

**SUBJECT:** Enhancing criminal penalties and providing civil damages for hate crimes

**COMMITTEE:** Judicial Affairs — committee substitute recommended

**VOTE:** 6 ayes — Thompson, Capelo, Deshotel, Hinojosa, Jim Solis, Uresti

2 nays — Hartnett, Shields

1 absent — Garcia

**WITNESSES:** For — Louvon Byrd Harris; Joel Brooks, American Jewish Congress; Meg Brooks, Travis County District Attorney's Office; Peter Brooks, Lesbian Gay Rights Lobby of Texas; Chester L. Bryant, Texas Western Jurisdiction, COGIC; Tommy "T.C." Calvert, Neighborhoods First Alliance; Rev. Colleen Darraugh, Harvest Metropolitan Community Church; Charlotte Flynn, Gray Panthers of Texas; Jesse Gutierrez, MALDEF; Jim Harrington, Texas Civil Rights Project; James Hill, Austin Human Rights Commission; Joseph L. Jacobson, ACLU of Texas; Rick Levy, Texas AFL-CIO; Rev. C.O. Maples, Congress of National Black Churches; Judith Mitchell, Austin Human Rights Commission; Annise Parker, City of Houston; Jonathan Poe, Alliance for Hate Crimes Legislation; 70 others

Against — Martin Angell, Every Church a School Foundation/A Choice for Every Child Foundation; Lorelei A. Gilliam, American Family Association of Texas; Charles Nick

On — Robert Kepple, Texas District and County Attorneys Association

**BACKGROUND:** In general terms, a "hate crime" is a crime motivated in whole or in part by hatred, bias, or prejudice based on the victim's actual or perceived race, color, religion, national origin, gender, disability, or sexual orientation. Nearly 2,300 such incidents were reported in Texas between 1992 and 1997. In 1997, the Department of Public Safety documented 331 hate crimes in Texas with more than 360 victims. Of these incidents, about 64 percent were based on racial motivation, 18 percent on sexual orientation, 9 percent on religious reasons, and 8 percent on ethnic reasons. Crimes against African-Americans accounted for about 46 percent of Texas hate crimes in 1997, followed by anti-white crimes at 13 percent. The Texas Crime Report estimates that about

25 percent of all hate crimes are property crimes. At a national level, the Federal Bureau of Investigation reports that hate crimes have grown from 4,558 in 1991 to 8,734 in 1996.

The federal Hate Crimes Sentencing Enhancement Act prohibits certain hate crimes committed on the basis of race, color, religion, or national origin. Congress is considering the Hate Crimes Prevention Act of 1999, which would expand the categories of crimes covered under the law.

As of 1998, 40 states, including Texas, had laws enhancing criminal penalties for hate crimes. In 1993, the Legislature added art. 42.014 to the Code of Criminal Procedure, providing that if a court determines at the punishment stage of a Penal Code offense that the defendant intentionally selected the victim primarily because of the defendant's bias or prejudice against a group, the court would make an affirmative finding of that fact.

Art. 12.47 of the Penal Code provides that if a judge or jury assessing punishment makes an affirmative finding that bias or prejudice against a group was involved in the offense, 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 the minimum term of confinement is increased to 180 days.

DIGEST:

CSHB 938 would enhance criminal penalties and allow civil damages for crimes and civil actions motivated by bias or prejudice toward a group identified by race, color, disability, religion, national origin or ancestry, or sexual orientation. The bill would allow court-issued protective orders in cases where individuals were threatened by such crimes and civil actions. The attorney general would have to designate personnel to help counties prosecute such crimes if the counties so requested. The governor's criminal justice division would have to provide grants to help counties with less than 50,000 residents prosecute these crimes under certain conditions. The bill also would require specialized training for peace officers in the investigation and documentation of these types of crimes.

**Criminal penalties.** In the punishment phase of a trial in which a person was found guilty of arson, criminal mischief, or an offense against a person, the court would have to make an affirmative finding to be entered into the final

judgment, if the court so determined by a preponderance of the evidence, that the person who committed the offense acted out of bias or prejudice against a group, actual or perceived, including a group identified by race, color, disability, religion, national origin or ancestry, or sexual orientation.

With this affirmative finding of prejudiced and biased motivation, a court would have to increase the punishment from what is prescribed under current statute for the given offense to the next level of punishment, as already provided in Penal Code, sec. 12.47. These provisions would not apply to injury offenses against the disabled under Penal Code, sec. 22.04, which establishes enhanced criminal penalties for offenses committed against children, the elderly, or the disabled.

**Civil action and damages.** CSHB 938 would declare that an individual in Texas has the right to be free from acts of violence or intimidation by threat of violence committed against a person or the person's property because of the person's actual or perceived race, color, disability, religion, national origin or ancestry, or sexual orientation.

With respect to this legal right, a person could sue for monetary and exemplary damages if someone else interfered with the person's "peaceable exercise or enjoyment" of that right by threat, intimidation, or coercion or an attempt to threaten, intimidate, or coerce. A person who won such damages would be entitled to a reimbursement of reasonable attorney's fees. The ability to sue under this provision would not be affected by other causes of action available to the person whose right had been affected.

A person who was the victim of or threatened by a hate crime could petition a court for a protective order, consistent with the Family Code procedure in cases of domestic violence. If the court found probable cause to believe that a hate crime had occurred and that the circumstances indicated that it would occur again, the court could issue the protective order.

Such a protective order could prevent the person who allegedly committed the offense from communicating with the person affected in any threatening or harassing manner or from going near the person's residence or business. Violation of the order would be a Class A misdemeanor, punishable by up to one year in jail and/or a maximum fine of \$4,000. If the court found that the violator previously had violated such an order two or more times or had

committed an assault against the protected person, the new offense would be a third degree felony, punishable by two to 10 years in prison and/or a fine of up to \$10,000. If an offense under this section was an offense under another statute, the violator could be prosecuted under either statute or both.

The protective order would have to conform to existing provisions for domestic violence-related protective orders, including the requirement of confidentiality of certain information. The order would have to have certain additional conforming features and would have to be forwarded to the Department of Public Safety for record-keeping and enforcement.

**Prosecutorial assistance.** Upon a county's request, the attorney general could assist the county in investigating or prosecuting a hate crime.

CSHB 938 would add art. 104.004 to the Code of Criminal Procedure, directing the governor's criminal justice division to distribute grants to counties with a population of 50,000 or less if, during the previous fiscal year, the county:

- ! had an operating deficit and incurred expenses for investigating or prosecuting a capital murder or a hate crime; or
- ! had an operating surplus but incurred expenses for investigating or prosecuting a capital murder or hate crime that exceeded 5 percent of the surplus.

The amount of the grant could not exceed 5 percent of the difference between the county's total revenues and expenditures during the fiscal year in which the application was made. A county's application for a grant would have to include relevant financial records. The governor's criminal justice division could adopt a budget and rules for managing these funds.

**Officer training.** CSHB 938 would require the Public Safety Commission to establish requirements for training programs and courses on the investigation and documentation of hate crimes. These courses would have to include training in the recognition of hate crimes unless the agency head determined that this would be inconsistent with the officer's assigned duties. A peace officer would have to undergo this training every two years.

CSHB 938 would take effect September 1, 1999.

SUPPORTERS  
SAY:

The brutal dragging, torture, and murder of James Byrd Jr. of Jasper has focused national attention on hate crimes in Texas. CSHB 938 is aimed at preventing further senseless crimes motivated by hatred toward an identifiable group. James Byrd Jr. could still be alive if his murderers had received stiffer sentences and additional jail time for their previous crimes motivated by group hatred.

CSHB 938 would address the rising level of crime motivated by hatred by enhancing the prosecutorial and investigative tools available to crime fighters. Prosecutors in small counties that face high administrative costs may now be unable or unwilling to prosecute many crimes that are destabilizing to entire communities. This bill would provide these prosecutors with financial grants that would help pay for the costs of expert witnesses at trial, juror costs, the salaries of visiting judges, and other mounting expenses associated with these types of crimes. Counties also would have access to the attorney general's expertise in investigating and prosecuting such crimes.

With specialized training in how to identify and investigate hate crimes, police officers who now do not investigate such crimes because of a lack of training would be prepared to identify such crimes on the basis of clear criteria. Such training would provide police with additional guidance as to what groups are covered under the current hate-crime law. Better training for police would improve the community's trust in police and would encourage residents to report these crimes.

Protections under CSHB 938 would apply to every Texan. A drive-by shooting committed by group of young African-American males against a white female chosen because of her color would be prosecuted as rigorously as the murder of a black woman chosen for her color by a gang of white males. While more hate crimes are committed against African-Americans than against any other group, CSHB 938 also would increase criminal penalties for anti-white crime, the second most prevalent category of racially based hate crimes in Texas.

CSHB 938 would pass constitutional muster. Language in the bill conforms with U.S. Supreme Court rulings. The Supreme Court unanimously ruled in *Wisconsin v. Mitchell*, 508 U.S. 476 (1993) that a Wisconsin hate-crime statute similar to CSHB 938 did not violate a criminal's First Amendment right to free expression by enhancing the criminal's punishment because of

his hateful motivation. Chief Justice William Rehnquist stated that the U.S. Constitution protects speech but does not protect conduct and that a state may punish conduct more severely if the conduct is motivated by bigoted beliefs. CSHB 938 would not regulate the content of speech but would regulate conduct unprotected by the First Amendment.

Neither would the bill violate the equal protection clause of the 14th Amendment to the U.S. Constitution. Under Supreme Court rulings interpreting this 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. CSHB 938 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. The Supreme Court stated in *Lindsley v. Natural Carbonic Gas Co.* that the equal protection clause “does not take from the State the power to classify in the adoption of police laws, but admits of the exercise of discretion in that regard.”

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 and misunderstandings among community groups. CSHB 938, by creating enhanced penalties for property crimes, would prevent the escalation from property crimes to offenses against people by providing sharp penalties that would deter future hate-based crime.

Court-issued protective orders and civil penalties also would further the prevention and deterrence of hate crimes. Protective orders would put the offender on notice that further threats and acts of intimidation would be punished severely. Civil damages would affect an offender where it counts, in the offender’s pocketbook.

CSHB 938 would endorse deterrence and punishment of hate-related crime without endorsing any group over another. There is no reason to exclude crimes committed because of hatred of a person’s sexual orientation. In light of statistics indicating that hate crimes based on sexual orientation represent the second highest category of hate-related crimes, this bill would work against a judicial system that tended to put the victim on trial and allowed the criminal to get off with a light sentence. The bill would endorse the goal of fundamental fairness in the judicial system.

Federal hate-crime laws are limited and address only narrow protected rights such as voting, travel, and interstate commerce. CSHB 938 would provide greater protection needed to stop the increase in hate crimes.

**OPPONENTS  
SAY:**

CSHB 938 would violate the equal protection section of the Texas Constitution, Art. 1, sec. 3, which states that all have equal rights, and no man, or set of men, is entitled to separate privileges. This bill would establish classes of Texans who would have new special privileges of protection from hateful acts. Members of that class would include Texans singled out because of their race, color, disability, religion, national origin or ancestry, or sexual orientation. The bill also would create other separate privileges by creating a civil cause of action for these special classes.

The bill is unsound because it would establish a right for a class or group that is not available to all Texans. The right to be free from hateful acts would not be extended to other groups. For example, if someone were subjected to hateful acts because he was a veteran, he would have no recourse under this bill. 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.

The protection of special classes of people to the exclusion of others also 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. It is the act itself — the murder, the assault, or the kidnapping — that is the crime.

The low burden of proof for a civil cause of action for the violation of the right created for these special classes should concern Texans. Because the standard would be lower than for a criminal cause, more people would try to pursue allegations civilly rather than criminally. The bill could be used to go after someone's assets rather than to seek a criminal conviction.

The creation of these special classes would not be tailored narrowly to serve a compelling government interest. Granting monetary damages for civil violations of the right to be free from hate crimes for these special groups would not serve a compelling government interest and could be achieved without creating new classes of protected persons.

This bill would have a chilling effect on free speech because of the fear of future prosecution. The Supreme Court has held that speech can be limited only in a few limited circumstances, and even then, the government may not regulate speech based on hostility. Texas' desire to communicate to minority groups that it does not condone "group hatred" or bias-motivated speech does not justify selectively silencing speech on the basis of content.

OTHER  
OPPONENTS  
SAY:

CSHB 938 would endorse the homosexual lifestyle by providing specific protection for sexual orientation. Such protection or recognition is found nowhere else in the law. Texas law still makes homosexual sodomy a criminal offense. By creating a specific protected class based on sexual orientation, CSHB 938 would offer special protection for homosexuals whose lifestyle includes such illegal activity. Such recognition of the homosexual lifestyle would be inconsistent with the moral values shared by most Texas families. Sufficient laws exist to protect groups in Texas. An unneeded special law to protect homosexuals would be tantamount to endorsing this behavior.

NOTES:

The committee substitute amended the original bill by changing the burden of proof from "beyond a reasonable doubt" to "by a preponderance of the evidence" when a court determines whether a person committed a crime because of bias or prejudice against a group. The substitute also added the provision that a mistake of fact as to the victim's identity would be immaterial to the determination of guilt. The substitute removed provisions on the content of speech, forum, enforcement of the provisions, warnings, and notification to law enforcement agencies. It also would require less training for police officers than the original bill would have required.

The companion bill, SB 275 by Ellis, has been referred to the Senate Criminal Justice Committee.

HB 424 by B. Turner, et al., which also would direct the governor's criminal justice division to distribute grants to certain eligible counties for assistance with extraordinary costs of prosecution, for investigation or prosecution of capital murder cases, passed the House on April 23.