

Crooks and Liars

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Fox's Napolitano fears hate-crimes law hurts free speech -- but ignores explicit language of bill

By David Neiwert

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Judge Andrew Napolitano sat in as the guest host yesterday on Glenn Beck's Fox News show, and featured a segment devoted to the notion that the hate-crimes legislation currently before the Senate might somehow be abused to undermine Americans' free-speech rights. His guest was David Rittgers of the Cato Institute.

There is, however, a problem right off the bat with their thesis: The bill in question -- [the Local Law Enforcement Hate Crimes Prevention Act](#) (LLEHCPA) -- contains specific language designed to ensure that the bill is never construed in such a fashion:

Nothing in this Act, or the amendments made by this Act, shall be construed to prohibit any expressive conduct protected from legal prohibition by, or any activities protected by, the Constitution.

Any honest discussion of this aspect of the legislation would have to bring this language into consideration -- but it's never mentioned by either Napolitano or Rittgers. Rittgers has [written about it at Cato](#) -- mostly objecting on the basis of concerns about federalism -- and similarly omits

any discussion of the bill's actual language (which also explicitly recognizes the primary role of the states and local jurisdictions).

Watch instead what Napolitano and Rittgers do in the course of this discussion: they bring in a totally unrelated piece of legislation -- [the "Megan Meier Cyberbullying Prevention Act"](#), which is indeed highly dubious from a constitutional point of view -- as though it were part and parcel of the same hate-crimes legislation issues -- even though the two laws have nothing to do with each other.

And then they return almost seamlessly to the federalism and double-jeopardy issues around the LLEHCPA -- Napolitano just refers briefly to "this legislation," but it's quickly clear they're discussing not the Megan Meier bill, which does not raise such issues, but rather the LLEHCPA. It's all so muddled up that anyone watching the show could easily conclude that they're somehow packaged together.

Moreover, the double-jeopardy problems -- as [we've explained in some detail](#) -- are largely nonexistent, or rather simply reflect the ongoing debate over "dual sovereignty doctrine," which involves many more issues than merely bias crimes.

The [ACLU strongly supports this bill](#), despite its usual concerns over double jeopardy, and if you look [the bill's actual language](#), you can see why:

‘(b) Certification Requirement- 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, the Deputy Attorney General, the Associate Attorney General, or any Assistant Attorney General specially designated by the Attorney General that--

‘(1) such certifying individual has reasonable cause to believe that the actual or perceived race, color, religion, national origin, gender, sexual orientation, gender identity, or disability of any person was a motivating factor underlying the alleged conduct of the defendant; and

‘(2) such certifying individual has consulted with State or local law enforcement officials regarding the prosecution and determined that--

‘(A) the State does not have jurisdiction or does not intend to exercise jurisdiction;

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

‘(C) the State does not object to the Federal Government assuming jurisdiction; or

‘(D) the verdict or sentence obtained pursuant to State charges left demonstratively unvindicated the Federal interest in eradicating bias-motivated violence.

It also contains this clause:

‘(e) Rule of Evidence- In a prosecution for an offense under this section, evidence of expression or associations of the defendant may not be introduced as substantive evidence at trial, unless the evidence specifically relates to that offense. However, nothing in this section affects the rules of evidence governing impeachment of a witness.’

This is why Caroline Frederickson, Director of the ACLU's Legislative Office, said this about it:

This bill has a provision, that has been in it since 2005, that has enabled the ACLU to support this legislation, because it does protect both civil rights and free speech and association. The bill specifically blocks evidence of speech and association that are not directly related to the crime.

That means that anyone saying we have unleashed the thought police, or thought crimes, is wrong.

... This bill will have the strongest protection against the misuse of a person's free speech that Congress has enacted in the entire federal criminal code.

Napolitano was obviously looking for a way to grind Glenn Beck's usual ax about "our rights" being "eroded" by the federal government. And he obviously didn't want to bother explaining the facts in order to do it.