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## CRIMINAL PROCEDURE: Sentence and Punishment

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## CRIMINAL PROCEDURE

***Sentence and Punishment: Amend Article 1 of Chapter 10 of Title 17 of the Official Code of Georgia Annotated, Relating to Procedure for Sentencing and Imposition of Punishment, so as to Revise the Criteria for Imposition of Punishment for Crimes Involving Bias or Prejudice; Revise the Sanctions for such Crimes; Provide for the Manner of Serving such Sentences; Provide for Related Matters; Repeal Conflicting Laws; and for Other Purposes***

CODE SECTIONS: O.C.G.A. §§ 17-10-17 (amended);  
17-4-20.2 (new)  
BILL NUMBER: HB 426  
ACT NUMBER: 329  
GEORGIA LAWS: 2020 Ga. Laws 10  
EFFECTIVE DATE: July 1, 2020  
SUMMARY: The Act repeals certain provisions regarding the sentencing of defendants for crimes involving bias or prejudice and provides both criteria for punishment for those crimes and required reporting of those crimes.

### *History*

#### *A Vague Hate Crimes Bill*

In 2000, the Georgia General Assembly passed a hate crimes bill, which enhanced a defendant's sentence if the victim was selected on the basis of bias or prejudice.<sup>1</sup> However, just four years later, the Supreme Court of Georgia struck the bill down.<sup>2</sup> In *Botts v. State*, the Supreme Court of Georgia unanimously deemed Code section

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1. Patricia Ammari, *Sentence and Punishment: Enhance Sentences for Crimes In Which the Trier of Fact Determines by a Reasonable Doubt That the Defendant Intentionally Selected Any Victim or Property as the Object of the Offense Because of Bias or Prejudice; Provide Procedures Under Which Enhanced Sentences May Be Sought*, 17 GA. ST. U. L. REV. 134, 144 (2000).

2. *Botts v. State*, 278 Ga. 538, 539, 604 S.E.2d 512, 514 (2004).

17-10-17 unconstitutionally vague under the Due Process Clauses of both the U.S. Constitution and the Georgia Constitution.<sup>3</sup> The statute enhanced a criminal sentence if a jury found “beyond a reasonable doubt that the defendant intentionally selected any victim or any property of the victim as the object of the offense because of bias or prejudice.”<sup>4</sup> The Court found the words “bias” and “prejudice” to be overbroad.<sup>5</sup> For example, the Court in *Botts* found Code section 17-10-17 would encompass the following scenarios:

A rabid sports fan convicted of uttering terroristic threats to a victim selected for wearing a competing team’s baseball cap; a campaign worker convicted of trespassing for defacing a political opponent’s yard signs; a performance car fanatic convicted of stealing a Ferrari—any “bias or prejudice” for or against the selected victim or property, no matter how obscure, whimsical or unrelated to the victim it may be, but for which proof beyond a reasonable doubt might exist, can serve to enhance a sentence.<sup>6</sup>

Because there was no qualification as to what constituted “bias or prejudice,” the Court held the statute unconstitutionally vague.<sup>7</sup> Additionally, the Court held that the statute “impermissibly delegate[d] basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory applications.”<sup>8</sup> The Court recognized that the Georgia General Assembly could enhance penalties for bias-motivated offenses, but Code section 17-10-17, as drafted, was unconstitutional.

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3. *Id.* at 539, 604 S.E.2d at 514.

4. O.C.G.A. § 17-10-17(a) (2020).

5. *Botts*, 278 Ga. at 540, 604 S.E.2d at 514–15.

6. *Id.* at 540, 604 S.E.2d at 514–15.

7. *Id.* at 540, 604 S.E.2d at 514–15.

8. *Id.* at 540, 604 S.E.2d at 514–15 (quoting *Thelen v. State*, 272 Ga. 81, 81–83, 526 S.E.2d 60, 62 (2000)).

*A Failed Attempt*

Fifteen years after *Botts*, Representative Chuck Efstoration (R-104th) sponsored a bill to put a hate crimes law on the books. Representative Efstoration said that the bill was introduced so “[t]hat Georgia [would] no longer be one of only a small group of states without a hate crimes law in effect.”<sup>9</sup> During those fifteen years, legislators attempted to pass a form of a hate crimes bill on many occasions.<sup>10</sup> However, all those previous attempts failed.<sup>11</sup> On March 7, 2019, the House voted 96-64 to send the measure to the Senate.<sup>12</sup> However, Senate Judiciary Chairman Jesse Stone (R-23rd) did not put the bill on the agenda, stating that he needed “more time” before he would consider it because he was not sure increased penalties for crimes against certain people would help increase the chance of justice for victims.<sup>13</sup>

*A Shooting in Brunswick*

On February 23, 2020, Gregory McMichael and Travis McMichael shot Ahmaud Arbery in Brunswick, Georgia.<sup>14</sup> Though no arrests were made initially, the killing attracted national attention after the release of video footage of the shooting, which renewed Georgia lawmakers’ interest in the previously failed hate crimes bill.<sup>15</sup> Arbery’s mother, Wanda Cooper-Jones, in a video published online by *The New York Times* said, “To me, this is clearly a hate crime. But

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9. Telephone Interview with Rep. Chuck Efstoration (R-104th) (June 29, 2020) (on file with the Georgia State University Law Review) [hereinafter Efstoration Interview].

10. *Id.*

11. *Id.*

12. Georgia House of Representatives Voting Record, HB 426, #214 (Mar. 7, 2019).

13. Maya T. Prabhu, *Hate Crimes Bill Expected to Stall in Georgia Senate*, ATLANTA J.-CONST. (Mar. 27, 2019), <https://www.ajc.com/news/state—regional-govt—politics/hate-crimes-bill-expected-stall-georgia-senate/jmNlyNfpVSXYuyLMhambBO/> [https://perma.cc/UQ25-BYNA].

14. Richard Fausset, *Two Weapons, a Chase, a Killing and No Charges*, N.Y. TIMES, <https://www.nytimes.com/2020/04/26/us/ahmed-arbery-shooting-georgia.html> [https://perma.cc/24LU-E6GT] (May 17, 2020).

15. Maya T. Prabhu, *In Arbery Killing and in General, Hate-Crimes Cases Difficult to Prove*, ATLANTA J.-CONST. (May 15, 2020), <https://www.ajc.com/news/state—regional-govt—politics/arbery-killing-and-general-hate-crimes-cases-difficult-prove/Cdxys8LumJnbsW2uXarOJ/> [https://perma.cc/NQP6-QNUF].

Georgia is one of four states in the country without a hate crime law. If Georgia had a hate crime law, Ahmaud’s killers could face additional sentencing for murdering my son because of the color of his skin.”<sup>16</sup> When the legislative session restarted after a break due to COVID-19, legislators were keen on passing the bill.<sup>17</sup>

### *Bill Tracking of House Bill (HB) 426*

#### *Consideration and Passage by the House*

Representative Chuck Efstoration (R-104th) sponsored the bill in the House in the 2019 legislative session.<sup>18</sup> The bill was assigned to the House Judiciary Non-Civil Committee.<sup>19</sup> The House read the bill for the first time on February 22, 2019.<sup>20</sup> On February 26, 2019, the House Judiciary Non-Civil Committee amended the bill in part and favorably reported the bill by Committee substitute.<sup>21</sup> The Committee offered the following three changes to the bill: (1) addition of “group of victims” language; (2) changing the terminology from “the individual’s belief or perception” of the victim’s classification to “the actual or perceived” classification; and (3) removal of Code section 17-10-17(c).<sup>22</sup> On March 7, 2019, the bill survived a motion to table by a vote of 47 to 115.<sup>23</sup> Immediately following the failed motion, the House passed the Committee substitute by a vote of 96 to 64.<sup>24</sup>

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16. Wanda Cooper-Jones, *How Was My Son Ahmaud Arbery’s Murder Not a Hate Crime?*, N.Y. TIMES (June 9, 2020), <https://www.nytimes.com/2020/06/09/opinion/hate-crime-bill-ahmaud-arbery.html> [https://perma.cc/RA6W-AB9F].

17. James Salzer & Mark Niese, *Georgia Session Reboot Opens with New Call for Hate-Crimes Law*, ATLANTA J.-CONST. (June 15, 2020), <https://www.ajc.com/news/state—regional-govt—politics/georgia-session-reboot-opens-with-new-call-for-hate-crimes-law/un1BmsYe4tJ7lhNdPnd2aK/> [https://perma.cc/2BJQ-TUDL].

18. Georgia General Assembly, HB 426, Bill Tracking [hereinafter HB 426, Bill Tracking], <http://www.legis.ga.gov/legislation/en-US/Display/20192020/HB/426>.

19. State of Georgia Final Composite Status Sheet, HB 426, Aug. 7, 2020.

20. *Id.*

21. *Id.*

22. HB 426 (HCS), 2019 Ga. Gen. Assemb.

23. Georgia House of Representatives Voting Record, HB 426, #213 (Mar. 7, 2019).

24. Georgia House of Representatives Voting Record, HB 426, #214 (Mar. 7, 2019).

*Consideration and Passage by the Senate*

Senator Bill Cowsert (R-46th) sponsored the bill in the Senate.<sup>25</sup> On March 8, 2019, the Senate read the bill for the first time and referred the bill to the Senate Judiciary Committee.<sup>26</sup> The bill stalled in the Senate Judiciary Committee and no further action was taken on the bill until June 2020.<sup>27</sup> When the Legislature reconvened in June 2020, there was bipartisan pressure to pass the bill.<sup>28</sup> House Speaker David Ralston (R-7th) urged for the passage of the bill as drafted.<sup>29</sup> A coalition of Georgia business leaders pushed for the legislature to address the lack of a hate crimes bill in the state.<sup>30</sup> On June 18, 2020, the Senate Judiciary Committee held a hearing on the bill.<sup>31</sup> Representative Efration and co-sponsor Representative Calvin Smyre (D-135th) presented the bill to the Committee.<sup>32</sup> The Committee heard feedback from members of the community regarding the bill.<sup>33</sup>

The following day, a last-minute change by the Committee added first responders, such as police officers, firefighters, and EMS crew, as a protected class.<sup>34</sup> In the Senate Judiciary Committee meeting on June 19, Senator Elena Parent (D-42nd) attempted to remove the protections for police, stating that the purpose of the bill was not to

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25. HB 426, Bill Tracking, *supra* note 18.

26. State of Georgia Final Composite Status Sheet, HB 426, Aug. 7, 2020.

27. Prabhu, *supra* note 13; HB 426, Bill Tracking, *supra* note 18.

28. Maya T. Prabhu, *Speaker Ups Push for Georgia Hate-Crimes Law, but Bill Faces Hard Road*, ATLANTA J.-CONST. (June 1, 2020), <https://www.ajc.com/news/state—regional-govt—politics/speaker-ups-push-for-georgia-hate-crimes-law-but-bill-faces-hard-road/tgUZeD8bkp3x9dLpQS4KfP> [<https://perma.cc/YKF2-CLSH>].

29. *Id.*

30. Greg Bluestein & Maya T. Prabhu, *Many of Georgia's Biggest Firms Rally Behind a 'Comprehensive' Hate-Crimes Law*, ATLANTA J.-CONST. (June 8, 2020), <https://www.ajc.com/blog/politics/many-georgia-biggest-firms-rally-behind-comprehensive-hate-crimes-law/PO47wWSIOT4r2P5GgDTD2H/> [<https://perma.cc/A4BH-JWWL>].

31. Video Recording of Senate Judiciary Committee Meeting at 7 min., 16 sec. (June 18, 2020) (remarks by Rep. Chuck Efration (R-104th)), <https://livestream.com/accounts/26021522/events/8743306/videos/207639476>.

32. *Id.*

33. Efration Interview, *supra* note 9.

34. HB 426 (LC 28 9829S), 2020 Ga. Gen. Assemb.

protect people based on their occupation.<sup>35</sup> Senator Parent's motion to amend failed, and the bill passed the Senate Judiciary Committee with the first responder provisions intact.<sup>36</sup>

Following the Senate Judiciary Committee, members of the public and leaders in the community publicly opposed the additional protections for occupations.<sup>37</sup> Many called the addition a "poison pill."<sup>38</sup> The leaders of the Senate Democratic Caucus said in a statement that the "amended version of House Bill (HB) 426 is harmful and undermines the purpose of hate crime legislation . . . . By including professional affiliation as a protected class, Senate Republicans have decided to ignore the cries of Georgians who are pleading for justice."<sup>39</sup>

At a meeting of the Senate Rules Committee on June 22, Senator Cowsert presented an updated version of the bill, removing first responders as a protected class.<sup>40</sup> The updated version also narrowed the applicable crimes affected by the statute to felonies and five designated misdemeanors.<sup>41</sup> The five designated misdemeanors were simple assault, simple battery, battery, criminal trespass, and misdemeanor theft by taking.<sup>42</sup> The proposed bill added reporting provisions similar to provisions from Lieutenant Governor Geoff

35. Video Recording of Senate Judiciary Committee Meeting at 1 hr., 25 min., 46 sec. (June 19, 2020) (remarks by Senator Elena Parent (D-42nd)), <https://livestream.com/accounts/26021522/events/8743306/videos/207667135>.

36. *Id.* at 1 hr., 30 min., 18 sec.; State of Georgia Final Composite Status Sheet, HB 426, Aug. 7, 2020.

37. *Georgia NAACP Renews Opposition to Hate Crimes Bill After Reports of Attacks on Protesters*, GA. NAACP (June 20, 2020), <https://www.naacpga.org/post/georgia-naacp-strongly-opposes-hb426-proposed-hate-crimes-law> [<https://perma.cc/ZJG2-9AEN>].

38. Jim Galloway, *Opinion: The GOP Attempt to Turn a Hate Crimes Bill into a Police Protection Vehicle*, ATLANTA J.-CONST. (June 22, 2020), <https://www.ajc.com/blog/politics/opinion-the-gop-attempt-turn-hate-crimes-bill-into-police-protection-vehicle/dalSzMFP5y7LYHk71tui3L/> [<https://perma.cc/RV4C-WC4J>].

39. Nyamekye Daniel, *Georgia Hate Crime Law Heads to Senate with Protections for Law Enforcement*, CTR. SQUARE (June 22, 2020), [https://www.thecentersquare.com/georgia/georgia-hate-crime-law-heads-to-senate-with-protections-for-law-enforcement/article\\_4ab2751c-b4b7-11ea-8f4c-33febde2e96b.html](https://www.thecentersquare.com/georgia/georgia-hate-crime-law-heads-to-senate-with-protections-for-law-enforcement/article_4ab2751c-b4b7-11ea-8f4c-33febde2e96b.html) [<https://perma.cc/7AH7-9CRC>].

40. Video Recording of Senate Rules Committee Meeting at 28 min., 35 sec. (June 22, 2020) (remarks by Senator Bill Cowsert (R-46th)) [hereinafter Senate Rules Committee Video], <https://livestream.com/accounts/26021522/events/8730585/videos/207802261>; HB 426 (LC 28 9843S), 2020 Ga. Gen. Assemb.

41. HB 426 (LC 28 9843S), *supra* note 40.

42. Efratration Interview, *supra* note 9; HB 426 (LC 28 9843S), *supra* note 40.

Duncan's (R) proposal.<sup>43</sup> The bill also added "sex" as a protected category.<sup>44</sup> The amended bill passed the Senate Rules Committee.<sup>45</sup>

On June 23, 2020, the Senate passed the Committee substitute by a vote of 47 to 6.<sup>46</sup> The Senate immediately transmitted the bill to the House.<sup>47</sup> The same day, the House agreed to the Committee substitute by a vote of 127 to 38.<sup>48</sup> The House sent the bill to Governor Brian Kemp (R) on June 25, 2020.<sup>49</sup> Governor Kemp signed the bill into law on June 26, 2020.<sup>50</sup> The law went into effect on July 1, 2020.<sup>51</sup> In a press release on the signing of the Act, Governor Kemp stated: "Today we took an important, necessary step forward for Georgia. We stood together as fellow Georgians to affirm one simple but powerful motto: Georgia is a state too great to hate."<sup>52</sup>

### *The Act*

The Act amends the following portions of the Official Code of Georgia Annotated: Article 1 of Chapter 10 of Title 17, relating to the procedure for sentencing and imposition of punishment; and Article 2 of Chapter 4 of Title 17, relating to an arrest by law enforcement officers generally.<sup>53</sup> The overall purpose of the Act is to increase the sentence of a defendant who intentionally selected a victim based on race, color, religion, national origin, sex, sexual orientation, gender, mental disability, or physical disability.<sup>54</sup>

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43. Efration Interview, *supra* note 9.

44. HB 426 (LC 28 9843S), *supra* note 40.

45. Senate Rules Committee Video, *supra* note 40, at 57 min., 45 sec. (remarks by Senator Jeff Mullis (R-53rd)).

46. Georgia Senate Voting Record, HB 426, #705 (June 23, 2020).

47. HB 426, Bill Tracking, *supra* note 18.

48. Georgia House of Representatives Voting Record, HB 426, #702 (June 23, 2020).

49. State of Georgia Final Composite Status Sheet, HB 426, Aug. 7, 2020.

50. *Id.*

51. O.C.G.A. § 17-10-17 (2020); O.C.G.A. § 17-4-20.2 (2020).

52. Press Release, Brian P. Kemp, Gov. of Georgia, Kemp, Duncan, Ralston Issue Statements on Signing of HB 426 (June 29, 2020) [hereinafter HB 426 Signing Press Release], <https://gov.georgia.gov/press-releases/2020-06-29/kemp-duncan-ralston-issue-statements-signing-hb-426> [<https://perma.cc/W5ZK-UNTR>].

53. 2020 Ga. Laws 10.

54. *Id.*

*Section 1*

Section 1 of the Act amends Code section 17-10-17 by replacing the previously unconstitutional hate crimes legislation and providing sentencing guidelines for anyone found guilty of intentionally targeting a victim because of their “actual or perceived race, color, religion, national origin, sex, sexual orientation, gender, mental disability, or physical disability.”<sup>55</sup> If a person is convicted of a felony or one of five “designated misdemeanors” and the trier of fact determines beyond a reasonable doubt that the crime was motivated by hate, a judge could impose additional penalties.<sup>56</sup> “Designated misdemeanors” include simple assault, simple battery, battery, criminal trespass, and misdemeanor theft by taking.<sup>57</sup> A person found guilty of a designated misdemeanor will face an additional six-to-twelve months of incarceration and a fine of up to \$5,000.<sup>58</sup> A person convicted of a felony will face imprisonment for a period of not less than two years and a fine not to exceed \$5,000.<sup>59</sup> The judge shall state when imposing the sentence the amount that the sentence will increase.<sup>60</sup>

*Section 2*

Section 2 of the Act adds Code section 17-4-20.2, which requires a law enforcement officer to “prepare and submit to the law enforcement officer’s supervisor or other designated person a written report of the incident entitled ‘Bias Crime Report’” when the officer investigates an incident that appears to be a hate crime.<sup>61</sup> The Bias Crime Report is written whether or not an arrest is made.<sup>62</sup> Because of this, the report is considered for “statistical purposes only.”<sup>63</sup> In

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55. § 17-10-17(b).

56. § 17-10-17(a).

57. *Id.*

58. § 17-10-17(b).

59. *Id.*

60. *Id.*

61. O.C.G.A. § 17-4-20.2 (2020).

62. *Id.*

63. *Id.*

addition, when the incident reported does not result in an arrest, the report will not be subject to Georgia's Open Records Act.<sup>64</sup>

Upon request, both a victim of a crime under the Act and a defendant arrested for a crime covered by the Act are entitled to review and copy any report prepared under the Act.<sup>65</sup> This report will then be sent to the Georgia Bureau of Investigation (GBI).<sup>66</sup> The GBI "shall compile and analyze statistics of such crimes and cause them to be published annually in the Georgia Uniform Crime Reports."<sup>67</sup>

### *Analysis*

As part of passing the Act, there were compromises and changes.<sup>68</sup> Because of this, the Act must be analyzed alongside another piece of legislation—HB 838.<sup>69</sup> In addition, although the bill passed with a bipartisan majority, criticism still remains.

### *Similar Legislation*

As part of a compromise to gain Republican support for the Act, the references to law enforcement inserted into the Act by the Senate Judiciary Committee were transferred into HB 838. HB 838 originally focused on updating the language of Code section 24-5-510.<sup>70</sup> The Code section creates privileged communications between law enforcement officers and peer counselors under certain circumstances.<sup>71</sup> HB 838's sponsor, Representative Bill Hitchens

64. *Id.*; see also O.C.G.A. § 50-18-71 (2013 & Supp. 2020).

65. § 17-4-20.2.

66. *Id.*

67. *Id.*

68. Telephone Interview with Sen. Elena Parent (D-42th) (July 28, 2020) (on file with the Georgia State University Law Review) [hereinafter Parent Interview].

69. *Id.*; HB 838, as introduced, 2020 Ga. Gen. Assemb. HB 838 was subsequently signed into law by Governor Brian Kemp (R) on August 5, 2020, with an effective date of January 1, 2021. 2020 Ga. Laws 671.; see also Georgia General Assembly, HB 838, Bill Tracking [hereinafter HB 838, Bill Tracking], <http://www.legis.ga.gov/legislation/en-US/Display/20192020/HB/838>.

70. HB 838, as introduced, 2020 Ga. Gen. Assemb.; O.C.G.A. § 24-5-510 (Supp. 2020); see also Maya T. Prabhu, *ACLU: Georgia Police Protections Bill Weakens Penalty for Killing an Officer*, ATLANTA J.-CONST. (June 28, 2020) [hereinafter *Police Protections Bill*], <https://www.ajc.com/news/state—regional-govt—politics/aclu-georgia-police-protections-bill-weakens-penalty-for-killing-officer/vb1oCJogFVEixqUMvjieKP/> [<https://perma.cc/A8T9-CUQB>].

71. § 24-5-510.

(R-161st) explained that, earlier in the year, his legislative counsel notified him of potential errors with the language of the Code, particularly with the use of the term “officer.”<sup>72</sup> The legislative counsel sought to reduce potential controversy in the future and to avoid a situation where firefighters, emergency medical technicians, or 911 operators would be deemed ineligible for the protections under the statute, and that protections would be limited to law enforcement officers.<sup>73</sup> The initial version of HB 838 passed the House on February 27, 2020.<sup>74</sup>

The overhaul to HB 838, adding protections for first responders, was brought to the Senate by Senator Randy Robertson (R-29th).<sup>75</sup> HB 838 established a new offense of “bias motivated intimidation.”<sup>76</sup> A person commits the offense when such person “maliciously and with the specific intent to intimidate, harass, or terrorize another person because of that person’s actual or perceived employment as a first responder . . . [c]auses death or serious bodily harm to another person; or . . . [c]auses damage to or destroys any real or personal property . . . .”<sup>77</sup> The term “first responder” includes firefighters, peace officers, and emergency medical technicians.<sup>78</sup> A person convicted of “bias motivated intimidation” faces imprisonment of one-to-five years, a maximum fine of \$5,000, or both.<sup>79</sup> A violation is considered a separate offense and runs consecutively.<sup>80</sup> The bill also allows a peace officer to bring a civil suit for damages suffered during an officer’s performance of official duties, for abridgment of the officer’s civil rights arising out of the officer’s performance of official duties, or for filing a complaint against the officer which the person knew was false when it was filed.<sup>81</sup>

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72. Video Recording of House Proceedings at 3 hr., 8 min., 27 sec. (June 23, 2020) (remarks by Rep. Bill Hitchens (R-161st)) [hereinafter House Proceedings Video], <https://livestream.com/accounts/25225474/events/8824297/videos/207824164>.

73. *Id.*

74. State of Georgia Final Composite Status Sheet, HB 838, Aug. 7, 2020.

75. HB 838, Bill Tracking, *supra* note 69.

76. *Police Protections Bill*, *supra* note 70.

77. O.C.G.A. § 35-8-7.4 (Supp. 2020).

78. *Id.*

79. *Id.*

80. *Id.* A consecutive sentence is when “two or more sentences of jail time are to be served in sequence.” *Consecutive sentences*, BLACK’S LAW DICTIONARY (11th ed. 2019).

81. O.C.G.A. § 35-8-7.3 (Supp. 2020).

Supporters of the bill felt it was necessary for the legislature to protect and show support for first responders.<sup>82</sup> Prior to the passage of the bill, Lieutenant Governor Geoff Duncan urged legislators to pass the bill and stated that “[a]t a time when officers feel under siege, when police fear politically motivated prosecution, when extreme voices are calling to ‘defund the police,’ our state must stand up for those who put their lives on the line for us.”<sup>83</sup> In support of HB 838, Representative Hitchens stated that “a lot of our law enforcement personnel across the state are subjected to a lot of what would be criminal activity if this passes” because of the position they hold.<sup>84</sup> Representative Hitchens also added that he has heard many people say “that it [is] part of the job,” but he does not think that it is “part of the job to be subjected to that kind of treatment on a regular basis.”<sup>85</sup>

Several legislators in the House raised concerns about the language used in HB 838.<sup>86</sup> Representative Mike Wilensky (D-79th) and Representative Josh McLaurin (D-51st) asked for clarification about the civil cause of action an officer could pursue.<sup>87</sup> In response, Representative Hitchens stated that he thought it would be defamatory but conceded that he “didn’t write this . . . [It] was an amendment that came over from the Senate,” and he was “trying to defend [his] part of the bill that deals with a lot of other issues [he] thought were very beneficial.”<sup>88</sup>

After Representative Hitchens’s presentation, Representative Jasmine Clark (D-108th) and Representative Mable Thomas (D-55th) raised concerns about the bill giving law enforcement the ability to sue citizens when qualified immunity limits a citizen’s ability to sue

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82. Beau Evans, *Police, First Responder Protections Pass in Georgia General Assembly*, AUGUSTA CHRON., <https://www.augustachronicle.com/news/20200623/police-first-responder-protections-pass-in-georgia-general-assembly> [<https://perma.cc/25PS-A9VF>] (June 23, 2020, 3:26 PM).

83. Press Release, Geoff Duncan, LG of Georgia, Duncan: Protect the Vast Majority of Officers Who Serve Honorably (June 23, 2020), <https://ltgov.georgia.gov/press-releases/2020-06-23/duncan-protect-vast-majority-officers-who-serve-honorably> [<https://perma.cc/22WF-ZLEJ>].

84. House Proceedings Video, *supra* note 72, at 3 hr., 18 min., 36 sec.

85. *Id.* at 3 hr., 20 min., 30 sec.

86. *Id.* at 3 hr., 21 min., 53 sec.

87. *Id.* at 3 hr., 23 min., 47 sec. (remarks by Rep. Wilensky (D-79th)); *id.* at 3 hr., 26 min., 0 sec. (remarks by Rep. McLaurin (D-51st)).

88. *Id.* at 3 hr., 26 min., 31 sec. (remarks by Rep. Bill Hitchens (R-161st)).

police officers.<sup>89</sup> Representative Thomas expressed her concern that the bill will “cause more harm than good.”<sup>90</sup> Representative David Wilkerson (D-38th) also expressed his displeasure and disappointment, stating: “We are pitting law enforcement against our citizens . . . . I don’t know what to say. I love this chamber, I love this body, but I have never been more disappointed in my life.”<sup>91</sup>

Critics of the bill point out that the bill may reduce the penalty for killing a police officer.<sup>92</sup> Andrea Young, Executive Director of the American Civil Liberties Union (ACLU) of Georgia, stated that the bill was “severely flawed.”<sup>93</sup> According to the ACLU of Georgia, Section 6 of the bill conflicts with existing Georgia law by creating uncertainty on how it would be applied.<sup>94</sup> The punishment for murder includes death, imprisonment for life without the possibility of parole, or imprisonment for life under current Georgia law.<sup>95</sup> Under HB 838, the maximum punishment is imprisonment for five years, a fine of \$5,000, or both.<sup>96</sup> The ACLU of Georgia contends that the “rule of lenity” applies, and when a statute is unclear, the courts will resolve the statutory ambiguity in a manner most favorable to a defendant.<sup>97</sup>

In Georgia, the rule of lenity provides that “when an ambiguity exists in one or more statutes, such that the law exacts varying degrees of punishment for the same offense, ‘the ambiguity [will be] resolved in favor of [a] defendant, who will then receive the lesser punishment.’”<sup>98</sup> The fundamental inquiry a court makes in

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89. *Id.* at 3 hr., 34 min., 36 sec. (remarks by Rep. Jasmine Clark (D-108th)); *id.* at 3 hr., 37 min., 19 sec. (remarks by Rep. Mable Thomas (D-55th)).

90. House Proceedings Video, *supra* note 72, at 3 hr., 37 min., 19 sec. (remarks by Rep. Mable Thomas (D-55th)).

91. *Id.* at 3 hr., 38 min., 27 sec. (remarks by Rep. David Wilkerson (D-38th)).

92. *Police Protections Bill*, *supra* note 70.

93. *Id.*

94. Press Release, ACLU of Georgia, Georgia Legislature Passed Flawed Bill to Silence Demand for Police Accountability, Substantially Reduced Penalty for Deliberately Killing a Police Officer (June 26, 2020), <https://www.acluga.org/en/georgia-legislature-passed-flawed-bill-silence-demand-police-accountability-substantially-reduced> [https://perma.cc/6R2K-J8UT].

95. *Id.*

96. *Id.*

97. *Id.*; see also *United States v. Bass*, 404 U.S. 336, 348 (1971).

98. *Gordon v. State*, 334 Ga. App. 633, 634, 780 S.E.2d 376, 378 (2015) (quoting *McNair v. State*, 293 Ga. 282, 283, 745 S.E.2d 646, 648 (2013)) (holding the defendant’s conviction for felony offense of making a false statement should have been reduced to the misdemeanor offense of making a false report

determining whether the rule of lenity applies is “whether the identical conduct would support a conviction under either of two crimes with differing penalties, i.e., whether the statutes ‘define the same offense’ such that an ‘ambiguity [is] created by different punishments being set forth for the same crime.’”<sup>99</sup> The rule of lenity applies “where there is ambiguity in the two statutes such that ‘both crimes could be proved with the same evidence.’”<sup>100</sup> A defendant’s actions may violate more than one penal statute, and a defendant may be prosecuted for more than one crime.<sup>101</sup> Georgia courts have held the “injustice that must be avoided is *sentencing* the defendant for more than one crime following his conviction of multiple crimes based upon the same act.”<sup>102</sup>

Critics of the bill also believe that it targets protestors.<sup>103</sup> Representative Bee Nguyen (D-89th) said the bill was “designed to intimidate and punish protestors.”<sup>104</sup> Representative Nguyen also stated that the bill “infringes on the rights of the people.”<sup>105</sup> Leaders from the Georgia National Association for the Advancement of Colored People also worry the bill will deter people from filing legitimate claims against officers.<sup>106</sup>

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of a crime because the two statutes provide different grades of punishment for the same criminal conduct and the rule of lenity applies).

99. *Id.* at 635, 780 S.E.2d at 379 (quoting *Banta v. State*, 281 Ga. 615, 618, 642 S.E.2d 51, 54 (2007)).

100. *Marlow v. State*, 339 Ga. App. 790, 795, 792 S.E.2d 712, 717 (2016) (quoting *Gordon*, 334 Ga. App. at 637, 780 S.E.2d at 380).

101. *Banta v. State*, 281 Ga. 615, 618, 642 S.E.2d 51, 54 (2007).

102. *Id.*

103. James Salzer & Maya T. Prabhu, *New Normal or One-Time Thing? The Legislative Session That Went Viral*, ATLANTA J.-CONST. (June 27, 2020), <https://www.ajc.com/news/state—regional-govt—politics/new-normal-one-time-thing-the-legislative-session-that-went-viral/np32cII38U2jkaCbCUBxhO/> [<https://perma.cc/2MTM-8477>].

104. *Id.*

105. *Id.*

106. Josh Green, *What Is Georgia’s Proposed Police Protections Bill? And Why Is It Controversial?*, ATLANTA MAG. (July 10, 2020), <https://www.atlantamagazine.com/news-culture-articles/what-is-georgias-proposed-police-protections-bill-and-why-is-it-controversial/> [<https://perma.cc/9MJM-D592>].

*Bias Crime Report*

The Act mandates that law enforcement officers report incidents in a Bias Crime Report.<sup>107</sup> On the Senate floor, Senator Harold Jones (D-22nd) said that these Bias Crime Reports were essential to hate crimes legislation because the data would help law enforcement figure out where specific instances of hate crimes were occurring in a “scientific” way.<sup>108</sup> Senator Jones also mentioned that Bias Crime Reports were present in model hate crimes legislation by the Anti-Defamation League.<sup>109</sup> He noted that Georgia was not alone in including these Reports; approximately twenty-four states had hate crimes legislation that used penalty enhancements and data collection.<sup>110</sup> However, Reports where no arrests occurred would not be subject to Georgia’s Open Records Act, so the Report could not be used against anyone because the names of parties are also reported.<sup>111</sup> Senator Bill Cowsert (R-62nd), also on the Senate floor, said that the Report would be available to the victim and to the accused in the name of fairness, because the Report contained personal information.<sup>112</sup>

Critics of the Act raised concerns about the Bias Crime Reporting process.<sup>113</sup> Representative Matthew Gambill (R-15th) stated: “When I studied the other states that have hate crimes laws, many of them did not establish a bias crime reporting process.”<sup>114</sup> This omission was significant because “[i]n HB 426, bias crime reports are exempt from open records and are made whether anyone is even arrested. This leaves room for too much subjective[ity] that I feel will be abused.”<sup>115</sup>

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107. O.C.G.A. § 17-4-20.2 (2020).

108. Video Recording of Senate Chamber Proceedings at 4 hr., 13 min., 53 sec. (June 23, 2020) (remarks by Sen. Harold V. Jones II (D-22nd)), <https://livestream.com/accounts/26021522/events/7940809/videos/207823696>.

109. *Id.* at 4 hr., 12 min., 18 sec.

110. *Id.* at 4 hr., 12 min., 48 sec.

111. *Id.* at 4 hr., 13 min., 43 sec.

112. *Id.* at 4 hr., 7 min., 17 sec. (remarks by Sen. Bill Cowsert (R-46th)).

113. James Swift, *Bartow County Lawmakers Split on ‘Hate Crime’ Bill*, DAILY TRIB. NEWS (July 4, 2020), <https://daily-tribune.com/stories/bartow-county-lawmakers-split-on-hate-crime-bill,25345> [<https://perma.cc/6XM6-BXD4>].

114. *Id.* (quoting Rep. Matthew Gambill (R-15th)).

115. *Id.*

The Act relies on police officers to classify the crimes as motivated by bias, which could raise potential issues if responding officers fail to report the crime accordingly.<sup>116</sup> A review by ProPublica showed that, prior to the Act's passing, only twelve states had statutes requiring police academies to provide instruction on hate crimes.<sup>117</sup> A lack of training or consistency could lead officers to misclassify or miss cases altogether.<sup>118</sup>

During an investigation, officers are not typically concerned with the motivation behind the crime or with uncovering the offender's beliefs.<sup>119</sup> By requiring law enforcement officers to investigate the motive for a crime, the investigation process becomes more complicated.<sup>120</sup> The Federal Bureau of Investigation uses a two-tiered decision-making process in classifying hate crimes.<sup>121</sup> Incidents identified by the first responding officer as potentially motivated by bias are reevaluated by a second investigator.<sup>122</sup> The second investigator determines whether the incident should be counted officially as a bias-motivated crime.<sup>123</sup>

The Bias Crime Report provision does not require those reports to include whether prosecutions are pursued or whether convictions are made.<sup>124</sup> Because of this, the data may not be as useful as proponents claim. Unlike Georgia, hate crimes in California are tracked from the time the incident occurs through a conviction or acquittal.<sup>125</sup> In addition, California's hate-crime conviction data is also publicly

116. O.C.G.A. § 35-8-7.4 (Supp. 2020).

117. A.C. Thompson et al., *Hate Crime Training for Police Is Often Inadequate, Sometimes Nonexistent*, PROPUBLICA (Nov. 29, 2017, 8:00 AM), <https://www.propublica.org/article/hate-crime-training-for-police-is-often-inadequate-sometimes-nonexistent> [<https://perma.cc/R58P-2YQ4>].

118. Ken Schwencke, *Why America Fails at Gathering Hate Crime Statistics*, PROPUBLICA (Dec. 4, 2017, 8:00 AM), <https://www.propublica.org/article/why-america-fails-at-gathering-hate-crime-statistics> [<https://perma.cc/E3ZU-WTAP>].

119. Shirin Afsous, *Proving Hate: The Difficulties of Successfully Prosecuting Bias-Motivated Crimes*, 22 SUFFOLK J. TRIAL & APP. ADVOC. 273, 284–85 (2017).

120. *Id.*

121. Schwencke, *supra* note 118.

122. *Id.*

123. *Id.*

124. O.C.G.A. § 17-4-20.2 (2020).

125. Maya T. Prabhu, *Tracking Convictions for Georgia's Hate-Crimes Law Could Be Difficult*, ATLANTA J.-CONST. (July 3, 2020) <https://www.ajc.com/news/state-regional-govt-politics/tracking-convictions-for-georgia-hate-crimes-law-could-difficult/gg3FMphLHfy82WJhGu2aJ/> [<https://perma.cc/NR5M-ERUD>].

available.<sup>126</sup> This data could allow for greater predictability of conviction results, aiding prosecutors in deciding whether to pursue charges.<sup>127</sup>

Senator Jones believes the current data collection process is a starting point.<sup>128</sup> “Right now, the first thing we wanted to do is make sure that they have data collection in there—remember: this was something we had to fight to get included. . . . Let [us] start with this data collection and then move forward and see where we are as far as keeping up with hate crimes in Georgia,” Senator Jones said.<sup>129</sup>

### *Conclusion*

Fifteen years since the Supreme Court of Georgia struck down Georgia’s hate crimes bill, the legislature has passed new hate crimes legislation. The Act amended portions of the Code that the Court previously found unconstitutional and also added other provisions. Senator Elena Parent (D-42nd), a supporter of the Act, said that “having [hate crimes legislation] was important for the stakes that it puts in the ground—in declaring that, in our society, we view all people as equal and that crimes that have been motivated by personal animus against someone for their immutable personal characteristics are, to us, heinous.”<sup>130</sup> Governor Brian Kemp (R) himself was hopeful that the passage of the Act was a sign of more legislation against bias-motivated crimes to come: “While this legislation does not right every wrong, it is an important step, and we will continue to do our part as state leaders to ensure that Georgia is a place where all people can live, learn, and prosper.”<sup>131</sup>

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126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.* (quoting Sen. Harold Jones (D-22nd)).

130. Parent Interview, *supra* note 68.

131. HB 426 Signing Press Release, *supra* note 52.