



**Maryland General Assembly**  
Senate Judicial Proceedings Committee  
House Judiciary Committee  
February 11, 2020  
**SUPPORT HB917/SB606**

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ADL (the Anti-Defamation League) is pleased to submit this testimony in support of *Criminal Law – Hate Crimes – Basis (2nd Lieutenant Richard Collins, III’s Law)*, S.B. 606 (Sen. Benson); H.B. 917 (Del. Wilson).<sup>1</sup> This legislation clarifies the causation standard under Maryland’s hate crime statute, giving law enforcement, prosecutors, and our state courts the legal certainty they need to bring the perpetrators of mixed motive hate crimes to justice.

**ADL (the Anti-Defamation League)**

Since 1913, the mission of ADL has been to “stop the defamation of the Jewish people and to secure justice and fair treatment for all.” Dedicated to combating anti-Semitism, prejudice, and bigotry of all kinds, as well as defending democratic ideals and promoting civil rights, ADL has been recognized as a leading resource on effective responses to violent bigotry, conducting an annual *Audit of Anti-Semitic Incidents* and drafting model hate crime statutes for state legislatures. We were also privileged to lead a broad coalition of civil rights, religious, educational, professional, law enforcement, and civic organizations for more than a decade in support of the 2009 Matthew Shepard and James Byrd Jr. Hate Crimes Prevention Act (HCPA).<sup>2</sup>

As one of the nation’s top non-governmental law enforcement training organizations, ADL also works directly with police at the federal, state, and local levels, providing resources and expertise to address the challenges of 21st century policing. In 2018, for example, our Washington, D.C. Regional Office partnered with the Maryland Coordination and Analysis Center to bring together dozens of law enforcement agencies to discuss best practices for addressing and responding to hate crimes and bias incidents when they occur.

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<sup>1</sup> ADL also supports a bill identical to *Lt. Collins III’s Law*, S.B. 335 (Sen. Peters), which has also been assigned to this committee.

<sup>2</sup> ADL continues to coordinate with a broad array of civil rights, education, and community organizations across the country to advocate for more comprehensive approaches to addressing the threat and impact of hate crimes. [https://www.adl.org/sites/default/files/documents/final-post-Charlottesville-DoJ-hate-crime-summit-coalition-recommendations.docx.pdf?\\_ga=2.235037057.1865847360.1551104355-388726761.1533317285](https://www.adl.org/sites/default/files/documents/final-post-Charlottesville-DoJ-hate-crime-summit-coalition-recommendations.docx.pdf?_ga=2.235037057.1865847360.1551104355-388726761.1533317285).

## **Impact of Hate Violence**

All Maryland residents have a stake in effective responses to violent bigotry. These crimes demand priority attention because of their special impact. Bias crimes are intended to intimidate not only the individual victim, but also the victim's entire community, leaving members feeling fearful, isolated, and vulnerable. Failure to address this unique type of crime can therefore cause an isolated incident to explode into widespread community tension. By making targeted communities fearful, angry, and suspicious of other groups (and of the power structure that is supposed to protect them) these incidents can damage the fabric of our society and fragment communities.

## **Hate Crimes Causation Standard**

One of the most challenging aspects of a hate crime prosecution is proving "causation"—i.e., did the hate crime offender intentional target the victim "because of" a belief or perception regarding a protected characteristic? In some cases, causation is difficult to prove because there is not enough evidence of bias. In other cases, however, there is overwhelming evidence of bias, but bias was not the only factor that motivated the perpetrator to act. If, for example, a suspect vandalizes a synagogue because of a deep hatred towards Jews, *but also* because he is angered by the amount of traffic that the synagogue brings to his neighborhood, can the suspect still be charged with a hate crime under state law?

Not all states treat these mixed motive hate crimes in the same way. Some states, like California, Tennessee, and Wisconsin, have hate crime laws that explicitly contemplate hate crimes motivated "in whole or in part" by bias. In other words, these states contain causation language that is *identical* to the language proposed in Maryland S.B. 606 / H.B. 917 and would be broad enough to encompass cases where there is more than one motive:<sup>3</sup>

- **California**: defines a hate crime as "a criminal act committed, **in whole or in part, because of** one or more of the following actual or perceived characteristics of the victim: (1) disability, (2) gender, (3) nationality, (4) race or ethnicity, (5) religion, (6) sexual orientation, (7) association with a person or group with one or more of these actual or perceived characteristics." *See* Cal. Penal Code § 422.55.

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<sup>3</sup> There are at least two state hate crime statutes that explicitly require bias to be a "substantial motivating factor" underlying the crime. *See* N.H. Stat. § 651:6(I)(f) (requiring that the perpetrator be "**substantially motivated** to commit the crime" because of hostility towards the victim's protected characteristic); N.Y. Penal Law § 485.05 (requiring intentional selection of person or property "**in whole or in substantial part** because of a belief or perception regarding the" protected characteristic of a person).

- Tennessee: defines a hate crime as the “intention[al] select[ion of] the person against whom the crime was committed or ... the property that was damaged or otherwise affected by the crime ... **in whole or in part, because of** the defendant’s belief or perception regarding the race, religion, color, disability, sexual orientation, national origin, ancestry, or gender of that person or the owner or occupant of that property.” See Tenn. Stat. § 40-35-114(17).
- Wisconsin: defines a hate crime as the “intention[al] select[ion of] the person against whom the crime ... is committed or ... the property that is damaged or otherwise affected by the crime ... **in whole or in part because of** the actor’s belief or perception regarding the race, religion, color, disability, sexual orientation, national origin or ancestry of that person or the owner or occupant of that property, whether or not the actor’s belief or perception was correct.” See Wis. Stat. Ann. § 939.645.<sup>4</sup>
- Maryland S.B. 606 / H.B. 907: defines a hate crime as a crime “**MOTIVATED EITHER IN WHOLE OR IN PART BY** another person’s or group’s race, color, religious beliefs, sexual orientation, gender, disability, or national origin, or because another person or group is homeless.”<sup>5</sup>

Other states, like Maryland, currently do not have a modifier akin to “in whole or in part” before the phrase “because of” in their hate crime statutes. While some courts in these states have interpreted “because of” to require that the defendant’s bias or prejudice be a “but for” cause of the harm—i.e., that the defendant would not have acted absent the defendant’s prejudice (e.g., Iowa<sup>6</sup>)—other states have interpreted “because of” to simply mean that bias played a role in the defendant’s criminal conduct (e.g., Massachusetts<sup>7</sup>).

Unfortunately, at least one state court in Maryland appears to have recently endorsed a narrow causation standard under our state’s hate crime statute, suggesting that a hate crime prosecution

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<sup>4</sup> Wisconsin’s hate crime statute has been upheld as constitutional by the U.S. Supreme Court in *Wisconsin v. Mitchell*, 508 U.S. 476 (1993).

<sup>5</sup> Kansas’s hate crime statute also includes causation language that is identical in meaning to S.B. 606 / H.B. 907. See Kansas Stat. § 21-6815(c)(2)(C) (requiring a hate crime offense to be “**motivated entirely or in part**” by the protected characteristic of the victim)

<sup>6</sup> *State v. Hennings*, 791 N.W.2d 828, 835 (Iowa 2010) (reasoning that to find a defendant guilty of a hate crime, the jury must determine beyond a reasonable doubt that the defendant would not have acted absent the defendant’s prejudice; if a defendant is partially motivated by bias, but would still have committed the acts regardless of the bias, the defendant usually cannot be guilty of a hate crime).

<sup>7</sup> *Commonwealth v. Kelley*, 470 Mass. 682, 689-92 (Mass. 2015) (declining to interpret “because of” to mean that hostility towards a protected characteristic must be the “sole” reason or a “substantial” reason for defendant’s unlawful conduct, and instead concluding that bias must “play a role” in the perpetration of the crime).

cannot succeed unless it can be shown beyond a reasonable doubt that the crime was solely motivated by hate.<sup>8</sup>

From ADL’s perspective, this is a devastating result that necessarily runs counter to the legislative intent underlying hate crime laws. Requiring prosecutors to prove that hate or bias was the *sole* motivating factor underlying a crime is an extremely high standard that gives hate crime offenders an easy defense—by pointing to any other factor that may have motivated their desire to commit the crime, hate crime offenders can potentially escape liability for conduct that otherwise rises to the level of a hate crime. But, just because a hate crime offender had multiple reasons for committing a crime, does not mean that the bias motivation was any less substantial, or had any less impact on the victims targeted.

Unfortunately, a similar tension also now exists with respect to the causation standard under the HCPA. In 2014, in a ruling that surprised many, the Sixth Circuit Court of Appeals held that, instead of demonstrating that the crime was substantially motivated by hate, prosecutors must now prove an even higher standard under the HCPA—that the crime would not have occurred “but for” the prohibited discriminatory motive.<sup>9</sup>

There is no question that since 2014, the Department of Justice has failed to bring several hate crimes cases due to this higher, judicially imposed standard. In order to correct this injustice, and clarify the legislative intent underlying the HCPA, Senators Klobuchar and Murkowski have recently introduced a bill entitled the *Justice for Victims of Hate Crimes Act* (S.3228),<sup>10</sup> which makes clear that prosecutors must only prove that bias against a protected characteristic was a substantial motivating factor for the crime, rather than the sole motivating factor, under federal law.<sup>11</sup> This degree of legal certainty is absolutely essential to bringing perpetrators of hate crimes to justice, and the same clarity is needed in Maryland.

At a time when hatred and bigotry are on the rise, we must ensure that law enforcement, prosecutors and judges in Maryland have the legal authority they need to hold hate crime offenders accountable to the fullest extent of the law.

**We therefore urge the Senate Judicial Proceedings Committee and the House Judiciary Committee to release S.B. 606 / H.B. 917 with a favorable report.**

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<sup>8</sup> <https://baltimore.cbslocal.com/2019/12/17/sean-urbanski-hate-crime-charge-dropped-richard-collins-iii-latest/>.

<sup>9</sup> *United States v. Miller*, 767 F.3d 585, 591-93 (6th Cir. 2014).

<sup>10</sup> <https://www.congress.gov/116/bills/s3228/BILLS-116s3228is.pdf>.

<sup>11</sup> <https://www.klobuchar.senate.gov/public/index.cfm/2020/1/klobuchar-murkowski-introduce-legislation-to-promote-enforcement-of-the-federal-hate-crimes-law>.