BUT-FOR THE BEARD: AN ANALYSIS OF CAUSATION UNDER UNITED STATES CODE SECTION 249

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I. INTRODUCTION

United States Code § 249[2] (Hate Crimes Act) elevates illegal acts to hate crimes[3] if the perpetrators committed said acts because of the victim's "actual or perceived . . . religion, or national origin."[4] Such legislation is meant to recognize not only the heinousness of discriminatory acts, but also that society, as a collective whole, will not stand for their continued perpetration.[5] In 2009, Congress amended the legislation to include the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act (HCPA), a provision meant to strengthen what Congress saw as an otherwise inadequate mechanism for combating hate crimes.[6] Recognizing the continuing prevalence of hate crimes in the United States[7], Congress reaffirmed its position on the hate crime

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2 Hate Crimes Act, 18 U.S.C. § 249 (2014).

3 A hate crime is a "crime motivated by the victim's race, color, ethnicity, religion, or national origin." BLACK'S LAW DICTIONARY 428 (9th ed. 2009).

4 18 U.S.C. § 249(a)(2)(A) (2014).

5 Sara Sun Beale, *Federalizing Hate Crimes: Symbolic Politics, Expressive Law, or Tool for Criminal Enforcement?*, 80 B.U. L. REV. 1227, 1255 (2000).

6 Avlana Eisenberg, *Expressive Enforcement*, 61 UCLA L. REV. 858, 867-68 (2014):

> In 2009 . . . President Barack Obama signed into law the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act, which expanded the categories of protected victims to include those targeted because of actual or perceived gender, sexual orientation, gender identity, and disability. Obama hailed the hate crimes bill as a crucial step that would "help protect our citizens from violence based on what they look like, who they love, how they pray." While the 2009 Act was significantly more expansive than its 1968 precursor, Obama's remarks highlighted the link between the modern federal hate crime law and its civil rights era predecessor, emphasizing the importance of the new legislation as a way to combat violent attacks against people based on core features of their identity.

Id.

7 Laura Meli, *Hate Crime and Punishment: Why Typical Punishment Does Not Fit the Crime*, 2014 U. ILL. L. REV. 921, 931-32 (2014).

legislation by clearly stating that, "The incidence of violence motivated by the actual or perceived race, color, religion, national origin, gender, sexual orientation, gender identity, or disability of the victim poses a serious national problem."[8] However, what happens if multiple external factors not explicitly listed in the statute motivated the offender to commit the illegal act? Can the offense still be classified as a hate crime if the aforementioned motivators were not the sole reasons behind its perpetration? Specifically, should 18 U.S.C. § 249 be interpreted as requiring solely color, race, religion, or national origin as the requisite motivation to satisfy the element of causality, or is it sufficient for such motivations to have played a significant factor in the crime? In order to address these questions, this article analyzes the causational element of hate crimes through a case contesting the role of religion as the sole necessary motivator.[9]

In August 2014, *United States v. Miller*,[10] on appeal from *United States v. Mullet*,[11] analyzed whether Bishop Samuel Mullet[12] and members of the Amish Bergholz community committed hate crimes when they forcibly trimmed the beards of several Amish men and the hair of several Amish women.[13] The defense argued that the attacks were not motivated by the religious identities of the victims, but by the interpersonal and familial controversies between the parties involved.[14] The prosecution maintained that both the victims and their punishments were specifically chosen because of the religious significance such acts hold to the Amish community, and the turmoil created by a split in church doctrine.[15] The defense's argument proved more persuasive, leading the United States Court of Appeals for the Sixth Circuit to conclude that federal

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8 Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act of 2009, 18 U.S.C. § 249 (2014).

9 United States v. Miller, 767 F.3d 585 (6th Cir. 2014).

10 *Id*.

11 United States v. Mullet, 868 F. Supp. 2d 618 (N.D. Ohio 2012).

12 A defendant in *United States v. Miller*, who served as the controversial bishop of the Amish Bergholz community in Ohio from which he excommunicated several members. James F. McCarty, *Amish Beard-Cutting Attacks Fueled by Compassion per Defense Team*, HUFFINGTON POST (Aug. 30, 2012, 9:11 AM), http://www.huffingtonpost.com/2012/08/30/amish-beard-cutting-attac_n_1841029.html.

13 *Miller*, 767 F.3d at 589.

14 *Id*. at 590-91.

15 *Id*. at 591.

legislation regulating hate crimes requires courts to issue but-for[16] instructions on causation in criminal matters.[17]

This article analyzes why a discrepancy existed between the interpretation of the HCPA by the United States District Court for the District of Ohio in *United States v. Mullet* and the Sixth Circuit Court of Appeals in *United States v. Miller*. It agrees with and analyzes the District Court's ruling that the bias-inspired cause behind an attack need only be a significant factor in the offender's motivation.[18] It disagrees with and analyzes the Sixth Circtuit's holding that the intent behind federal legislation and public policy mandate but-for causation instructions for criminal matters in which the defendant has been accused of committing a hate crime.[19] Specifically, the article takes issue with the application of *Burrage v. United States*,[20] dealing with the causational element of a substance abuse crime, to *Miller*, dealing with a hate crime. It disagrees with the majority's conclusion that statutes utilizing phrases such as "because of" mandate a requirement of but-for causality.[21] It agrees with Justice Ginsburg's concurring opinion that the Court's interpretation should not apply to antidiscrimination laws like hate crimes.[22]

II. LEGAL BACKGROUND

This section discusses the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act of 2009,[23] and how the Act seeks to regulate and discourage hate crimes in the United States. This section also discusses the requirements for bringing a hate crime claim to court, and how such a claim can be defeated.

In 1968, Congress enacted the Interference with Federally Protected Activities Act[24] as an amendment to Title 18[25] of the United States Code.[26] Inspired by the civil rights movement, the

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16 *Id.*

17 *Miller*, 767 F.3d at 589.

18 *Id.*

19 *Id.* at 593.

20 Burrage v. United States, 134 S. Ct. 881 (2014).

21 *Id.* at 889.

22 *Id.* at 892.

23 18 U.S.C. § 249(a)(2)(A) (2014).

24 Catherine Pugh, *What Do You Get When You Add Megan Williams to Matthew Shepard and Victim-Offender Mediation? A Hate Crime Law That Prosecutors Will Actually Want to Use*, 45 CAL. W. L. REV. 179, 200 (2008).

25 18 U.S.C. § 245 (2014).

26 Pugh, *supra* note 24, at 200-02.

legislation was aimed at regulating and combatting bias-inspired crimes.[27] The amendment enabled the federal government to exact certain penalties from perpetrators who committed acts of violence or intimidation based on their bias towards their victims' race, color, religion, or national identity.[28] In more recent years, hate crime awareness increased after national media attention alerted millions of Americans to the bias-inspired killings of Matthew Shepard[29] and James Byrd, Jr.[30] As public outrage over the killings grew, politicians were forced to confront the inadequacy of the existing hate crime legislation.[31] After reassessing this legislation, Congress passed the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act of 2009.[32] Aside from expanding the definition of the legislation's protected classes[33] and making it easier to prosecute offenders,[34] the HCPA took measures to bolster local efforts to fight hate crimes throughout the United States.[35] In doing so, the legislation provided individual states

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27 Christopher DiPompeo, *Federal Hate Crime Law and United States v. Lopez: On a Collision Course to Clarify Jurisdictional-Element Analysis*, 157 U. PA. L. REV 617, 627 (2008).

28 Pugh, *supra* note 24, at 200-02.

29 A homosexual college student who was kidnapped, robbed, and beaten. He is believed to have been targeted because of his sexual identity and died five days after his rescue. James Brooke, *Gay Man Dies From Attack, Fanning Outrage and Debate*, N.Y. TIMES (Oct. 13, 1998), http://www.nytimes.com/1998/10/13/us/gay-man-dies-from-attack-fanning-outrage-and-debate.html.

30 An African-American man who was tied to the back of a truck and dragged until dead. He was targeted because of his race. *Man Executed for Dragging Death of James Byrd*, CNN (Sept. 22, 2011, 1:13 PM), http://www.cnn.com/2011/09/21/justice/texas-dragging-death-execution/.

31 DiPompeo, *supra* note 27, at 620.

32 Samuel Duimovich, *A Critique of the Hate Crimes Prevention Act Regarding Its Protection of Gays and Lesbians (and How a Private Right Could Fix It)*, 23 S. CAL. REV. L. & SOC. JUST. 295, 302 (2014).

33 "The HCPA makes it a federal offense to injure or attempt to injure by means of fire, a firearm, a dangerous weapon, or an explosive or incendiary devise any person because of their race, color, religion, or national origin. It also criminalizes the same acts motivated by bias against a person's actual or perceived gender, sexual orientation, gender identity, or disability . . . ." *Id.*

34 Prior to the HCPA, existing federal hate crime legislation mandated that in order to prosecute, the government must also prove that the victim was prevented from engaging in a federally protected right. By eliminating this requirement, the HCPA increased the government's ability to engage in the prosecution of various hate crimes that occurred outside the attempted exercise of federally protected rights. DiPompeo, *supra* note 27, at 627.

35 Kami Chavis Simmons, *Subverting Symbolism: The Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act and Cooperative Federalism*, 49 AM. CRIM. L. REV. 1863, 1883-84 (2012).

with more federal funding, training, and investigatory expertise aimed at eradicating hate crimes within their own jurisdictions.[36]

Hate crimes have been acknowledged as unique amongst other illegal acts due to their perpetrators' desires to spread fear, oppression, and intimidation in local communities.[37] As a result, federal hate crime legislation is earnestly and specifically tailored towards deterring illegal activities motivated by the victim's identity.[38] To that end, such legislation allows for dual-punishment of the perpetrator by prosecuting both the illegal act and the action of targeting the victim based on bias.[39] Therefore, proving a causal link between the act and the bias-inspired motivation is essential in establishing any successful hate crime claim.[40]

The defense in a hate crime claim may prevail by proving that the prosecution has failed to establish one or both elements of the crime.[41] First, as in any case, the defense may demonstrate that the prosecution has failed to prove the occurrence of the underlying illegal act.[42] Second, the defense may show that the bias-inspired motivation behind the act is absent, thus depriving the prosecution of the element necessary to elevate the act to a hate crime and the possibility of pursuing enhanced punishments under such legislation.[43]

III. ANALYSIS

A. Factual Background

In 2006, Samuel Mullet excommunicated several members of the Bergholz Amish community for questioning practices, which Mullet, in his role as bishop,[44] had instituted.[45] Controversy surrounding the excommunications caused tension and strife

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36 *Id*.

37 Duimovich, *supra* note 32, at 300.

38 *Id*.

39 *Id*. at 324.

40 *Miller*, 767 F.3d at 592.

41 *Id*. at 590.

42 *Id*.

43 *Id*.

44 An Amish bishop serves as the head of his spiritual community. His role is to interpret and create local rules and regulations, and to determine the best course for dealing with those who deviate from said behavior. Zachary Rothenberg, *The Symbiotic Circle of Community: A Comparative Investigation of Deviance Control in Intentional Communities*, 49 CLEV. ST. L. REV. 271, 290 (2001).

45 *Miller*, 767 F.3d at 589.

among the many families affected by Mullet's decisions.[46] The ensuing turmoil resulted in divorce, custody battles, and familial division.[47] In an effort to circumvent church doctrine, some of those excommunicated by Mullet asked to be admitted to other Amish communities without going through the usual established procedure.[48]

Due to the controversial nature of Mullet's leadership and the pleas of the excommunicated, three hundred bishops from across the United States gathered and overturned Mullet's order, reversing the excommunications.[49] In doing so, these bishops broke from traditional church doctrine by refusing to abide by the largely accepted Amish practice of shunning[50] those excommunicated from their communities.[51] Additionally, the ruling allowed for the continuation of a custody battle over the children of Mullet's daughter, Wilma, and her husband Aden Troyers.[52] Aden's parents were among those excommunicated by Mullet.[53] As a result, Aden gained emergency temporary custody of his children to relocate with them to another Amish community in Pennsylvania.[54]

As Mullet's daughter, Wilma sought to remain in the Bergholz community with the children.[55] Aden's custody became permanent two years later when a court declared that, "All parenting time shall be in Pennsylvania. Under no circumstances shall parenting time take place in Bergholz, Ohio."[56] As a result of losing Bishop Mullet's grandchildren, the Bergholz community became more distraught and blamed the events on their own lack of faith.[57] In an act of atonement, several members of the community broke from church tradition by trimming their own hair and beards.[58] These acts represented a marked departure

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46 *Id*.

47 *Id*.

48 *Id*. at 589-90.

49 *Id*.

50 "The Amish employ shunning to socially ostracize members of their group who deviate from their religious order." Nicholas Merkin, *Getting Rid of Sinners May Be Expensive: A Suggested Approach to Torts Related to Religious Shunning Under the Free Exercise Clause*, 34 COLUM. J.L. & SOC. PROBS. 369, 373 (2001).

51 *Miller*, 767 F.3d at 589-90.

52 *Id*. at 590.

53 *Id*. at 589.

54 *Id*. at 590.

55 *Id*. at 589.

56 *Miller*, 767 F.3d at 590.

57 *Id*.

58 *Id*.

from the long-held practice of allowing men's beards and women's hair to grow unmolested as a sign of the Amish faith and identity.[59]

In another surprising move, several members of the traditionally nonviolent community launched a series of five attacks against nine individuals.[60] In each instance, the assailants cut off the beards of the male victims and the hair of the females.[61] Additionally, those targeted were associated in some way with members of the community or the families of the excommunicated, often through ties of blood or marriage.[62]

Sixteen members of the Bergholz community were indicted for violating and conspiring to violate the HCPA.[63] Four of the sixteen were also charged with concealing evidence, while one was charged with making false statements to the FBI.[64] In assessing the federal hate crime claims, the district court issued a jury instruction[65] that the motive element of a hate crime is satisfied if the victims' actual or perceived religion was a *significant motivating factor* behind the attack.[66] Therefore, the jury could convict even if the defendants were motivated not solely by religious identity, but also by additional factors.[67]

As a result, the prosecution sought to show that the attacks were motivated by the defendants' desire to punish those they saw as sacrilegious.[68] Conversely, the defense claimed that the attacks were not motivated by the victims' religious beliefs, but by familial and interpersonal issues.[69] Though several defendants contested their direct participation in the attacks, none disputed that they actually occurred.[70] The jury convicted each defendant of at least one violation of the hate crime statute, as well as seven of the additional charges.[71] Though none of the defendants contested any

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59 Rothenberg, *supra* note 44, at 289.

60 *Miller*, 767 F.3d at 590.

61 *Id*.

62 *Id*.

63 *Id*.

64 *Id*.

65 "A direction or guidelines that a judge gives a jury concerning the law of the case." BLACK'S LAW DICTIONARY 935 (9th ed. 2009).

66 *Miller*, 767 F.3d at 589.

67 *Id*.

68 *Id*. at 591.

69 *Id*. at 590-91.

70 *Id*. at 590.

71 *Miller*, 767 F.3d at 591.

of these seven additional convictions, all sixteen defendants appealed the hate crime convictions.[72]

On appeal, the Sixth Circuit relied heavily on the interpretation of causality in criminal statutes as set forth by the Supreme Court in *Burrage v. United States*.[73] This case post-dated the lower court's ruling in *United States v. Miller*.[74] In *Burrage*, the Court held that clauses within criminal statutes relying on "because of" to denote causation mandate the use of but-for causation.[75] The Court stressed that otherwise, juries would be forced to determine which reasons out of many potential motives were significant factors, and which were not substantial enough to contribute to the causal element.[76] Finding that the error was not harmless,[77] the Sixth Circuit reversed each of the hate crime convictions handed down by the district court.[78]

B. Discussion

The Sixth Circuit Court of Appeals ruled correctly on the law when it reversed the convictions handed down by the United States District Court for the Northern District of Ohio in *United States v. Mullet*. However, the precedent relied upon by the Sixth Circuit should not be binding for all antidiscrimination cases. The District Court failed legally when it interpreted 18 U.S.C. § 249 and issued a jury instruction favoring significant factor causation, rather than the required but-for causation.[79] However, the District Court's interpretation should be applied to cases dealing with bias-inspired crimes. The Supreme Court's interpretation of causation, as laid out in *Burrage v. United States*, should not be applied to cases dealing with antidiscrimination laws.

1. Religious Significance

Amish communities across the United States have taken many steps to isolate themselves in an effort to maintain a separate culture from mainstream America.[80] In achieving this

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72 *Id*.
73 *Burrage*, 134 S. Ct. 881.
74 *Miller*, 767 F.3d at 589.
75 *Id*. at 592-93.
76 *Id*. at 592.
77 *Id*. at 589.
78 *Id*.
79 *Miller*, 767 F.3d at 589.
80 Rothenberg, *supra* note 44, at 287-88.

end, church leaders convene semi-annually to form the rules[81] that define the Amish way of life.[82] Though these rules tend to vary slightly from community to community,[83] one thing seems to remain constant: appearance.[84] As a religiously united community, the Amish consider faith to be the center of their daily lives.[85] Outward appearance serves as a means for consolidating the unity of the community by bringing that faith into their everyday activities.[86]

In preserving long beards for married men and long, uncut hair for women, the Amish profess their solidarity as a unique group.[87] More importantly, these identifiers symbolize a shared commitment to religious righteousness, purity, and faith.[88] Even when members of the Bergholz community trimmed their own beards and hair, they did so with the mindset that it would bring them some form of religious repentance.[89] Therefore, it is clear that the beards of Amish men and the hair of Amish women are of religious significance to those seeking to conform to the unique and religiously-centered Amish identity.[90]

2. Causation Issue

In prosecuting a hate crime, the success of the state's case depends on whether it can prove the requisite motive element.[91] Without this crucial element, the illegal act cannot be elevated to a hate crime under federal legislation.[92] In *United States v. Mullet*, the district court issued a jury instruction stating that the motive element could be satisfied if the victim's actual or perceived religion was a significant motivating factor behind the attack.[93] In other words, the court instructed the jury that it could find the

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81 The *Ordnung* is the set of rules set forth by Amish church leaders based on a combination of longstanding tradition and semi-annual decisions aimed at forming and reinforcing the Amish identity and way of life. *Id.* at 288.

82 *Id.*

83 *Id.* at 289.

84 *Id.*

85 Andrew Glover, *The Pit and the Pendulum: How Far Can RLUIPA Go in Protecting the Amish?*, 19 PENN ST. ENVTL. L. REV. 109, 115 (2011).

86 *Id.* at 129.

87 *Miller*, 767 F.3d at 590.

88 *Id.*

89 *Id.*

90 *Id.*

91 *Id.* at 591.

92 18 U.S.C. § 249(a)(2)(A) (2014).

93 *Miller*, 767 F.3d at 591.

defendants guilty of a hate crime even if religion was not the sole motivating factor behind the attack.[94]

As a result, despite the defense's showing that the attacks were largely motivated by interpersonal differences between the parties involved, the causation instruction allowed the jury to convict on the hate crime charges.[95] On appeal in *United States v. Miller*, the Sixth Circuit took issue with the instruction, relying heavily on the Supreme Court's ruling in *Burrage v. United States*.[96] In *Burrage*, the defendant sold heroin to a man who subsequently died after using it in combination with other drugs not supplied by the defendant.[97] Expert medical testimony showed that it was impossible to determine whether the heroin alone killed the decedent, or if it was merely a contributing factor that was unable to have caused the death without the inclusion of other drugs.[98]

The district court instructed the jury that it could return a guilty verdict against the defendant if the prosecution proved that the defendant's heroin was a contributing cause in the death of the decedent.[99] Under the Controlled Substances Act,[100] the jury could impose a harsher mandatory minimum sentence if the defendant distributed the drug, and "death . . . result[ed] from the use of such substance."[101] The court found that the heroin was indeed a contributing factor and sentenced him to the Act's enhanced punishment.[102]

The Supreme Court overturned the conviction due to the instruction regarding causation.[103] The Court held that the defendant could not be found liable unless the heroin he provided the decedent was proven to be the sole proximate cause of death.[104] The Court also held that the Act's use of the phrase "results from" provided a clear intent from its authors that the illegal substance provided by a defendant must be the sole but-for cause of death.[105] The majority reasoned that Congress would have used alternative

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94 *Id.*
95 *Id.* at 590-591.
96 *Id.* at 589.
97 *Burrage*, 134 S. Ct. at 885.
98 *Id.* at 885-86.
99 *Id.* at 886.
100 21 U.S.C. § 841 (2014).
101 21 U.S.C. § 841 (b)(1)(A)-(C) (2014).
102 *Burrage*, 134 S. Ct. at 886.
103 *Id.* at 892.
104 *Id.* at 892.
105 *Id.* at 891.

phrasing to indicate that the Act's enhanced punishment could be employed for defendants whose illegal substances merely contributed to the death at issue.[106] Additionally, because there was room for debate regarding the criminal statute's interpretation, the Court was bound by the rule of lenity[107] to interpret the language according to its accepted meaning and to choose the construction more favorable for the defendant.[108]

3. Opposing Views

This paper takes no issue with the Court's ruling. However, while the Court's reasoning in *Burrage* was sound, I take the view of Justice Ginsburg in her concurring opinion regarding the causational element in antidiscrimination legislation.[109] Therefore, I object to the applicability of the *Burrage* court's reasoning that dealt with controlled substances. Instead I favor the facts and ruling in *Miller*, dealing with hate crimes.

Justices Ginsburg and Sotomayor joined the Court's judgment based on their deference to the rule of lenity.[110] However, Justice Ginsburg was clear in her concurrence that statutory phrases like "because of" should not be interpreted to mean "solely because of" in the context of antidiscrimination laws.[111] Justice Ginsburg's concurrence cites to her dissent in *University of Texas Southwestern Medical Center v. Nasser*.[112]

In *University of Texas Southwestern Medical Center*,[113] a physician of Middle Eastern descent resigned from his post on a university's faculty for two reasons.[114] First, he claimed that his supervisor had harassed him because of his religion and ethnic descent.[115] Second, he claimed that his supervisor's superior had retaliated against him because of his efforts to complain about the

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106 *Id*.

107 The rule of lenity is a common law doctrine practiced in American jurisprudence. Also known as "strict construction," it mandates that courts interpret ambiguities in criminal statutes in the light more favorable to the defendant. Zachary Price, *The Rule of Lenity as a Rule of Structure*, 72 FORDHAM L. REV. 885 (2004).

108 *Burrage*, 134 S. Ct. at 891.

109 *Id*. at 892 (Ginsburg, J., concurring).

110 *Id*.

111 *Id*.

112 *Id*.

113 Univ. of Tex. Sw. Med. Ctr. v. Nassar, 133 S. Ct. 2517 (2013).

114 *Id*. at 2520.

115 *Id*.

supervisor's harassment.[116] The physician filed suit against the university claiming two Title VII[117] violations.[118] The first[119] prohibits employers from discriminating against employees because of the employees' race, color, religion, sex, or national origin.[120] The second[121] prohibits employers from retaliating against employees because they have opposed an unlawful practice or claimed that Title VII was violated.[122]

The Court held that Title VII claims regarding retaliation for complaints against disparate treatment must be proven utilizing traditional but-for causation.[123] Justice Kennedy delivered the opinion of the Court, joined by Chief Justice Roberts, and Justices Scalia, Thomas, and Alito.[124] First, the Court relied on its interpretation of the common law principles of tort law, holding that an action is not the cause of an event if the particular event would have otherwise occurred without it.[125] Second, the Court looked to the Congressional intent behind Title VII, finding that "because" necessarily demands but-for causation and excludes all other theories of causation.[126] Third, the Court looked to its decision in *Gross v. FBL Financial Services, Inc.*[127] for precedent, finding that Title VII plaintiffs must demonstrate but-for causation to establish liability.[128]

In her dissent, cited in *Burrage*, Justice Ginsburg, joined by Justices Breyer, Sotomayor, and Kagan, addressed an alternative view of each of the majority's holdings.[129] First, the dissent approached the idea that textbook tort law requires a showing of but-for causation by a discussion of "overdetermined"[130] events.[131] In such circumstances, tort law allows plaintiffs to prove their claims by showing that either of the sufficient conditions created

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116 *Id*.
117 42 U.S.C. § 2000e-3 (2014).
118 *Univ. of Tex. Sw. Med. Ctr.,* 133 S. Ct. at 2520.
119 42 U.S.C. § 2000e-2(a) (2014).
120 *Univ. of Tex. Sw. Med. Ctr.,* 133 S. Ct. at 2520.
121 42 U.S.C. § 2000e-3(a) (2014).
122 *Univ. of Tex. Sw. Med. Ctr.*, 133 S. Ct. at 2520.
123 *Id*.
124 *Id*. at 2522..
125 *Id*. at 2524-25.
126 *Id*. at 2539-40.
127 Gross v. FBL Fin. Servs., 557 U.S. 167 (2009).
128 *Univ. of Tex. Sw. Med. Ctr.*, 133 S. Ct. at 2520-21.
129 *Id*. at 2534 (Ginsburg, J., dissenting).
130 "Overdetermined" events are those in which two separate forces create an injury, and either alone would be sufficient to have caused it. *Id*. at 2546.
131 *Id*.

the harm at issue.[132] Therefore, the majority's interpretation that "because" mandates sole but-for causation runs afoul of textbook tort law.[133]

Next, Justice Ginsburg took a different approach to the text of the statute and the Congressional intent behind it.[134] When Congress revisited legislation banning discrimination in employment, it did so with the intent to strengthen such laws.[135] As conceded by Justice Ginsburg, Congress did not tie the explicitly clarified "because of" language in the status-based section of Title VII, allowing for mixed factor causation, to the section dealing with retaliation.[136] However, there is little reason to think that Congress would have strengthened one and not the other, as both are critical for combating employment discrimination.[137]

Lastly, though the Court held in *Gross* that claims brought under the Age Discrimination in Employment Act[138] do not allow for mixed factor causation, federal appellate courts split over the need for but-for causation in *all* employment discrimination cases.[139] It was not until *Nassar* that the Court took its firm stance against mixed factor causation in favor of but-for causation in employment discrimination cases.[140] When the Court utilized this logic in *Burrage*, it effectively drew the bridge between the causational element in both civil and criminal cases anchored in antidiscrimination statutes.

Similarly, in her concurring opinion in *Burrage*, Justice Ginsburg demonstrated that her causation argument utilized in *University of Texas Southwestern Medical Center* could be employed in criminal and civil cases.[141] Though *Nassar* is a civil case and *Burrage* is a criminal case, each deals with the causational element in antidiscrimination legislation. Recognizing this similarity, Justice Ginsburg reiterated her stance against requiring but-for causality in either type of case.[142] Instead, she professed her belief in the "motivating factor approach" utilized by

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132 *Id*.
133 *Univ. of Tex. Sw. Med. Ctr.*, 133 S. Ct. at 2546 (Ginsburg, J., dissenting).
134 *Id*. at 2539-40.
135 *Id*.
136 *Id*.
137 *Id*.
138 29 U.S.C. § 623 (2006).
139 *Gross*, 557 U.S. at 168.
140 *Univ. of Tex. Sw. Med. Ctr.*, 133 S. Ct. at 2520.
141 *Burrage*, 134 S. Ct. at 892 (Ginsburg, J., concurring).
142 *Id*.

Section 2000e-2(m) of Title VII. This section deals with discrimination by employers because of an employee's race, color, religion, sex, or national origin.[143] In doing so, I believe she correctly interpreted the text and intent of the legislation.

4. Effects on Existing Hate Crime Legislation

But-for causation should not be required for all antidiscrimination legislation. In particular, hate crime legislation is meant to combat the spread of illegal acts motivated by hatred for a person's identity.[144] In focusing on race, color, religion, and national origin, the HCPA shows a clear intent to focus on specific characteristics of identity typically targeted by offenders.[145] These protected characteristics are the products of countless years spent fighting against hate-based offenses.[146] Therefore, it does not seem likely that Congress, in seeking to strengthen the ability of the courts to fight such offenses, would instead limit its application by mandating sole but-for causation. Instead, the efforts to fight hate crimes would be better served by employing the motivating factor approach utilized by Title VII in dealing with status-based discrimination in employment matters.

Under this approach, plaintiffs would only need to prove that race, color, religion, or national origin was a motivating factor behind the defendant's hate crime.[147] Proof that additional factors motivated the bias-inspired act would not defeat the claim.[148] Undoubtedly, applying motivating factor causation rather than but-for causation would strengthen hate crime legislation. As applied by the *Burrage* court, illegal acts with more than one motivating factor cannot be subjected to heightened repercussions when terms like "because of" are used to denote causation.[149] This outcome is likely to limit the reach of our nation's hate crime legislation. In the interest of bolstering the Hate Crimes Act, Congress specifically revisited this statute with the intent to broaden its reach, scope, and effectiveness.[150] Adding the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act was a

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143 *Univ. of Tex. Sw. Med. Ctr.,* 133 S. Ct. at 2535 (Ginsburg, J., dissenting).
144 *Id.*
145 *Id.*
146 Meli, *supra* note 7, at 924.
147 *Univ. of Tex. Sw. Med. Ctr.*, 133 S. Ct. at 2528.
148 *Id.* at 2535 (Ginsburg, J., dissenting).
149 *Burrage*, 134 S. Ct. at 884.
150 Eisenberg, *supra* note 6, at 867-68.

clear indicator that the government sought to improve and broaden existing legislation, which it found insufficient.[151] Taking the view of the Court in *Burrage*, one would have to believe that Congress revisited the legislation only to leave it weaker and less effective than before. This approach directly contradicts the purpose behind the statute and lends credence to Justice Ginsburg's opinion that antidiscrimination laws should not be read to require but-for causation.[152]

IV. CONCLUSION

Justice Ginsburg's dissent in *Nassar* and her concurrence in *Burrage* echo the sentiment that sole but-for causation should not be applied to all claims brought under antidiscrimination legislation. In approaching the issue through a broad view of the intended reach of such legislation, it is clear that Congress would not have revisited a hate crime statute which it found ineffective simply to further weaken the government's reach in prosecuting such claims. Mandating sole but-for causation over mixed factor causation has exactly that effect.

While an aerial view of the issue provides some guidance, an analysis of an individual case offers further insight into how this theory of but-for causation has real-world consequences for hate crime prevention. Specifically, when viewed through the scope of *Miller*, it is plain to see that the majority's logic in *Burrage* regarding causation lays a dangerous foundation for limiting the scope of the HCPA. When Samuel Mullet and his fellow defendants launched their attacks, they were motivated by two things: interpersonal differences and religious disputes.[153] When they perpetrated their crimes, they did not employ a typical mode of assault such as beating or stabbing. Their intent was not to physically immobilize their victims or diminish their mental faculties. Rather, the perpetrators attacked their way of life by robbing them of an outward appearance meant to express their faith and closeness to God. It is clear that their intent was to violently send a message that they, not their victims, were in charge. Additionally that they were superior, and that their differences, both familial and religious, would no longer be tolerated. They did so by launching an attack steeped in religious

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151 *Id*.

152 *Burrage*, 134 S. Ct. at 892 (Ginsburg, J., concurring).

153 *Miller*, 767 F.3d at 589-90.

significance, which they knew would shake their devout victims more than any other mode of attack.

These acts were motivated in part by hate and meant to instill feelings of fear, inferiority, and helplessness. This was punishment for thinking differently, for pursuing religion outside the traditional doctrines of the Amish church, and for questioning their bishop whose word and rule command respect as an agent of God. Under the Court's ruling in *Burrage*, these defendants are not liable for a hate crime. This outcome is completely contrary to the rationale behind drafting and strengthening hate crime legislation.

Therefore, but-for causality should not be applied to all cases arising under antidiscrimination statutes. Doing so limits the scope of the HCPA and the tools with which courts can combat the spread of hatred and oppression in our nation. As suggested by Justice Ginsburg in her dissent in *Nassar*, Congress should revisit the legislation and explicitly allow for mixed factor causation in cases arising under the HCPA.[154]

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[154] *Univ. of Tex. Sw. Med. Ctr.*, 133 S. Ct. at 2547 (Ginsburg, J., dissenting).