attempt either in public places or privately with individuals.

<sup>2</sup> 18 U.S.C. §249 (a)(2)(A).

<sup>3</sup> 18 U.S.C. §249 (a)(2)(A).

<sup>4</sup> 18 U.S.C. §249 (c)(1) (emphasis added).

<sup>5</sup> 18 U.S.C. §1365 (h)(4).



individual may attempt to complain that a “hate crime” was committed because he heard a sermon condemning homosexual behavior that caused him to be ill. However, the term “bodily injury” has never been applied to such circumstances and was not intended to cover such circumstances.<sup>6</sup> Any attempt by an overzealous prosecutor to apply the Hate Crimes Act in circumstances like this, which really amount to no more than psychological or emotional injury at most, would be unconstitutional.

Therefore, in order for the Hate Crimes Act to be triggered, some form of physical violence must be accomplished against a person, and the violence must be done against the person “because of” the protected status of the person. Simply preaching a sermon or speaking the truth of Scripture about homosexual behavior, or the essence of who we are as a gendered species, does not trigger the terms of the Hate Crimes Act because there is no accompanying violence that causes bodily injury.

**2. Would a Pastor Violate the Hate Crimes Act if Someone Heard a Sermon about Homosexual Behavior or Gender and then Committed Violence?**

No. Simply because an individual hears a sermon regarding what Scripture or church doctrine teaches regarding sexual behavior and then commits a “hate crime” afterwards does not subject the church or pastor to criminal liability under the Hate Crimes Act. The same would also be true regarding a sermon on God’s creation of men and women and that surgery and drugs can never change one’s sex. According to the terms of the Hate Crimes Act, there must be physical violence directed against a person because of that person’s behavior in order for the Hate Crimes Act to be triggered.

**3. Would a Pastor or Church be Liable for “Conspiracy” to Commit a Hate Crime if Someone Heard a Sermon about Homosexual Behavior or Gender and then Committed Violence?**

No. A conspiracy is usually defined as an agreement between two or more persons to commit a crime. If a pastor preaches a sermon regarding what Scripture says about homosexual behavior, and one person who hears the sermon then commits a crime “because of” an individual’s “sexual orientation,” the pastor would not be liable for conspiracy to commit a “hate crime” because there is no “agreement” between two persons to commit a crime. All the pastor has done is to simply preach Scripture’s teaching on the matter.

In the long term, pastors and churches must be vigilant against an expansive definition of conspiracy that would encompass merely preaching a sermon. If a judge or prosecutor attempts to broadly apply the definition of conspiracy to cover a situation similar to the one described above,

---

<sup>6</sup> See e.g., *U.S. v. Steele*, 550 F.3d 693 (8th Cir. 2008) (Defendant jammed both thumbs into police officers’ eyes); *U.S. v. Gonzales*, 436 F.3d 560 (5th Cir. 2006) (detainees’ neck broken and pepper sprayed by officers); *U.S. v. Bailey*, 405 F.3d 102 (1st Cir. 2005) (detainee suffered multiple blows to head, shoulders, ribs, and thighs, and cried both before and after attack);



such an attempt would be unconstitutional as a violation of the pastor’s and church’s right to free speech and free exercise of religion.

#### **4. Doesn’t the Hate Crimes Act Contain Exemptions for Religious Speech?**

Yes. The hate crimes law contains two main exemptions that could apply to religious speech. The first exemption states:

Nothing in this division shall be construed to allow a court, in any criminal trial for an offense described under this division, or an amendment made by this division, in the absence of a stipulation by the parties, to admit evidence of speech, beliefs, association, group membership, or expressive conduct unless that evidence is relevant and admissible under the Federal Rules of Evidence. Nothing in this division is intended to affect the existing rules of evidence.<sup>7</sup>

This section seemingly protects against a prosecutor seeking to introduce evidence of a person’s church attendance or association with a religious group as evidence of bias against a particular victim. However, the evidence exclusion only works if the evidence is already impermissible under the Federal Rules of Evidence. Put simply, it is possible, even with this evidence exemption, for a prosecutor to use evidence of a person’s speech, sermons the person may have heard, a person’s church attendance, or other similar evidence, as a means of proving that a crime was committed “because of” a person’s protected status under the law. There is no other way of proving that a crime was committed, for example, “because of” a person’s “sexual orientation” without introducing evidence of what the perpetrator of the crime was thinking when the crime was committed. Thus, evidence of the perpetrator’s speech or associations may be offered in court, even with this evidence exemption.

The hate crimes law also contains a second exemption that states the following:

Nothing in this division, or an amendment made by this division, shall be construed or applied in a manner that infringes any rights under the first amendment to the Constitution of the United States.<sup>8</sup>

This section purports to protect First Amendment rights in any “hate crimes” prosecution, though it does not do anything beyond what the First Amendment already does. No law can violate the First Amendment regardless of whether Congress says that in the law or not. Therefore, while this exemption is good evidence of Congress’ sensitivity to First Amendment rights, in the end the exemption does not accomplish anything.

---

<sup>7</sup> Hate Crimes Law, §4710 (1).

<sup>8</sup> Hate Crimes Law, §4710 (3).



**5. What are the Long-Term Implications of the “Hate Crimes” Law on Freedom of Speech and Freedom of Religion?**

While it is important to know that the Hate Crimes Act should have no immediate impact on a pastor’s sermon from the pulpit or a church’s Scriptural teaching, there are some long-term implications of the Hate Crimes Act that churches and pastors must be vigilant and aware of in order to combat when and if they arise.

**A. Broad Interpretation of the Provisions of the Hate Crimes Act.**

As described above, pastors and churches should be vigilant and prepared to defend against any attempt to broadly construe the provisions of the Hate Crimes Act in a way that would violate freedom of speech or the free exercise of religion. Any attempt by a prosecutor or a court to interpret the phrase “bodily injury” in such a way as to allow application of the “hate crimes” law to perceived psychological or emotional injuries should be opposed as unconstitutional.

Likewise, any attempt to construct a “conspiracy” out of a pastor’s sermon that someone who commits a “hate crime” has heard must be opposed as unconstitutional.

**B. Introduction of Evidence of Religious Speech or Associations to “Prove” a “Hate Crime.”**

As noted above, a prosecutor or a court may attempt to introduce evidence of an alleged perpetrator’s beliefs, associations, religious attendance, or other similar evidence in order to prove that a crime was committed “because of” a person’s protected status under the law. Introduction of this evidence can take several forms, but one potential long-term implication of the Hate Crimes Act is that a prosecutor may attempt to call a pastor to testify as to what he preaches or his church believes about homosexual behavior. While it is questionable whether such evidence is even relevant to prove that a “hate crime” has been committed, should a pastor be called to testify in connection with a “hate crimes” prosecution, the pastor, and other churches and pastors who hear about it, may feel compelled to censor themselves or to chill their own speech and simply stay away from any discussion or teaching of what Scripture says about homosexual behavior. Requiring a church or pastor to testify in connection with a “hate crimes” prosecution can lead to widespread chilling of speech.

**C. The Implementation of Hate Speech Regulations.**

Virtually everywhere that hate crimes laws have been enacted, “hate speech” regulations follow. This is not surprising, considering the fact that “hate crimes” are enacted solely to send a governmental message of disapproval of certain beliefs. For example, the sole difference between an assault that is already a crime under the criminal law and an assault classified as a “hate crime” is the alleged belief of the perpetrator of the crime. Because an assault is already criminalized, enacting a



“hate crimes” law only serves the added purpose of trying to send a message of governmental disapproval of the purported beliefs of the perpetrator.

It is only a small step from the philosophical basis underlying “hate crimes” laws to the enactment of a “hate speech” regulation. “Hate speech” regulations have followed the enactment of “hate crimes” laws in places like Canada, Europe, and Australia, and those “hate speech” laws have been used to try to silence Christians and others who speak out against same-sex “marriage,” homosexual behavior, and other things that conflict with deeply-held religious beliefs. Additionally, many university campuses in the United States have enacted “hate speech” regulations. Any attempt to justify the enactment of a “hate speech” regulation by citing the previous enactment of a “hate crimes” law should be vigorously opposed.

## CONCLUSION

Pastors and churches have nothing to currently fear from the face of the newly-enacted Hate Crimes Act itself because the law does not apply to religious speech. While there is good reason to be concerned about the long-term implications of the Hate Crimes Act on free speech and freedom of religion, pastors and churches should continue to lovingly and boldly speak Scriptural truth without fear of punishment or censorship.

If you or your church have any additional questions about the impact of the Hate Crimes Act on your church and its ministry, please call Alliance Defending Freedom at (800) 835-5233.

**Disclaimer:** *The information contained in this document is general in nature and is not intended to provide, or be a substitute for, legal analysis, legal advice, or consultation with appropriate legal counsel. You should not act or rely on information contained in this document without seeking appropriate professional advice. By printing and distributing this guide, Alliance Defending Freedom, Inc. is not providing legal advice, and the use of this document is not intended to constitute advertising or solicitation and does not create an attorney-client relationship between you and Alliance Defending Freedom or between you and any Alliance Defending Freedom employee. For additional questions, call Alliance Defending Freedom at (800) 835-5233.*