
August 07, 2009, 4:00 a.m.

Expanding Double Jeopardy

The wrong direction on hate crimes.

By David Rittgers

Welcome to a new age of double jeopardy. The hate-crime statute just passed by Congress expands the potential for federal prosecutions to chilling new levels, and even creates the possibility of retrials for crimes that have already been ruled on by state courts. In one fell swoop, lawmakers have virtually ensured legal proceedings that obviously violate the Bill of Rights — and this, for some reason, is being widely hailed as a triumph of justice.

The lack of rigorous debate over this policy is ominous. In the Senate, the hate-crime legislation was not even adopted as a stand-alone measure, but as an add-on to another bill. This relative stealth aside, the flourish of the president's signature pen will radically redraw the boundaries between state and federal jurisprudence.

States and the federal government are considered separate sovereigns. If someone has broken both state and federal laws, he can have a day in court in both systems. A counterfeiter can be charged for his funny money in federal court, for instance, and also face murder prosecution by a state if he has moved to eliminate his competition. A trial by a state does not rule out federal prosecution for the same crime, and this does threaten to thwart the Fifth Amendment's demand that no person suffer double jeopardy. In practice, however, this hasn't happened too often; until now, limited federal jurisdiction meant that Uncle Sam usually didn't have the ability to try or retry a state defendant.

That's what makes the new hate-crime law so remarkable. Its defining feature is not that it allows federal prosecution of crimes motivated by the race, gender, sexual orientation, or disability of the victim. What's significant is that it greatly expands the federal government's jurisdiction to prosecute cases that properly belong in a state court.

In legal terms, this law achieves its aims through federal authority over interstate commerce. If someone assaults you by throwing a cell phone at you, what Congress has done is enabled the prosecution of the thrower as a function of the fact that the cell phone was made in Japan, and therefore must have crossed state lines. To non-lawyers, that surely sounds absurd — which is precisely why this law's drastic overreach is so stark. This is a sea change in the power of the government to reach into a state and define violence between two people as a federal matter, one traditionally handled by state laws and state prosecutors.

An equally striking feature of the law is that the federal power to prosecute is not dissipated even if the defendant is found guilty by the state. It explicitly says, in fact, that federal charges should be pursued if the state verdict “left demonstratively unvindicated the Federal interest in eradicating bias-motivated violence.”

The term “demonstratively unvindicated” becomes downright Orwellian when applied to the kinds of cases that will inevitably invite public outcry. The crime of rape, for example, is already severely punished by every state — but has brand-new implications as a hate crime because it is typically an offense based on gender. And are there any high-profile rape cases that do not produce amplified cries for vengeance?

The protection against double jeopardy was put in place to prevent retrying a politically unpopular but evidentially elusive defendant until he was found guilty. Congress apparently sees this as a glitch, rather than a virtue, in the American criminal-justice system.

The power to re prosecute is not one we should grant to any government, much less one with a politicized selection of who will be haled into court. For evidence, look no further than the Duke lacrosse non-rape case a few years ago. If the trial had gone to court and ended in acquittal, would we now be in federal court for a second round? The recent Department of Justice decision not to prosecute members of the New Black Panther Party who engaged in voter intimidation last November illustrates the flip side of this coin. Decisions to prosecute or not based on race undermine the rule of law.

Politically motivated prosecutions are sure to result from this statute. Attorney General Eric Holder saw fit to lecture America as a “nation of cowards” when it comes to race. He is now empowered with the new hate-crime authority to retry many high-profile cases that split political constituencies on hot-button issues. I have no desire to see what havoc his notions of “courage” will wreak upon fundamental American civil liberties.

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