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ACLU OF RI POSITION: OPPOSE

TESTIMONY IN OPPOSITION TO 21-S 803,
RELATING TO CRIMINAL PROCEDURE—SENTENCE OR EXECUTION
April 29, 2021

While hate crimes deserve condemnation, the ACLU of RI is opposed to passage of 21-S 803 for several reasons. In expanding the scope of coverage of the Hate Crimes Sentencing Act, S 803 would make it easier to find a hate crime based solely on the written or spoken word and without a direct finding of animus. But the ACLU of RI is long on record as opposing restrictions on what many—including many in the ACLU—consider offensive and toxic speech, and that is especially problematic where that speech could be inappropriately used to enhance the punishment imposed on an individual.

This expansion is particularly troubling when one recognizes that these laws have often been used against members of those groups that are actually most likely to be victims of hate crimes. Further, the law being expanded by the bill contains a mandatory sentencing provision, a sentencing measure that the ACLU strongly opposes for any offense. Finally, the bill would give a judge instead of a jury the power to determine whether a variety of petty offenses may have been motivated by hate, and could thereby encourage police and prosecutors to raise the stakes against minor offenders who refuse to plea bargain. All these concerns follow in more detail below.

Section 1 of S 803 would amend the Hate Crimes Sentencing Act in several ways. First, it would alter the standard for determining the existence of a "hate crime" by providing that one can

be established whenever *any* person or group is the target of a crime "in whole *or in part*" by a protected characteristic, such as race or national origin or religion. This revision significantly increases the risk that proof of a "hate crime" would no longer require the State to prove beyond a reasonable doubt that the accused targeted his victim *because of* a protected characteristic motivation—meaning that the knowledge or perception that the target represented the hated group was the "but for" cause of the accused's criminal action—but rather that it is enough that the accused engaged in his criminal actions "in part" because of the target's characteristic.

What does that mean? Would anyone charged with disorderly conduct or property damage during a Black Lives Matter protest be subject to hate crimes enhancement because their actions occurred while they were protesting against claims of systemic racism and therefore the criminal conduct which occurred happened, "in part," because of race? Is graffiti or vandalism of a Christopher Columbus statue, expressing opposition to treatment of indigenous peoples, targeted "in part" at individuals of Italian heritage, and thus a hate crime? Is it enough that, during the commission of a crime, the accused notices the race, gender or religion of the victim and makes a reference to it? Would a defendant's disparaging posts on Facebook about certain religions or races be admissible to allege that a crime was motivated "in part" by race or religion? It would seem so.

We recognize that the bill, by adding gender identity or expression to the group of protected characteristics and seeking to recognize the community's outrage over hate-motivated crimes, stems from important, laudable goals. But the First Amendment protects the right of speakers to express vile opinions, and we must remain vigilant to prevent our criminal laws from trying to impose enhanced penalties solely on the basis of such speech or protest activities.

Further, broadly worded hate crime laws inevitably give prosecutors and police wide discretion to decide who will face enhanced criminal penalties, and they are just as apt to be used against members of minority communities. One of the first people charged under Florida's hate crime law was an African-American who, arrested for assault, called a police officer a "white cracker." And when the U.S. Supreme Court generally upheld the constitutionality of penalty enhancements for hate crimes, it was in a case involving not a white supremacist, but a young African American who assaulted a white man after a showing of the movie *Mississippi Burning*. Of course, color-blind enforcement of these laws is appropriate, but it also raises the question as to exactly how helpful they are in addressing the root problem they seem designed to address.

The expansion of this law is particularly detrimental from the ACLU's perspective because the hate crimes statute is one of only a handful of state laws that contain mandatory minimum sentencing provisions. The ACLU has long expressed concern that mandatory sentencing takes away needed discretion in the judicial process, and that is true no matter what the crime. Mandatory sentencing laws have contributed to the mass incarceration of large portions of the population and especially communities of color; reaffirming it as a legitimate tool for expansion in this context is to give its use an imprimatur for other criminal offenses.

S 803 also would add a hate crimes sentence enhancement to every offense which is described in chapter 44 of title 11 of the general laws. It is worth noting that chapter 44 contains over 35 separate offenses, which include criminal penalties ranging from such things as breaking glass on a public highway or building (11-44-29), applying graffiti to private or public property (11-44-21.1), littering on Middletown beaches (11-44-19), defacing public statues (11-44-13), stealing fruits and vegetables (11-44-3), or trespassing on posted lands and destroying or defacing no-trespass signs (11-44-4).

Just from a drafting standpoint, a provision that purports to make every one of these offenses a potential hate crime in a catch-all provision creates grave risk of injustice and misuse of the criminal justice system to label as serious "hate crimes" conduct which right now includes prohibitions carrying fines between $5 and $20 (e.g., 11-44-4, 11-44-9, 11-44-10). Any non-conforming or protest expression tied to one of these illegal activities could readily be viewed as offensive or hostile to one of the groups protected by this law.

The bill would also allow consideration of a person's alleged animus in committing one of these petty offenses to take place after the trial is concluded and without a jury making that determination. This process not only usurps the jury's fact-finding function, but it could be used vindictively by police to target offenders who refuse to plea bargain or are seen as "troublemakers."

For all these reasons – and without in any way questioning the motivations behind the bill – we are constrained to oppose this legislation's passage.

We thank you for considering our views.

Submitted by:
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