

**SUMMARY OF ANTICIPATED TESTIMONY  
OF  
ANDREW A. CHIRLS  
REGARDING H.B. 903 AND H.B. 904  
BEFORE THE PENNSYLVANIA HOUSE OF REPRESENTATIVES  
JUDICIARY COMMITTEE**

**TESTIMONY TO BE PRESENTED ON BEHALF OF  
GAY AND LESBIAN LAWYERS OF PHILADELPHIA (GALLOP)**

**AUGUST 28, 1995**

**INTRODUCTION**

I am Andrew A. Chirls. I am a partner in the litigation department at the Philadelphia law firm of Wolf, Block, Schorr and Solis-Cohen. I was a member of the Philadelphia Commission on Human Relations from 1990 to 1992, and I was acting chair of the Commission for a brief period in 1992. I have served as a trustee of the Philadelphia Fellowship Commission and as a member of the board and the executive committee of Lambda Legal Defense and Education Fund, Inc., which is the oldest and largest public interest legal organization promoting the interests of sexual privacy and communities affected by HIV and AIDS throughout the United States.

I am testifying today on behalf of Gay and Lesbian Lawyers of Philadelphia (GALLOP), of which I am a founding member. GALLOP is the lesbian and gay bar association serving the legal community of the metropolitan Philadelphia area, including lawyers, judges and paralegals. It has more than 200 members, and it is active in the affairs of the Philadelphia Bar Association, the Pennsylvania Bar Association in areas of legislation, judicial selection and education, legal service provision and law reform.

I bring my experience with these organizations and governmental bodies to this committee with the hope that it will enlighten the discussion of the bills that are before it.

The board and the members of GALLOP thank the Judiciary Committee for the opportunity to present testimony about H.B. 903 and H.B. 904. I am personally grateful for this opportunity, as well.

In recent weeks I have had a number of discussions with public officials, their staff members and people interested in legal aspects of the legislation before this committee. I will confine my testimony to matters related to the legal issues that are presented by this legislation as those legal issues have been raised by these public officials, judges and members of the community.

## I. IS THERE ANY CONSTITUTIONAL IMPEDIMENT TO H.B. 903 AND 904?

There are two relatively recent cases decided by the United States Supreme Court which should put to rest any question about whether H.B. 903 is constitutional. These cases make it clear that there is no constitutional impediment to enactment and enforcement of H.B. 903.

The first case is R.A.V. v. City of St. Paul, Minnesota, 112 S.Ct. 2538 (1992). In that case, the Supreme Court examined an ordinance that was quite different from the Ethnic Intimidation Law of Pennsylvania, 18 Pa.C.S.A. § 2710. The St. Paul ordinance made it unlawful for any person to trespass or engage in any violent act with the purpose of arousing "anger, alarm or resentment in others on the basis of race, color, creed, religion or gender." (quoted in R.A.V., 112 S.Ct. at 2541). The court recognized that it was constitutional for the St. Paul government to outlaw acts which were likely to incite anger, alarm or resentment, particularly where the acts were violent; such a law could be permitted because of the constitutional rule that "fighting words" -- words which are likely to incite violence -- could be prohibited. Nevertheless, the Supreme Court also held that a law which prohibited "fighting words" on the basis of their political message or content could not be singled out without violating the First Amendment.

While R.A.V. called into question the constitutionality of some laws which are commonly called "hate crime laws," it did not bring the constitutionality of laws upon which Pennsylvania's Ethnic Intimidation Law was modelled. The Ethnic Intimidation Law is a sentencing enhancement law, and it does not single out any particular kind of political speech or conduct as a basis for punishment. This was established by a unanimous Supreme Court in the more recent case of Wisconsin v. Mitchell, 113 S.Ct. 2194 (1993). In that case, the Supreme Court held that there is no constitutional impediment to enhancing punishment for an act which is already a crime where the enhancement is based on evidence that the offender had a motive in selecting the victim or committing the crime based on personal characteristics of the victim such as race, religion or sexual orientation.

The Ethnic Intimidation Law is patterned closely on the statute examined and approved in Wisconsin v. Mitchell, and it is clear that there is no impediment to its enforcement that may be based on any generally accepted First Amendment principles.

## II. IS THERE ANY CONSTITUTIONAL IMPEDIMENT TO INCLUDING SEXUAL ORIENTATION AS A CATEGORY IN H.B. 903 OR H.B. 904?

The inclusion of sexual orientation in H.B. 903 and H.B. 904 would not create any special "protected class" for constitutional purposes, and would not imply that there is any

constitutional or legal requirement that homosexuals be treated equally for purposes of laws prohibiting discrimination or for purposes of constitutional law.

A number of people involved in the debate over Hate Crimes legislation have raised the question of whether passage of a bill like H.B. 903 or H.B. 904 would establish a precedent for equal rights beyond the Ethnic Intimidation context. It would not. A discussion of this issue may begin and end with a case decided by the United States Court of Appeals for the Sixth Circuit on May 12, 1995, Equality Foundation of Greater Cincinnati, Inc. v. City of Cincinnati, 54 F.3d 261 (6th Cir. 1995).

Out of fairness to myself and to the other witnesses who will be testifying on my side of the issue, I am compelled to say that I do not agree with the substance of the holdings in Equality Foundation, which is based on the notion that homosexuals are not an identifiable and insular minority which is a "protected class" entitled to Equal Protection of the laws under constitutional jurisprudence. Nevertheless, I must concede that there is so far a paucity of judicial authority holding the other way.

In Equality Foundation, the voters of Cincinnati had passed a City Charter amendment repealing that part of the Equal Rights Ordinance which prohibited discrimination against homosexuals and bisexuals. The Sixth Circuit decided, narrowly, that there is no constitutional requirement that prohibits the voters of a city from repealing such a provision of its equal rights ordinance. While a government is prohibited as a general matter from making distinctions based on race, religion, gender (in some cases) and "legitimate" or "illegitimate" birth status, the constitution, according to the Sixth Circuit Court of Appeals, does not prohibit rationally based legal distinctions based on sexual orientation. Therefore, a law that repeals that part of a civil rights ordinance that prohibits discrimination based on sexual orientation, but leaves in place the part of the ordinance that prohibits racial discrimination, is not unconstitutional.

Brought to its basics, the Equality Foundation case, as decided by the Sixth Circuit, stands for the proposition that it is usually within the Constitutional prerogative of the legislature to pass a law which protects sexual minorities just as it is within the Constitutional prerogative of the legislature to decline to do so. Therefore, there is no Constitutional issue with respect to H.B. 903 and 904 raised by that case. The issue, simply, is one of legislative policy and fairness. The question really boils down to whether or not there is a need to enact H.B. 903 and 904 in order to minimize the degree of social conflict that arises from bias crimes or to otherwise promote the social

welfare by enhancing sentences for crimes arising from bias on the basis of sexual orientation.

So long as there is a rational basis for including the category of sexual orientation in Pennsylvania law dealing with Hate Crimes and hate incidents, there is no constitutional impediment to doing so. The Supreme Court recognized in Wisconsin v. Mitchell that it was within the judgment of the legislature to provide for enhancement of bias-motivated crimes because "they are more likely to provoke retaliatory crimes, inflict distinct emotional harms on their victims, and incite community unrest." This argument was presented most clearly in a brief submitted by the Anti-Defamation League of the B'nai B'rith. The need for this legislation and the purposes it would serve include those grounds listed by the Supreme Court, and will, I anticipate, be substantiated by the other witnesses appearing today. These witnesses will, I anticipate, describe other reasons for passage of the bills before you, including the need to require judges to take such crimes seriously, the need to overcome the notion that anti-homosexual bias is the basis for a defense rather than an enhancement, and the need to deter.

**III. WILL INCLUSION OF SEXUAL ORIENTATION IN THE ETHNIC INTIMIDATION LAW CREATE DIFFICULTIES IN ENFORCEMENT, AND IS THE DEFINITION OF BIAS BASED ON SEXUAL ORIENTATION TOO BROAD OR VAGUE?**

Some people have raised a concern about whether inclusion of the motivation defined by H.B. 903 in the Ethnic Intimidation law will create complications because evidence of this motivation is based on vague factors. The simple answer to this is that the inclusion of motivation based on race, religion and other factors is already in the Ethnic Intimidation law, and it has not given rise to these difficulties. The more complicated answer may be derived from two appellate cases from the Pennsylvania courts, but the cases yield the same result.

In Commonwealth v. Rink, 574 A.2d 1078 (Pa. Super. 1990), the court upheld a conviction for ethnic intimidation where the defendant had on several occasions incited his peers to kill niggers and the next thing that happened was that they did attack an African-American. Words were spoken and conduct was undertaken during the commission of the violence that showed that the victims were being singled out because of their race. In Commonwealth v. Ferino, 640 A.2d 934 (Pa. Super. 1994), on the other hand, the court reversed a conviction where the defendant yelled once "I'm going to kill you, nigger," and the two victims of the crime were of different races. The use of the racial epithet was isolated, was brief, and was not accompanied by any evidence that preceded or followed the underlying crime to show that either victim was being selected based on their race.

These two cases show that the quantum of evidence to show that a bias crime has been committed must be of some significance, and cannot be based on a single epithet. The Supreme Court in Wisconsin v. Mitchell approved the statute it examined on the basis of its expectation that the evidence required to convict would have to be substantial.

In this Commonwealth, the legislature should be confident that the restraint exercised by prosecutors, the legal restrictions observed by judges and the wisdom and common sense exercised by jurors in the discharge of their responsibilities will prevent the imposition of criminal penalties based on suspicion or on isolated words, beliefs and emotions. Indeed, this is already the case in connection with the categories that are already codified in the Ethnic Intimidation law.

A similar question arises when people ask whether it would be unfair to prosecute people on the basis of their membership in organizations which do not support equality for homosexuals or on the basis of their political beliefs on this topic. The answer is that there is no such danger. In Dawson v. Delaware, 112 S.Ct. 1093 (1992), the Supreme Court of the United States held that it was impermissible to permit a jury to hear evidence of a defendant's membership in the Aryan Brotherhood and to use that evidence to decide whether the defendant had violent propensities. Unless the person has taken action which shows that he or she has committed a crime and chosen the victim based on race, religion or sexual orientation, mere membership or political advocacy should not and will not be a basis for charging a person with Ethnic Intimidation.

A third question arises about whether inclusion of motive as an element of a crime will give rise to difficulty in deciding what to charge and in deciding what is punishable. There are a few reasons for answering "no." First, this element of motive is already in the Ethnic Intimidation law, and there appears to be no movement to repeal it. Inclusion of motive by way of H.B. 903 will not be any more complicated than its current inclusion in the statute. Second, there are dozens of criminal statutes which include motive as an element of an offense. These include:

Burglary (18 Pa.C.S.A. § 3502), in which the entry into a building with intent to commit a felony is punishable. Evidentiary decisions about what constitutes motive and evidence of it are often difficult, but we have never seriously considered changing the law against burglary.

Assault on a sports official motivated by the official's conduct in that capacity (18 Pa.C.S.A. § 2712) gives rise to the same issues about motive.

Under the disorderly conduct statute (18 Pa.C.S.A. § 5501) the intent to prevent or coerce official misconduct aggravates or is an element of an offense.

Laws against rioting and incitement to riot (18 Pa.C.S.A. § 5515(b)) depend on the defendant's intent with respect to how a gathering will respond to the words or conduct of the defendant.

Laws against lewdness and certain kinds of sexual conduct (18 Pa.C.S.A. §§ 5901 and 5902(a)(2)) also depend on the purpose of the actor and the actor's belief on how the other persons involved are likely to respond to the actor's conduct.

Different grades of homicide depend on the intent of the defendant.

These statutes show that the legislature has not been afraid to include the element of intent as part of many traditional crimes, and there is no reason why the element of intent should give the legislature pause in this case.

The legal literature is full of hard cases and close cases. It is what many of us spent our entire studies on in law school. The fact that there will be close cases or difficult cases under the Ethnic Intimidation law does not mean it should not be enacted. If the prospect of difficult deterred this legislature from passing criminal laws, there would be few, if any, such laws passed. We rely on our prosecutors, our judges and our juries to sort out guilty and harmful conduct from innocent conduct. There is no reason why we should not rely on them under the Ethnic Intimidation law.

#### IV. SHOULD THE MATTERS COVERED BY H.B. 903 BE LEFT TO THE SENTENCING COMMISSION?

Some people involved in this debate have asked whether the matters covered by H.B. 903 should be left to the Pennsylvania Commission on Sentencing. We submit that the answer is no.

The Sentencing Commission's Guidelines do provide that convictions for ethnic intimidation receive an offense gravity score that is one point higher than the underlying offense itself. 18 Pa. Code § 303.3(d). The way to be sure that bias crimes motivated by the victim's sexual orientation are treated with equal seriousness is to add sexual orientation to the Ethnic Intimidation law. A special category for sexual orientation where the Sentencing Commission Guidelines already treat all Ethnic Intimidation convictions the same would imply that there

is something different about bias crimes motivated by the victim's sexual orientation as opposed to the victim's race. Creation of a special category could create much confusion.

It is notable that the Sentencing Commission's Guidelines are based entirely on objective factors, such as the defendant's previous criminal history and on the definition of the crime for which the defendant was convicted. There is nothing in the Guidelines which allows enhancement or mitigation based on motive or on the impact that the crime had on the victim. Introduction of considerations based on motive in applying the guidelines would make application of the Guidelines more complex, and would take away from the ability of judges to apply them mechanically. The idea of the Guidelines was to promote uniformity and to avoid imposition of sentences based on "soft" factors. Introduction of considerations based on motive in the Guideline application process would reduce the safeguards that I have discussed earlier, such as reliance on evidentiary limitations, constitutional limitations, and the restraint of judges, juries and prosecutors. There would be less protection for defendants, and there would be a tendency to require post-conviction mini-trials on what the defendant's motive was.

There is also the question of whether the Sentencing Commission is even statutorily or constitutionally empowered to promulgate a guideline based on a motive where motive is not an element of the crime. We submit that the place to solve the problem of Ethnic Intimidation based on sexual orientation is in the legislature, and not in the Sentencing Commission.

#### CONCLUSION

I thank you for your consideration, and I am eager to answer any questions you may have.