

**SUBJECT:** Modifying hate crime law and penalties

**COMMITTEE:** Criminal Jurisprudence — favorable, without amendment

**VOTE:** 5 ayes — Farrar, Greenberg, Hudson, Pickett, Solis  
2 nays — Talton, Nixon  
1 present, not voting — Place  
1 absent — Pitts

**SENATE VOTE:** On motion to suspend regular order of business, April 20 — 22-9 (Bivins, Brown, Harris, Haywood, Henderson, Leedom, Nelson, Nixon, Sibley voting nay)  
On final passage, April 20 — voice vote

**WITNESSES:** None

**BACKGROUND:** The Legislature in 1993 provided for an enhanced punishment if in the punishment phase of a criminal trial if a court determines and affirmatively finds that the defendant intentionally selected the victim primarily because of the defendant's bias or prejudice against a person or a group.  
The punishment for offenses other than a first-degree felony is increased to the punishment for the next highest category of offense, which means, for example, that if the person was convicted of a Class B misdemeanor, Class A misdemeanor penalties would apply.

**DIGEST:** SB 141 would amend Code of Criminal Procedure art. 42.014 to provide that if a court determined beyond a reasonable doubt in the punishment phase of a trial that the defendant intentionally selected the victim or property damaged because of the race, color, disability, religion, national origin or ancestry or sexual orientation of the victim or owner of the property, the court would make an affirmative finding of that fact in the judgment.

Applicability of the section would be limited to the punishment phase of trials brought under Penal Code secs. 28.02, 28.03 and Title 5, which address arson, criminal mischief and offenses against a person (including assault) respectively.

SB 141 would amend Penal Code sec. 12.47 so that an enhanced punishment would not apply to a Class A misdemeanor, but if the offense was a Class A misdemeanor, the minimum term of confinement would be 180 days.

This section would not apply to the trial of an injury offense to a disabled individual under Penal Code sec. 22.04 if the court's affirmative finding showed that the defendant intentionally selected the victim because the victim was disabled.

The bill would take effect September 1, 1995.

**SUPPORTERS  
SAY:**

SB 141 would give effect to the hate crime legislation passed last session by conforming current law to language approved by the U.S. Supreme Court in 1993. The hate crime law on the books now is not fulfilling its intended purpose because district attorneys around the state do not use the law because of the fear that the basis of "bias or prejudice" would be found unconstitutionally vague. After all, it could be interpreted that every offender had a bias against the victim.

Because the law now is ineffectual, SB 141 is needed to deter the hate crimes that continue to plague both urban and rural areas across Texas. Hate crimes — offenses that are committed because of prejudice against a person or group — are morally and socially reprehensible, justifying tougher penalties. As with past uses of selective violence, hate crimes are intended to use the individual to "make a point" to other members of a group.

Many hate crimes are particularly vicious. In December 1994 Randall Tubb was shot and killed by four young men who were "queer hunting." Randall Tubb and his brother met the men at a Longview gay bar and invited them home. The men walked in Randall Tubb's home, and without saying anything, shot and instantly killed him.

In June 1991 Donald Thomas was killed by a shotgun blast fired from a moving automobile as he sat outside drinking beer with some white friends in Dallas. The three teenagers convicted of the murder, all members of a white supremacist group called the Confederate Hammer Skins, admitted they had made plans that night to go out and shoot a "nigger."

Reported hate crime incidents statewide in 1994 totaled 374. Sixty-five percent of those reported incidents were motivated by racial prejudice. Sixteen percent were motivated by sexual orientation prejudice. Fifty-three offenses were against gay males in the state, and eight homosexual men were killed in Texas because of their sexual orientation. The bill would neither condone nor condemn homosexuality, but would provide an effective deterrent against heinous crimes unmistakably motivated by prejudice based on sexual orientation.

This bill would conform the law to reflect a Wisconsin statute upheld as constitutional by the U.S. Supreme Court. The Wisconsin law also defines a hate crime as an offense motivated by bias of race, color, disability, religion, national origin or ancestry, or sexual orientation. Todd Mitchell was convicted of felony aggravated battery in Wisconsin, and under the hate-crime enhancement was sentenced to four years rather than two years. Mitchell challenged the enhanced sentence, claiming that his First Amendment free speech rights had been violated. He contended that he was being punished for his thoughts rather than his actions and that threat of prosecution under the Wisconsin law would have a chilling effect on free speech.

The U.S. Supreme Court upheld the Wisconsin law saying that it does not violate free speech rights. The court stated, "[t]he statute in this case is aimed at conduct unprotected by the First Amendment." Although the court did not address possible 14th Amendment violations, it is unlikely that a 14th Amendment challenge would be sustained because of the precedent of upholding affirmative action challenges based on the 14th Amendment.

SB 141 was not only carefully crafted to withstand constitutional challenge, it would provide other safeguards as well. For instance, the court would need to determine the prejudicial motivation beyond a reasonable doubt, a

change from the generally applicable preponderance of evidence standard. The bill would not address murder because the state's criminal laws already provide strong punishment.

In addition, the bill would make technical corrections to the law. First, it would correct the problem that would be faced by county criminal courts trying to enhance a Class A misdemeanor to a felony. This is a problem because a county criminal court cannot hear a felony case. The bill would set the penalty for a Class A misdemeanor at a minimum of 180 days to provide some enhancement without raising the punishment to the level of a felony.

Second, the bill would prevent the potential double enhancement that could occur if a defendant's penalty could be enhanced under this bill as well as enhanced under the penalty for causing bodily injury to a disabled individual. Because the enhancement is greater for the latter, the enhancement provided by this bill would not apply if the defendant were charged with injury to a disabled individual.

A number of other states have hate crime statutes based on the premise that crimes driven by hate warrant harsher punishment. Texas laws already recognize that motivation must be considered in determining punishment: the state differentiates categories of manslaughter based on the actor's intent, for example. Similarly, drug possession with intent to sell is a more serious offense than simple possession. The U.S. Supreme Court noted that "it is but reasonable that among crimes of different natures those should be most severely punished, which are the most destructive of the public safety and happiness."

**OPPONENTS  
SAY:**

Although the U.S. Supreme Court upheld similar language in the Wisconsin law based on a First Amendment challenge, the language proposed in SB 141 would likely not withstand a 14th Amendment equal protection challenge.

Moreover, increasing protection for certain groups would subvert Texas law that holds that human life has the same value, regardless of race, sex, or religion by stipulating that in some circumstances offenses against one

person may merit more punishment than offenses against another. The state should protect all of its citizens equally.

For example, a defendant who assaults a person because of the person's race would receive a harsher punishment than a defendant who assaults a person based on unprotected reasons. Assault is wrong no matter why the defendant assaults the victim, and the punishment should reflect that. All Texans are already adequately protected from assault and other offenses by the laws that are on the books. In the future, this type of law could lead to stiffer punishments for those with unpopular views.

Furthermore, concerns have been raised that a person might get an enhanced punishment for getting into a fight with a person and then only later find out that the person was gay or lesbian. Concerns have also been raised that because the bill does not include a definition of sexual orientation, enhanced punishment for offenses against bisexuals, transsexuals or child molesters might be an unintended result.

In addition, including the term "sexual orientation" would legitimize and condone homosexuality. The bill might even lead to protected class status for gays and lesbians in the workplace and in schools, which would be detrimental to Texas communities.