

HOUSE BILL No. 4836

April 28, 2009, Introduced by Reps. Robert Jones, Stanley, Warren, Donigan, Smith, Bauer, Geiss, Young, Durhal, Leland, Scripps, Gregory, Roy Schmidt and Cushingberry and referred to the Committee on Judiciary.

A bill to amend 1931 PA 328, entitled
"The Michigan penal code,"
by amending section 147b (MCL 750.147b), as added by 1988 PA 371,
and by adding section 377d.

THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

1 Sec. 147b. ~~(1) A person is guilty of ethnic intimidation if~~
2 ~~that person maliciously, and with specific intent to intimidate or~~
3 ~~harass another person because of that person's race, color,~~
4 ~~religion, gender, or national origin, does any of the following:~~
5 — (a) ~~Causes physical contact with another person.~~
6 — (b) ~~Damages, destroys, or defaces any real or personal~~
7 ~~property of another person.~~
8 — (c) ~~Threatens, by word or act, to do an act described in~~

1 ~~subdivision (a) or (b), if there is reasonable cause to believe~~
2 ~~that an act described in subdivision (a) or (b) will occur.~~

3 ~~—— (2) Ethnic intimidation is a felony punishable by imprisonment~~
4 ~~for not more than 2 years, or by a fine of not more than \$5,000.00,~~
5 ~~or both.~~

6 (1) A PERSON IS GUILTY OF A BIAS-MOTIVATED CRIME IF THE PERSON
7 SELECTS THE TARGET OF A PREDICATE CRIME BASED IN WHOLE OR IN PART
8 ON 1 OR MORE OF THE FOLLOWING CHARACTERISTICS, REGARDLESS OF
9 WHETHER OR NOT THE PERPETRATOR'S BELIEF OR PERCEPTION OF THE
10 CHARACTERISTIC IS CORRECT:

11 (A) DISABILITY.

12 (B) GENDER, GENDER IDENTITY, OR EXPRESSION OF GENDER.

13 (C) NATIONAL ORIGIN OR ANCESTRY.

14 (D) RACE, COLOR, OR ETHNICITY.

15 (E) RELIGION.

16 (F) SEXUAL ORIENTATION.

17 (G) STATUS AS A VETERAN.

18 (H) ASSOCIATION WITH A PERSON OR GROUP WITH 1 OR MORE OF THE
19 CHARACTERISTICS IN SUBDIVISIONS (A) TO (G).

20 (2) A PREDICATE CRIME AGAINST PRIVATE PROPERTY IS BIAS-
21 MOTIVATED IF THE PERPETRATOR TARGETS THE PROPERTY BECAUSE OF A
22 CHARACTERISTIC IN SUBSECTION (1) OF ANY INDIVIDUAL ASSOCIATED WITH
23 THE PROPERTY.

24 (3) A PREDICATE CRIME AGAINST PUBLIC PROPERTY IS BIAS-
25 MOTIVATED IF THE PERPETRATOR DEMONSTRATES THE SPECIFIC INTENT TO
26 INTIMIDATE OR HARASS 1 OR MORE INDIVIDUALS BECAUSE OF A LISTED
27 CHARACTERISTIC.

1 (4) A BIAS-MOTIVATED CRIME IS A FELONY PUNISHABLE AS FOLLOWS:

2 (A) IF THE PREDICATE CRIME IS A MISDEMEANOR, BY IMPRISONMENT
3 FOR NOT MORE THAN 2 YEARS OR A FINE OF NOT MORE THAN \$5,000.00, OR
4 BOTH.

5 (B) IF THE PREDICATE CRIME IS A FELONY, BY IMPRISONMENT WITHIN
6 THE STATUTORY RANGE ESTABLISHED FOR THE PREDICATE CRIME EXCEPT THAT
7 THE MINIMUM AND MAXIMUM RECOMMENDED SENTENCING RANGE UNDER THE
8 SENTENCING GUIDELINES FOR THAT CRIME SHALL BE INCREASED BY 50% AS
9 PROVIDED IN SECTION 21 OF CHAPTER XVII OF THE CODE OF CRIMINAL
10 PROCEDURE, 1927 PA 175, MCL 777.21.

11 (5) A PERSON SHALL NOT BE CONVICTED OF BOTH THE LESSER
12 INCLUDED PREDICATE CRIME AND A BIAS-MOTIVATED CRIME CHARGED UNDER
13 THIS SECTION. THIS SECTION DOES NOT PROHIBIT A PERSON FROM BEING
14 CHARGED WITH, CONVICTED OF, OR SENTENCED FOR ANY OTHER VIOLATION OF
15 LAW ARISING OUT OF THE SAME CRIMINAL TRANSACTION.

16 (6) ~~(3)~~ Regardless of the existence or outcome of any criminal
17 prosecution, a person who suffers injury to his or her person or
18 damage to his or her property as a result of ~~ethnic intimidation~~ A
19 **BIAS-MOTIVATED CRIME** may bring a civil cause of action against the
20 person who commits the offense to secure an injunction, actual
21 damages, including damages for emotional distress, or other
22 appropriate relief. A plaintiff who prevails in a civil action
23 brought pursuant to this section may recover both of the following:

24 (a) Damages in the amount of 3 times the actual damages
25 described in this subsection or \$2,000.00, whichever is greater.

26 (b) Reasonable attorney fees and costs.

27 (7) AS USED IN THIS SECTION:

1 (A) "DISABILITY" MEANS A DETERMINABLE PHYSICAL OR MENTAL
2 CHARACTERISTIC OF AN INDIVIDUAL THAT MAY RESULT FROM DISEASE,
3 INJURY, CONGENITAL CONDITION, OR FUNCTIONAL DISORDER THAT
4 SUBSTANTIALLY LIMITS 1 OR MORE OF THE INDIVIDUAL'S MAJOR LIFE
5 ACTIVITIES.

6 (B) "GENDER, GENDER IDENTITY, OR EXPRESSION OF GENDER" MEANS A
7 PERSON'S ACTUAL OR PERCEIVED GENDER OR GENDER-RELATED APPEARANCE,
8 SELF-IMAGE, BEHAVIOR, OR EXPRESSION, WHETHER OR NOT TRADITIONALLY
9 ASSOCIATED WITH THE PERSON'S ASSIGNED SEX AT BIRTH.

10 (C) "PREDICATE CRIME" MEANS A VIOLATION OF ANY OF THE
11 FOLLOWING, BUT NOT IF PROOF OF A CHARACTERISTIC IDENTIFIED IN
12 SUBSECTION (1) (A) TO (G) IS AN ELEMENT OF THE VIOLATION:

13 (i) CHAPTER X.

14 (ii) CHAPTER XI.

15 (iii) CHAPTER XXXIII.

16 (iv) CHAPTER XLV.

17 (v) CHAPTER LVI.

18 (vi) CHAPTER LXIV.

19 (vii) CHAPTER LXXVI.

20 (viii) CHAPTER LXXXIII-A.

21 (ix) SECTIONS 223 TO 234C.

22 (x) SECTION 240.

23 (xi) SECTION 411A(2).

24 (xii) SECTION 411H OR 411I.

25 (xiii) ANY OTHER PROVISION OF THIS ACT THAT INCLUDES AS AN
26 ELEMENT OF THE OFFENSE THE SPECIFIC INTENT TO INTIMIDATE OR HARASS
27 ANOTHER PERSON OR PERSONS.

1 (D) "SEXUAL ORIENTATION" MEANS AN ORIENTATION FOR
2 HETEROSEXUALITY, HOMOSEXUALITY, OR BISEXUALITY OR A HISTORY OF OR
3 IDENTIFICATION WITH THAT ORIENTATION.

4 SEC. 377D. FOR PURPOSES OF SECTIONS 377A TO 377C, 380, 383,
5 AND 387, A PERSON WHO, WITH INTENT TO INTIMIDATE, DOES ANY OF THE
6 FOLLOWING ON PROPERTY WITHOUT THE EXPRESS PERMISSION OF THE
7 PROPERTY OWNER IS CONSIDERED TO HAVE INJURED OR ALTERED THAT
8 PROPERTY, WHETHER OR NOT ANY PHYSICAL DAMAGE IS CAUSED:

9 (A) HANGS, AFFIXES, OR OTHERWISE PLACES A NOOSE ON THE
10 PROPERTY.

11 (B) BURNS, OR PLACES WITH INTENT TO BURN, A CROSS OR CROSS-
12 SHAPED OBJECT ON THE PROPERTY.

13 Enacting section 1. This amendatory act does not take effect
14 unless Senate Bill No.____ or House Bill No. 4835(request no.
15 01144'09 a) of the 95th Legislature is enacted into law.

Legislative Analysis



BIAS-MOTIVATED CRIMES

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House Bill 4836 as introduced
Sponsor: Rep. Robert Jones
Committee: Judiciary

First Analysis (5-14-09)

BRIEF SUMMARY: The bill would replace the current prohibition on ethnic intimidation with a prohibition on bias-motivated crimes, expand the categories of groups for which a crime could be considered a bias-motivated crime, increase the penalties, define terms, and place the new penalties within the sentencing guidelines.

FISCAL IMPACT: The bill's fiscal impact on state and local correctional systems would depend on how it affected numbers of convictions and severity of sentences. In 2007, there were 28 sentences for ethnic intimidation, the offense that the bill would replace. Of those 28 sentences, 15 were to probation, 8 to jail, 3 to prison, and 2 to some other sanction such as Holmes Youthful Trainee Act. The average appropriated cost of incarceration in a state prison is about \$33,000 per prisoner per year, a figure that includes various fixed administrative and operational costs. The state's average cost of parole and probation supervision is about \$2,100 per supervised offender per year. Costs of any jail incarceration would be borne by the county; those costs vary by county. Any increase in penal fine revenues could benefit local libraries, which are the constitutionally-designated recipients of those revenues.

THE APPARENT PROBLEM:

Since 1988, it has been a felony offense in Michigan to commit a hate crime against another person because of that person's race, color, religion, gender, or national origin. Over a decade later, the federal Hate Crime Statistics Act required the U.S. attorney general to acquire data about crimes that manifested evidence of prejudice based on race, religion, or ethnicity, and, unlike Michigan law, included sexual orientation. In 1994, the act was amended to also collect data on crimes in which the victim was disabled.

What makes a hate crime different from an ordinary crime? According to the first report analyzing data collected from the FBI (which has compiled statistics on hate crimes since 1992) and the Bureau of Justice and the U.S Census Bureau (which, since mid-2000, has collected data from victims of hate crimes), "an ordinary crime becomes a hate crime when offenders choose a victim because of some characteristic—for example, race, ethnicity, or religion—and provide evidence that hate prompted them to commit the crime." (*Hate Crimes Reported by Victims and Police*, Harlow, Caroline Wolf, Ph.D., Bureau of Justice Statistics Special Report, Nov. 2005).

How often is a hate crime committed? According to the statistics compiled by the U.S. Department of Justice (DOJ) for 2007, almost 8,000 cases were reported by 2,025 law enforcement agencies. However, research also reveals that only about 44 percent of hate crimes are reported to police. Therefore, the incidence of hate crimes is likely to be much higher. Michigan ranks third in the nation with reported hate crimes, trailing only California and New Jersey.

Isn't a crime a crime? Some would say that an assault is an assault, and therefore every crime classification should be treated the same, regardless of any characteristics of the victim that would place the victim in a specific classification. However, according to the American Psychological Association in a position paper first released in the late 1990s but subsequently updated, the emotional damage to a victim of a hate crime is far more destructive to the victim than if he or she had been randomly selected. "Intense feelings or vulnerability, anger, and depression, physical ailments and learning problems, and difficult interpersonal relations – all symptoms of posttraumatic stress disorder – can be brought on by a hate crime." In addition, the research reveals that "some hate crime victims have needed as much as 5 years to overcome their ordeal." By contrast, "victims of nonbias crimes experienced a decrease in crime-related psychological problems within 2 years of the crime." In addition, the paper reports that gays and lesbians "suffer more serious psychological effects from hate crimes than they do from other kinds of criminal injury," perhaps because "the association between vulnerability and sexual orientation is particularly harmful" due to sexual identity being "such an important part of one's self-concept."

In light of the above discussion, some people argue that by not including conduct where a motivating factor is the victim's sexual orientation or disability, Michigan law is woefully behind both federal reporting standards and national research standards. Further, prosecutors maintain that the current ethnic intimidation law is inadequate to prosecute crimes they suspect may be motivated by hate. For instance, hanging a noose from a tree on public or private property can only be charged as a hate crime if the bark on the tree was damaged by the noose. In another instance, in what initially looked like as an ordinary bar fight involving a white man and a black man, where the latter claimed no provocation was given for the assault, law enforcement later discovered the white man had previously taken part in a racially motivated incident in which a school superintendent attempting to desegregate a school district had been tarred and feathered. In that instance, a two-year felony, in which a term of imprisonment is unlikely to occur, could be argued as not being an effective deterrent and therefore not sufficient to protect the public. Indeed, ranking in the top three states with the most reported hate crimes could be argued by some as evidence that Michigan law needs updating.

THE CONTENT OF THE BILL:

House Bill 4836 would replace the current prohibition on ethnic intimidation with a prohibition on bias-motivated crimes, expand the categories of groups for which a crime could be considered a bias-motivated crime, increase the penalties, and define terms.

Under provisions of the Michigan Penal Code, ethnic intimidation is a felony punishable by up to two years' imprisonment and/or a fine of up to \$5,000. A person is guilty of ethnic intimidation if he or she maliciously, and with specific intent to intimidate or harass another person because of that individual's race, color, religion, gender, or national origin, caused physical contact with another; damages, destroys, or defaces any real or personal property of another; and/or threatens, by word or act, to do one of the fore-mentioned acts.

House Bill 4836 would amend the Michigan Penal Code (MCL 750.147b and 750.377d) to delete the above provision relating to a crime of ethnic intimidation. Instead, the bill would specify that a person would be guilty of a bias-motivated crime if he or she selects the target of a predicate crime based, in whole or in part, on one or more of the following characteristics -- regardless of whether or not the perpetrator's belief or perception of the characteristic is correct:

- Disability, defined to mean a determinable physical or mental characteristic of an individual that may result from disease, injury, congenital condition, or functional disorder that substantially limits one or more of the individual's major life activities.
- Gender, gender identity, or expression of gender, defined to mean a person's actual or perceived gender or gender-related appearance, self-image, behavior, or expression, whether or not traditionally associated with the person's assigned sex at birth.
- National origin or ancestry.
- Race, color, or ethnicity.
- Religion.
- Sexual orientation, defined to mean an orientation for heterosexuality, homosexuality, or bisexuality or a history of or identification with that orientation.
- Status as a veteran.
- Association with a person or group with one or more of the characteristics listed above.

Predicate Crime

A predicate crime would mean a violation of any of the following prohibited acts, but not if proof of a characteristic identified above is an element of the violation:

- Arson and burning.
- Assault.
- Homicide.
- Acts involving explosives and bombs, and harmful devices.
- False report of a violation involving explosives, bombs, and harmful devices.

- Malicious and wilful mischief and destruction.
- Poisoning.
- Rape.
- Stalking and aggravated stalking.
- Terrorism.
- False alarm of fire.
- A violation of Sections 223 to 234c of the penal code, which pertain to various firearm violations, stun guns and tazers, armor piercing ammunition, self-defense sprays, switchblades, body armor, and the sale to a minor of a flare gun approved for emergencies involving vessels or aircraft.
- Any other provision of the act that includes as an element of the offense the specific intent to intimidate or harass another person or persons.

In addition, a person who – with intent to intimidate and without the express permission of the property owner – hung, affixed, or otherwise displayed a noose on property; or, burned, or placed with intent to burn, a cross or cross-shaped object would be considered to have injured or altered property described in several sections of Chapter LVI pertaining to malicious and wilful mischief and destruction - whether or not any physical damage was caused. The sections listed in the bill pertain to malicious and wilful destruction of personal property; police or fire department property; school buses; a person's home; boundary markers, guard-rails, highway mile markers, municipal streetlights, etc.; lawfully posted notices; and headstones, flowers, shrubs, and other grave-markers.

A predicate crime against private property would be bias-motivated if the perpetrator targeted the property because of a listed characteristic of any individual associated with the property. A predicate crime against public property would be bias-motivated if the perpetrator demonstrated the specific intent to intimidate or harass one or more individuals because of a listed characteristic.

Penalties

If the predicate crime was a misdemeanor, the penalty would be a felony punishable by not more than two years' imprisonment and/or a maximum fine of \$5,000. If the predicate crime was a felony, the penalty would be a felony punishable by imprisonment within the statutory range established for the predicate crime except that the minimum and maximum recommended sentencing range under the sentencing guidelines for that crime would have to be increased by 50 percent.

A person could not be convicted of both the lesser included predicate crime and a bias-motivated crime charged under the bill. However, the bill would not prohibit a person from being charged with, convicted of, or sentenced for any other violation of law arising out of the same criminal transaction.

Civil Action

Currently, regardless of the existence or outcome of any criminal prosecution, a person who suffered personal injury or property damage as a result of ethnic intimidation may bring a civil suit against the perpetrator for an injunction, actual damages, or other appropriate relief. The bill would retain this provision, but would replace the term "ethnic intimidation" with "bias-motivated crime."

BACKGROUND INFORMATION:

A similar package of bills was passed by the House of Representatives last session but failed to see Senate action.

ARGUMENTS:

For:

There appears to be misconceptions about the possible impact of the legislation. First of all, Michigan law already criminalizes ethnic intimidation as a felony. The bills would replace the current law with a bias-motivated law that ties the offense to the commission of one or more underlying serious crimes in which the victim was selected in whole or in part because of having, or because the offender believed the victim had, one of several listed characteristics. Just because a victim has one of the listed characteristics does not mean the crime would be automatically prosecuted as a bias-motivated crime.

It is also important to note that the listed characteristics include all of the same characteristics included in the current ethnic intimidation law. However, House Bill 4836 would add five new characteristics – disability, status as a veteran, sexual orientation, gender identity, and expression of gender. The more controversial characteristics – disability and sexual orientation – are already included in federal and national reporting and research standards as elements constituting a hate crime. In that sense, Michigan law is woefully behind the times on a national level.

Hate crimes affect the victim differently and in deeper ways than if they were victims of random crimes. Hate crimes also impact the community in different ways than do random acts of violence. For instance, will shopping at a store targeted with anti-gay or racial slurs identify the shopper as a potential target? Will the single female living next door to a lesbian couple who were attacked or whose home was vandalized be next on the list if seen hugging her sister or close female friend? After all, many attacks are perpetrated on the basis of perceived traits, and also on those considered to be sympathizers.

Further, if a noose is hung on a private or public property, or a cross burned – clear symbols of intimidation and harassment – the crime cannot be prosecuted as a hate crime unless the noose damaged the tree’s bark or the burning grass caused damage to the grass or surrounding structures. Under the bill, targeting the property of a private individual because that person has a listed characteristic, or, in the case of public property, demonstrating a specific intent to harass or intimidate others, would trigger prosecution under the bill. Free speech rights would still be protected.

In short, the legislation focuses on the motivation behind the commission of certain violent crimes, not specifically on the crimes or the victims. The motivation that drives one to commit a crime that he or she would not ordinarily commit, is what the legislation seeks to address. In regards to penalties, a hate crime is already a two-year felony. This would not change if the underlying crime is a misdemeanor. If the underlying crime is a felony, however, the bills may increase the time that an offender is incarcerated by increasing the minimum and maximum recommended sentencing range under the sentencing guidelines by 50 percent. However, given that hate-motivated crimes tend to be more violent than similar non-biased related crimes, and that the impact to victims and communities is greater than similar but random crimes, this is a fitting punishment and, hopefully, deterrent.

Against:

Opponents of the legislation have offered the following arguments:

- The legislation would create special protection, over that given to ordinary citizens, for certain classifications of people. The effect, they maintain, is that a grandmother or a pregnant woman who is the victim of a violent assault would see a lesser standard of justice than a gay man, veteran, or anyone else with a listed characteristic for a similar assault.
- Though stated as being tied to specific acts, such as arson or assault and battery, House Bill 4836 contains a catch-all provision that could capture almost any type of conduct that currently is a crime if the person is accused of having a specific intent to intimidate or harass another person.
- If the current law is inadequate to prosecute acts such as the noose hung from a tree at a state university, that can be easily addressed without having to gut the entire ethnic intimidation law.

- The bill could violate Free Speech rights under the U.S. Constitution. Already pro-gay groups have voiced opinions that activists, ministers, or anyone speaking publicly should be held criminally liable as accomplices if someone used a phrase from a speech or a sermon as justification for a criminal act against another person.

Response:

Proponents say that the bill does not create "more justice" for a person with a listed characteristic. A crime involving a random target who just happens to have one or more of the listed characteristics would not be automatically prosecutable as a hate crime under the bill. The prosecution would have to prove, beyond a reasonable doubt, that the victim was deliberately selected because of that listed characteristic. Therefore, under the bill, a crime is just a crime, unless there is evidence that but for a listed characteristic, the victim would not have been chosen. Statistically, according to the Bureau of Justice Special Report previously cited, police were able to validate only about one in five cases reported as hate crimes.

POSITIONS:

Representatives of the Michigan Department of Civil Rights testified in support of the bill. (5-13-09)

The Michigan Department of State Police indicated support for the bill. (5-13-09)

A representative of the Prosecuting Attorneys Association of Michigan testified in support of the bill. (5-13-09)

A representative of the Mt. Pleasant Area Diversity Group testified in support of the bill. (5-13-09)

A representative of the Triangle Foundation testified in support of the bill. (5-13-09)

Unity Michigan, SPICE, Michigan Equality, and Affirmations submitted a letter of support for the bill. (5-13-09)

The Women's Commission submitted a letter of support. (5-13-09)

The Michigan National Organization for Women submitted a letter of support for the bill. (5-13-09)

The Advisory Council on Asian Pacific Affairs indicated support for the bill. (5-13-09)

The Michigan Domestic Violence Prevention & Treatment Board indicated support for the bill. (5-13-09)

The Michigan Roundtable for Diversity and Inclusion indicated support for the bill. (5-13-09)

Michigan Protection & Advocacy Services indicated support for the bill. (5-13-09)

Pride At Work-Michigan indicated support for the bill. (5-13-09)

The Anti-Defamation League indicated support for the bill. (5-13-09)

The Grand Rapids Community Relations Committee indicated support for the bill.
(5-13-09)

A representative of the American Family Association of Michigan testified in opposition to the House Bill 4836. (5-13-09)

The American Decency Association indicated opposition to House Bill 4836. (5-13-09)

Legislative Analyst: Susan Stutzky
Fiscal Analyst: Marilyn Peterson

■ This analysis was prepared by nonpartisan House staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent.