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Hate Crime Bill Goes Against the Constitution

By [Nat Hentoff](#)

THROUGHOUT the Bush-Cheney creation of a society under surveillance and unprecedented government secrecy, I have often praised Sen. Patrick Leahy, D-Vt., for resisting that administration's penchant for degrading the Constitution. But on July 16, he proudly watched as the Senate passed his "hate crimes" bill (the Matthew Shepard Act) that is the biggest expansion of federal hate-crimes laws since 1968 - providing extra prison time to committers of violent acts perceived to be based on sexual orientation, gender identity or disability (adding to the previous classifications of race, color, religion or national origin).

On the Senate floor, John McCain, R-Ariz., cut to the unconstitutional core of this bill and all such "hate crime" legislation. Leahy's bill, as of this writing, the president is eager to sign.

Said McCain: "Our legal system is based on identifying, capturing and punishing criminals, and not on using the power of government to try to divine biases." In opposing what James Madison condemned as "thought crimes," McCain added: "Crimes motivated by hate deserve vigorous prosecution, but so do crimes motivated by absolute wanton disregard for life of any kind." No matter against whom.

Leahy's bill, like the counterpart "hate crimes" measure of House Judiciary Chairman John Conyers, D-Mich., that passed in the House this past April, violates the 14th Amendment's equal protection under the laws for individual Americans by setting up a special collective class of victims whose assailants, when convicted, will be given extra punishment for crimes perceived to be based on gender identity, sexual orientation or disability, among other biases. Those who attack the elderly, police or those of the poor who are not among the "protected classes" would not get lengthier "hate" sentences than the law provides for the ACT itself. Doesn't this make lesser citizens of their victims?

Very late into the night on July 12, Democratic Senate leader Harry Reid slipped the Leahy "hate crimes" bill, as an amendment, into the \$680 billion Defense Authorization Act. Leahy agreed with this avoidance of a full-scale floor debate. The amendment was approved by voice vote, following a 63-28 procedural vote that broke a Republican filibuster. All the 28 negatives were by Republicans. Harry Reid declared the vote "a victory for all Americans."

For some Americans more than others.

An editorial in the daily Free Lance-Star (Fredericksburg, Va.) in May warned: "Hate-crimes bill is an assault on the Constitution." (Full disclosure: The editorial mentions content I wrote for the Cato Institute.) Unique among daily newspapers, this paper occasionally runs educational articles on the Constitution, very much including the Bill of Rights. I wrote one for it on the First Amendment. Too bad other papers don't tell Americans who they are.

Trying to avoid criticism of the impending law by First Amendment protectors, Sen. Sam Brownback, R-Kan., had submitted an amendment to the Leahy measure that passed and says this law will not infringe on freedom of speech "if such exercise of religion, speech, expression or association was not intended to plan or prepare for an act of physical violence; or incite an imminent act of physical violence against another."

However, the bill still punishes a PERCEIVED hate crime.

That's the kind of broad language James Madison did not intend to encumber the First Amendment with when he wrote it. The ACLU now insists the Senate bill include what it calls the stronger protection of free-speech rights in the House bill. But the White House Web site points out that the House bill cites a hate crime is based on actual or PERCEIVED hate against a victim. Both bills include constitutional violations of double-jeopardy prosecutions by making it easier for the federal government to prosecute a defendant in a hate-crime case when the state says it cannot convict or chooses not to prosecute.

There were minor differences between the Senate and House "hate-crimes bills," requiring a Senate-House conference to resolve them. As I write this column, the conference hasn't happened yet, but I expect to see President Obama, a former professor of constitutional law, to delightedly sign it.

Almost as alarming as this invitation to state and then federal prosecutors to pursue "thought crimes" is a statement made by Leahy advancing the bill before the Senate Judiciary Committee, which he chairs. The list of supporters he cited is too long for inclusion here, but among them are: "26 state attorneys general ... the Federal Law Enforcement Association; the International Association of Chiefs of Police; the Hispanic National Law Enforcement Association ... The National Asian Peace Officers Association; National Black Police Association, National Center for Women in Police ... 26 state attorneys general ... National District Attorneys Associations...and 44 women's organizations."

I have often reported on other such constitutionally disadvantaged groups: school boards, heads of school systems, principals and teachers who fail - while assiduously teaching to tests in reading and math under No Child Left Behind - to inform students of the roots of their individual liberties in the Bill of Rights. Absent from most classes are the dramatic stories of the long, tumultuous history of what it's taken to keep the First Amendment, due process, the right to privacy and the rest of the Constitution alive.

How many Americans of all ages know of James Madison writing to Thomas Jefferson: We have "extinguished forever the ambitious hope of making laws for the human mind." But here we now have added federalization of one way not even Bush and Cheney ever thought of to undermine the 14th Amendment's "equal protection of the laws" for individuals, not protected classes.

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Nat Hentoff is a nationally renowned authority on the First Amendment and the Bill of Rights. He is a member of the Reporters Committee for Freedom of the Press, and the libertarian Cato Institute, where he is a senior fellow.

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