

SUBJECT: Revising hate crime offense and allowing civil damages and protective orders

COMMITTEE: Judicial Affairs — committee substitute recommended

VOTE: 7 ayes — Thompson, Capelo, Deshotel, Garcia, Hinojosa, Solis, Uresti

2 nays — Hartnett, Talton

WITNESSES: *On original bill:*

For — Stella Byrd and James Byrd, Sr.; Donna Nevelow; Prof. Martin Levy; Maria Ross; Dean John C. Brittain; Morris L. Overstreet; Mark L. Briskman, Anti-Defamation League of North Texas, Oklahoma, and Southwest Regions; Rev. Ron Foshage; Rev. Kenneth O. Lyons; Steve Harris; Gary L. Bledsoe, Texas NAACP; Walter Hinojosa, Texas AFL-CIO; Joel Brooks, American Jewish Congress and Texas Alliance for Hate Crimes Legislation; Patty Bates, Greater Dallas Community Relations Commission; Cruz Saldana; Kelly Martino; Jim Rigby; William Harrell, ACLU of Texas; Samantha Smoot, Texas Freedom Network; Noah R. Truax; Molly Beth Malcolm, Texas Democratic Party; Ruth-Ellen Gura, Travis County District Attorney's Office

Against — Nathan H. Zook; Thomas Bryan; Anne Markham; Bo Armstrong, Texas Eagle Forum; Marc Levin, Young Conservatives of Texas, Texas Eagle Forum, and American Freedom Center

On — Rudy Meteyer, Young Conservatives of Texas, College Republicans, Libertarian Longhorns, and Students for a Color-Blind Society

BACKGROUND: In 1993, the Legislature added art. 42.014 to the Code of Criminal Procedure, providing that if a court determined at the punishment stage of a Penal Code offense that the defendant intentionally chose the victim primarily because of the defendant's bias or prejudice against a group, the court must make an affirmative finding of that fact.

Penal Code, art. 12.47 provides that if a judge or jury assessing punishment makes an affirmative finding that the offense involved bias or prejudice against a group, the punishment is increased to the next highest category of offense. The exceptions are first-degree felonies, which cannot be enhanced to a higher category, and Class A misdemeanors, which are not enhanced to a felony but for which the minimum term of confinement is set at 180 days.

Under Penal Code, sec. 22.04, a person commits an offense by intentionally, knowingly, recklessly, or with criminal negligence by act or intentionally, knowingly, or recklessly by omission causing bodily injury, serious mental deficiency, impairment, or injury, or serious bodily injury to a disabled person.

A Class A misdemeanor is punishable by up to one year in jail and/or a maximum fine of \$4,000. A Class B misdemeanor is punishable by up to 180 days in jail and/or a maximum fine of \$2,000.

In *Wisconsin v. Mitchell*, 508 U.S. 476 (1993), the U.S. Supreme Court upheld a Wisconsin law that 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 state's hate-crime enhancement, was sentenced to four years rather than two years. Mitchell challenged the enhanced sentence, claiming that the law violated his First Amendment free-speech rights. He contended that he was being punished for his thoughts rather than for his actions and that the threat of prosecution under the Wisconsin law had a chilling effect on free speech. The Supreme Court upheld the Wisconsin law, saying that it does not violate free-speech rights and that "[t]he statute in this case is aimed at conduct unprotected by the First Amendment." The court did not address possible 14th Amendment equal-protection violations.

DIGEST:

CSHB 587 would change when a judge would have to make an affirmative finding that a crime had been committed due to bias or prejudice; establish civil remedies for violence committed because of specific characteristics of a victim; allow protective orders for certain crimes committed because of bias or prejudice; and require reporting to a state agency of judicial affirmative findings of hate crimes.

The bill would take effect September 1, 2001.

Prosecution. CSHB 587 would require judges to make affirmative findings of fact if, during the guilt or innocence phase of a trial for an offense against a person or for arson, criminal mischief, or graffiti, the court found beyond a reasonable doubt that the defendant intentionally chose the victim or chose to damage the victim's property because of the defendant's bias or prejudice against a group identified by race, color, disability, religion, national origin or ancestry, age, gender, or sexual orientation.

The bill would exclude injury to a disabled person from the requirement that penalties be enhanced if the court finds that the offense was committed because of bias or prejudice.

CSHB 587 would allow the attorney general to assist a prosecuting attorney in the investigation or prosecution of a hate crime if the prosecutor asked for help. The attorney general would have to designate a person to coordinate responses to such requests.

Subject to certain conditions, a county with a population below 125,000 could apply to the Criminal Justice Division of the Governor's Office for a grant to help the county prosecute hate crimes. The commissioners court of a county could apply for such a grant after September 1, 2001.

Civil remedies. CSHB 587 would establish civil remedies for and protections against violence committed because of specific characteristics of victims. It would state that everyone in Texas has the right to be free from an act of violence or from intimidation by threat of violence committed against the person or the person's property because of the person's race, color, disability, religion, national origin or ancestry, age, gender, or sexual orientation, or because someone else perceived the person to have one or more of those characteristics.

A person whose exercise or enjoyment of this right was interfered with could enter a civil action in a district or county court for damages arising from the defendant's actions, for exemplary damages, injunctive relief, or any other appropriate relief. The court would have to award a successful claimant

reasonable attorney's fees. An action brought under these provisions would be independent of any other remedy or procedure available to the claimant.

An civil action brought under CSHB 587 could not be based solely on the content of the defendant's speech unless it was shown that:

- ! the speech threatened violence against a specific person or group;
- ! the person or group reasonably feared that violence would be committed against the person or the group or their property because of the threatening speech; and
- ! the defendant making the threatening speech had the apparent ability to carry out the threat.

A court could not issue an order restricting the content of any defendant's speech. The court could restrict the time, place, or manner of the defendant's speech only to the extent that the order was reasonably necessary to protect the rights of a member of the protected group and was consistent with the defendant's constitutional rights.

A court that ordered temporary or permanent relief from hateful acts would have to order the claimant or the claimant's attorney to deliver, or the court clerk to mail, two copies of the order to each local law enforcement agency with jurisdiction over the residence of the claimant and to any other location in which the court determined that hateful acts were likely to occur against the claimant. A law enforcement agency that received a copy of such an order would have to serve a copy on the defendant and alert any law enforcement officer responding to a reported hateful act against the claimant of the order's existence, terms, and status.

A person who knowingly violated an order for temporary or permanent relief from hateful acts would commit a Class B misdemeanor unless the defendant previously had been convicted at least twice of violating an enjoining order, in which case the offense would be a Class A misdemeanor.

Protective orders. A person could ask for a protective order in cases of offenses against a person or arson, criminal mischief, graffiti, in which the defendant allegedly committed the offense because of bias or prejudice. The court would have to render a protective order under the guidelines in Title 4

of the Family Code if it found that probable cause existed to believe that an offense against property or persons had occurred, that the defendant had committed the offense because of bias or prejudice, and that the defendant's conduct indicated that the defendant was likely to commit similar offenses in the future because of bias or prejudice.

Enforcement procedures for a protective order under the Family Code would apply to enforcement of a protective order under CSHB 587, except that the printed statement on the warning would have to refer to prosecution of prior hate-crime offenses, the court would have to require a constable to serve the protective order, and the court clerk would have to forward a copy of the order to the Department of Public Safety (DPS). DPS would have to enter information from the order into its law enforcement information system.

A person would commit an offense if, in violation of such a protective order, that person:

- ! knowingly or intentionally committed an offense against a person or committed arson, criminal mischief, or graffiti because of bias or prejudice;
- ! communicated directly in a threatening or harassing manner with a protected person;
- ! communicated a threat through another person to a protected person;
- ! communicated in any manner with a protected person if the order prohibited any such communication; or
- ! went to or near a protected person's residence or place of employment or business.

The offense of violating a protective order would be a Class A misdemeanor. If the offender previously had violated a protective order at least twice or had violated the order by assaulting the protected person, the offense would be a third-degree felony (punishable by two to 10 years in prison and an optional fine of up to \$10,000).

A violation of a protective order that also constituted an offense under another section of the Penal Code could be prosecuted under either section or both. A peace officer investigating a violation of a protective order could not arrest the person protected by the order.

Reporting hate crimes. District and county court clerks would have to report requests for affirmative findings of bias or prejudice to the Texas Judicial Council. The report would have to state whether the court had granted the request and, if so, whether the court had entered an affirmative finding in the case. The clerk would have to file the report within 30 days of the date the case's judgment was entered. The Texas Judicial Council would have to summarize the information in these reports in an annual report.

**SUPPORTERS
SAY:**

CSHB 587 would strengthen Texas's current hate-crime law and ensure that it would pass constitutional muster. Because it does not delineate among the various protected groups, the current law is too vague, making it difficult for prosecutors to use.

Texas needs a strong hate-crime law because crime motivated by hatred is increasing. CSHB 587 would give law enforcement officers the tools they need to address these crimes. Offenders often commit hate crimes with the intention of victimizing an individual to "make a point" to other members of the group. Hate crimes affect not only the individual victim but the entire community. Swastikas etched on neighborhood walls and burning crosses left in residential front yards create fear in communities and may lead to frictions among community groups.

Hate crimes are a form of terrorism and should be punished more harshly than other crimes. Serious offenses could be prevented if defendants knew before committing these crimes that they would receive stiffer sentences for crimes motivated by hatred of a group. Enhanced penalties for less serious hate crimes, such as vandalized property, could prevent the escalation to more serious offenses. However, CSHB 587 would not enhance a Class A misdemeanor to a felony, because felony punishments for a misdemeanor could be inappropriate. The bill also would not address murder specifically because state laws already provide strong punishment for murder, and capital murder is punished by death or life in prison.

Contrary to popular belief, most hate crimes are not committed by members of organized hate groups. Research on hate crimes has shown that hate crimes are not necessarily inevitable. Laws do influence people's behavior, and CSHB 587 would deter future hate crimes.

It would not be inappropriate to allow harsher punishments based on a defendant's bias or prejudice. Texas laws already recognize that motivation may be considered in determining punishment. For example, the state differentiates categories of manslaughter based on the actor's intent. Similarly, drug possession with intent to sell is a more serious offense than simple possession. Premeditation may lead to a more severe penalty, while an act of sudden passion may result in a lighter penalty.

Prosecution. Texas' current hate-crime law is not used by prosecutors as much as it should be because it is too vague to pass constitutional muster. In *Apprendi v. New Jersey* 120 S.Ct. 2348 (2000), the U.S. Supreme Court held that the New Jersey hate-crime law, which was similar to Texas' law, violated the U.S. Constitution's due process clause.

If challenged, the current Texas hate-crime law likely would not pass constitutional muster, and CSHB 587 would remedy this shortcoming. The New Jersey law used preponderance of evidence — as does Texas' law — as the standard for determining if a defendant's intent in committing a crime was based on bias or prejudice. Due process requires that a defendant be found guilty of every element of the charged crime beyond a reasonable doubt. Also, the U.S. Supreme Court stated in *In re Winship* 397 U.S. 358 (1970) that the reasonable-doubt standard is necessary in criminal procedure because the defendants could lose their liberty and most likely would be stigmatized if convicted.

By requiring the higher standard of "beyond a reasonable doubt," CSHB 587 would ensure that the hate-crime law was not used capriciously to prosecute cases where there was no bias. For example, if a heterosexual got into a fight with another person and only later discovered that the other person was a homosexual, the reasonable-doubt standard would ensure that the incident was not categorized erroneously as motivated by hatred of a group.

The protections in CSHB 587 would apply to every Texan. Everybody is of some race, color, national origin or ancestry, age, gender, and sexual orientation. An attack by a group of African-American males against a white male chosen for his color would be prosecuted as rigorously as in the reverse situation. CSHB 587 would deter and punish hate-related crime without favoring any group over another. Offenses against other groups, such

as public officials and police officers, are subject to enhanced punishment, and hate crimes should be too.

There is no reason to exclude from the bill crimes committed because of hatred of a person's sexual orientation. According to the National Criminal Justice Reference Service, hate crimes based on sexual orientation represent the third largest category of hate-related crimes after race and religion. CSHB 587 would protect many would-be victims. The bill would not condone or condemn homosexuality but would help deter heinous crimes unmistakably motivated by prejudice based on sexual orientation.

CSHB 587 would exclude injury to a disabled person from the enhanced penalties for hate crimes to prevent the double enhancement of punishment in cases where a defendant's penalty could be enhanced under this bill as well as under the current laws against causing bodily injury to a disabled person. Because the enhancement is greater for the latter, the enhancement provided for a hate crime would not apply.

CSHB 587 would help prosecutors in small counties battle hate crimes. Smaller counties that face high administrative costs may be unable or unwilling to prosecute hate crimes that could destabilize entire communities. This bill would enable prosecutors to obtain financial grants to help pay for the costs of expert witnesses at trial, juror costs, the salaries of visiting judges, and other expenses associated with these types of crimes. Counties also would have access to the attorney general's expertise in investigating and prosecuting such crimes.

Constitutionality. CSHB 587 would pass constitutional muster because the new language would conform with U.S. Supreme Court rulings. The high court ruled unanimously in *Wisconsin v. Mitchell* that a Wisconsin hate-crime statute similar to the language in CSHB 587 did not violate a defendant's First Amendment right to free expression in enhancing the criminal's punishment because of hateful motivation. Chief Justice William Rehnquist stated that the U.S. Constitution protects speech but not conduct and that a state may punish conduct more severely if the conduct is motivated by bigoted beliefs. CSHB 587 would not regulate the content of speech but would regulate conduct unprotected by the First Amendment.

Nor would CSHB 587 violate the 14th Amendment's equal-protection clause. Under Supreme Court rulings interpreting the proposed new clause, states may not distinguish on the basis of race, nationality, or national origin unless the distinction is tailored narrowly to serve a compelling state interest. This bill would not distinguish one race from another, nor would it distinguish between types of national origin. Its scope would cover all races and national origins.

Civil remedies. Current law allows criminal actions also to be brought as civil actions, and CSHB 587 simply would clarify that this applied to hate crimes as well. Liability for civil damages would affect an offender where it counts, in the pocketbook. Because the parties would not be in court but for the defendants' actions, it would be appropriate for the defendant to bear the costs of the claimants' attorney's fees. Also, civil suits require the lower standard of proof, preponderance of evidence, while criminal actions require proof beyond a reasonable doubt. The lower standard could allow civil cases to prevail if prosecutions could not prevail in criminal court.

CSHB 587 would include provisions to ensure that it would not hinder free speech. Civil remedies could not be ordered on the basis of speech that people simply did not like. Civil remedies could be ordered on the basis of speech only if the speech threatened violence against an individual or group, the individual or group feared that violence might be committed against them because of the speech violence, and the person making the speech had the apparent ability to carry out the threat.

A court could not order civil remedies that restricted a defendant's speech. It could order remedies that restricted the time, place, or manner of the speech, but only to the extent that the order was reasonably necessary and consistent with constitutional rights.

Protective orders. Court-issued protective orders and civil penalties also would strengthen deterrence of hate crimes. Protective orders would help protect victims from repeat offenses and would put offenders on notice that further threats and acts of intimidation would be punished severely. Currently, protective orders are only issued for domestic violence situations. CSHB 587 would expand the situations for which protective orders could be issued.

Protective orders are easier and more accessible than temporary injunctions. The filing fees for injunctions are high, while requests for protective orders are free. Because of the complexity of the legal procedure for filing for an injunction, most victims would need a lawyer, leading to further expenses that would not be needed for a protective order. In addition, hearings for protective orders can be heard any time after the protective order is in place, and the party against whom the order is issued does not need to be present. For temporary injunctions, a hearing must be held 10 days after it was filed, and both parties must be present at the hearing. Also, protective orders — but not injunctions — go into a statewide data base that can be used by law enforcement officers.

Reporting hate crimes. County clerks would have to report requests for affirmative findings of bias or prejudice to the Texas Judicial Council. This would lead to a more accurate reporting of the number of hate crimes that are occurring in Texas. Also, it could help persuade people who have been victimized that the law is on their side and could encourage more victims to come forward to report hate crimes.

Reporting hate crimes would not be overly burdensome to clerks. They would have to report only hate-crime actions and the judgement of the case. The reports would not have to be long or detailed, and clerks routinely report certain types of crimes. The Code of Criminal Procedure now requires peace officers to report incidents of family violence to DPS.

OPPONENTS
SAY:

CSHB 587 is unnecessary because Texas already has an adequate hate-crime law. The current law is more inclusive than CSHB 587 would be, because it protects all groups without listing them and defining the characteristics of protected persons.

The criminal justice system should prosecute actions, not thoughts. By allowing enhancement of penalties based on a defendant's bias or prejudice toward certain groups, CSHB 587 could be misused to punish offenders with unpopular views more stiffly than other offenders. Stiffer penalties do not necessarily deter crime. If they do, then penalties should be increased for all crimes.

All Texans are protected adequately by laws that are already on the books. Under CSHB 587, a defendant who assaulted a person because of the person's race would receive a harsher punishment than a defendant who assaulted a person for unrelated reasons. Assault is wrong no matter what the reason, and the punishment should reflect that. By definition, crime typically harms a group of people, not just an individual. All crimes intimidate people.

To prosecute a hate crime successfully, CSHB 587 would require an extra element of proof in a trial that would be difficult to ascertain. It would be difficult to deduce a suspect's motive for committing a crime and to prove a suspect's mental state. In the case of other crimes that may be motivated by hatred, the state is not required to prove motive, only that a particular person committed the crime. CSHB 587 would require the defense to prove a negative: that the defendant did not think about the victim's characteristics. Defendants could have their friendships, relationships, and memberships in organizations dissected and analyzed. A hate-crime trial could result in trying the defendant's character, values, and beliefs rather than his actions.

Prosecution. By listing protected groups, CSHB 587 would establish a right for certain classes or groups that would not be available to all Texans. The bill arbitrarily would select certain attributes — some identifiable and some not, some immutable and some not — and would establish separate privileges for possessors of those attributes. CSHB 587 would not extend to other groups the right to be free from hateful acts. For example, a person subjected to hateful acts because he was a military veteran would have no recourse under this bill.

CSHB 587 could lead to balkanization of population groups into mutually hostile units. Special protection for groups with particular characteristics could exacerbate social tension. Those excluded from the enhanced protection could become disenchanted and begin to agitate for their own special protection.

By including the term "sexual orientation," CSHB 587 would legitimize and condone homosexuality. Such protection or recognition is found nowhere else in the law. By creating a specific protected class based on sexual orientation, the bill would offer special protection for homosexuals, whose lifestyles are inconsistent with moral values shared by most Texas families.

An unneeded special law to protect homosexuals would be tantamount to endorsing this behavior.

The enhanced penalties easily could be misused. For example, a person might receive an enhanced punishment for getting into a fight with someone whom he later found out was homosexual.

Constitutionality. Although the U.S. Supreme Court upheld similar language in the Wisconsin law based on a First Amendment challenge, the language of CSHB 587 likely would not withstand a 14th Amendment equal-protection challenge. Texas law holds that human life has the same value, regardless of race, sex, or religion, and the state should protect all its citizens equally. This bill would establish classes of Texans who would have special privileges of protection from hateful acts. It would create other separate privileges by creating a civil cause of action for these special classes.

Protecting special classes of people to the exclusion of others would violate the equal-protection clause of the U.S. Constitution. To say that a crime motivated by a person's race would be more reprehensible than a similar crime motivated by a person's size or hair color would not provide equal protection under the law. The act itself — the murder, the assault, or the kidnaping — is the crime.

Civil remedies. It would be inappropriate to create a specific civil cause of action for hate crimes. Victims of hate crimes can use current law to bring civil actions. Because the standard for liability in a civil action would be lower than the determination of guilt for a criminal case, more people might try to pursue allegations civilly rather than criminally in cases in which the evidence was not strong enough to prove that it was motivated by bias. Hate crimes are addressed more properly by criminal suits than by civil suits.

CSHB 587 could be used to go after a defendant's assets rather than to seek a criminal conviction. This could lead to bankrupting a defendant who might prefer to spend time in jail and save his assets.

CSHB 587 also could have a chilling effect on free speech. The bill would allow certain facets of a speech, such as the place and manner, to be subject to civil orders. These circumstances surrounding speech could be considered

extensions or enhancements or could have special significance for the speech. CSHB 587 could cause defendants with “inappropriate” thoughts expressed by their speech, associations, literature, and ideas to be vulnerable to civil remedies. To determine the defendant’s frame of mind, a court would have to consider the defendant’s verbal statements, display of symbols, and choice of literature. People would not be able to express themselves freely for fear that their speech later might be used against them in a hate-crime action.

The Supreme Court has held that speech can be limited only in a few circumstances, and even then, the government may not regulate speech based on hostility. The state’s desire to communicate that it does not condone “group hatred” or bias-motivated speech does not justify selectively silencing speech on the basis of content.

Protective orders. Protective orders should not be extended to include alleged victims of hate crimes, because those victims already have access to temporary injunctions, which can be used to order someone to stop potentially harmful behavior. Because a person’s alleged bias would be harder to prove than physical abuse, protective orders should remain limited to cases of domestic violence.

Reporting hate crimes. The bill’s requirement to report hate-crime findings to a state agency could be burdensome on some court clerks, especially those in small counties.

NOTES:

The committee substitute differs from the original bill by substituting the term “sexual orientation” for “sexual preference.” The substitute removed:

- ! the provision that a defendant’s incorrect perception of a person as a member of a group would be immaterial to the determination of bias or prejudice;
- ! the definition of “sexual preference” in the Code of Criminal Procedure and the Civil Practice and Remedies Code; and
- ! “status as a pregnant person” from the list of characteristics for which a person would have a right to be free from hateful acts.

The substitute added provisions regarding content of speech, forum, enforcement, warning, notification, and duties of law enforcement agencies with respect to civil remedies and protections against hateful acts. It added graffiti to the list of offenses for which a person could request a protective order and to the list of offenses for which a person could be held in violation of that order. The substitute also added the provisions that would establish an offense and penalties for people who knowingly violated an order for temporary or permanent injunctive relief.

The substitute changed the provisions regarding grants for smaller counties with extraordinary prosecution costs to apply to any offense under certain circumstances, rather than capital murder alone. The substitute also would provide that a person has the right to be free from intimidation by threat of violence.

The companion bill, SB 87 by Ellis, et al., was reported favorably, as substituted, by the Senate Criminal Justice Committee on February 12.

A similar bill in the 76th Legislature in 1999, HB 938 by Thompson, et al., passed the House by but died in the Senate Criminal Justice Committee.