
SENATE COMMITTEE ON PUBLIC SAFETY

Senator Steven Bradford, Chair
2021 - 2022 Regular

Bill No: AB 2282 **Hearing Date:** June 21, 2022
Author: Bauer-Kahan
Version: May 19, 2022
Urgency: No **Fiscal:** Yes
Consultant: MK

Subject: *Hate crimes: nooses, crosses, and swastikas*

HISTORY

Source: Oppose, and Abolish Hate (NOAH) Marin

Prior Legislation: AB 412 (Carter) Chapter 106, Stats. 2009
SB 1404 (Johnston) Chapter 414, Stats. 1998

Support: California State Sheriffs' Association; Hindu American Foundation, INC.; Peace Officers Research Association of California (PORAC); The Arc and United Cerebral Palsy California Collaboration

Opposition: California Public Defenders Association (unless amended); Coalition of Hindus of North America (unless amended)

Assembly Floor Vote: 73 - 0

PURPOSE

The purpose of this bill is to equalize the penalty for the crimes of hanging a noose, displaying a symbol of hate, including a Nazi swastika, and burning or desecrating religious symbols, on specified property, for the purpose of terrorizing, and expands and aligns the places where this conduct is prohibited for each offense.

Existing law provides that any person who hangs a noose, knowing it to be a symbol representing a threat to life, on the private property of another, for the purpose of terrorizing the owner or occupant of the property or in reckless disregard of the risk of terrorizing the owner or occupant of that property, or who hangs a noose, knowing it to be a symbol representing a threat to life on the property of a school, college campus, public park, or place of employment, for the purpose of terrorizing any person who attends or works at the school, park, or place of employment or who is otherwise associated with school, park or place of employment is guilty of a misdemeanor

Existing law provides that any person who hangs a noose, knowing it to be a symbol representing a threat to life, on the private property of another without authorization for the purpose of terrorizing the owner or occupant of that private property or in reckless disregard of the risk of terrorizing the owner or occupant of that private property, or who hangs a noose, knowing it to be a symbol representing a threat to life, on the property of a primary school, junior high school, high school, college campus, public park or place of employment for the purpose of terrorizing any person who attends or works at the school, park or place of employment or who is otherwise

associated with the school, park or place of employment, shall be punished by imprisonment in the county jail not to exceed one year, by a fine not to exceed five \$5,000, or by both the fine and imprisonment for the first conviction and by imprisonment in the county jail not to exceed one year, by a fine not to exceed \$15,000, or by both the fine and imprisonment for any subsequent conviction. (Penal Code § 11411 (b).)

Existing law declares that any person who places or displays a sign, mark, symbol, emblem, or other physical impression, including, but not limited to, a Nazi swastika on the private property of another, without authorization, for the purpose of terrorizing the owner or occupant of that private property or in reckless disregard of the risk of terrorizing the owner or occupant of that private property shall be punished by imprisonment in the county jail not to exceed one year, by a fine not to \$5,000, or by both the fine and imprisonment for the first conviction and by imprisonment in the county jail not to exceed one year, by a fine not to exceed \$15,000, or by both the fine and imprisonment for any subsequent conviction. (Penal Code § 11411 (b).)

Existing law provides that any person who engages in a pattern of conduct for the purpose of terrorizing the owner or occupant of private property or in reckless disregard of terrorizing the owner or occupant of that private property, by placing or displaying a sign, mark, symbol, emblem, or other physical impression, including, but not limited to, a Nazi swastika, on the private property of another on two or more occasions, shall be punished by imprisonment in the county jail for 16 months, 2 or 3 years under realignment, by a fine not to exceed \$10,000, or by both the fine and imprisonment; or by imprisonment in a county jail not to exceed one year, by a fine not to exceed \$5,000, or by both the fine and imprisonment. (Penal Code § 11411 (c).)

Existing law provides that any person who burns or desecrates a cross or other religious symbol, knowing it to be a religious symbol, on the private property of another without authorization for the purpose of terrorizing the owner or occupant of that private property or in reckless disregard of the risk of terrorizing the owner or occupant of that private property, or who burns, desecrates, or destroys a cross or other religious symbol, knowing it to be a religious symbol, on the property of a primary school, junior high school, or high school for the purpose of terrorizing any person who attends or works at the school or who is otherwise associated with the school, shall be punished by imprisonment in the county jail for 16 months, 2 or 3 years under realignment, by a fine of not more than \$10,000, or by both the fine and imprisonment, or by imprisonment in a county jail not to exceed one year, by a fine not to exceed \$5,000, or by both the fine and imprisonment for the first conviction and by imprisonment in the state county jail for 16 months, 2 or 3 years under realignment, by a fine of not more than \$10,000, or by both the fine and imprisonment, or by imprisonment in a county jail not to exceed one year, by a fine not to exceed \$15,000, or by both the fine and imprisonment for any subsequent conviction. (Penal Code § 11411 (d).)

Existing law defines “terrorize” as meaning to cause a person of ordinary emotions and sensibilities to fear for personal safety. (Penal Code § 11411 (e).)

Existing law defines “hate crime” as a criminal act committed, in whole or in part, because of one or more of the following actual or perceived characteristics of the victim:

- Disability;
- Gender;
- Nationality;
- Race or ethnicity;

- Religion;
- Sexual orientation; or,
- Association with a person or group with one or more of these actual or perceived characteristics. (Penal Code, § 422.55.)

Existing law provides that no person, whether or not acting under color of law, shall by force or threat of force, willfully injure, intimidate, interfere with, oppress, or threaten any other person in the free exercise or enjoyment of any right or privilege secured to them by the Constitution or laws of California or by the Constitution or laws of the United States in whole or in part because of one or more of the actual or perceived characteristics of the victim as proscribed under existing law. However, no person may be convicted of violating this provision based upon speech alone, except upon a showing that the speech itself threatened violence against a specific person or group of persons and that the defendant had the apparent ability to carry out the threat. (Penal Code § 422.6 (a) & (c).)

Existing law states that no person, whether or not acting under color of law, shall knowingly deface, damage, or destroy the real or personal property of any other person for the purpose of intimidating or interfering with the free exercise or enjoyment of any right or privilege secured to the other person by the Constitution or laws of California or by the Constitution or laws of the United States, in whole or in part because of one or more of the actual or perceived characteristics of the victim as proscribed under existing law. (Penal Code § 422.6 (b).)

Existing law penalizes persons convicted of interfering with the free exercise or enjoyment of any right or privilege secured to him or her by the Constitution or laws of California or by the Constitution or laws of the United States with imprisonment in a county jail not to exceed one year, by a fine not to exceed \$5,000, or by both the above imprisonment and fine, and the court shall order the defendant to perform a minimum of community service, not to exceed 400 hours, to be performed over a period not to exceed 350 days, during a time other than his or her hours of employment or school attendance. (Penal Code § 422.6 (c).)

This bill makes hanging expands the provision making hanging a noose on private property to terrorize another to include a public place, place of worship, and cemetery and increases the penalty from a misdemeanor to a wobbler and changes the fine to up to \$10,000, plus penalty assessments, for the felony or up to \$5,000, plus penalty assessments, for misdemeanor for a first conviction.

This bill deletes the existing provision criminalizing placing or displaying a sign, mark, or emblem including a “Nazi swastika” on the property of another and instead includes placing such an item in the provision criminalizing engaging in a pattern of behavior for the purpose of terrorizing an individual. The penalty is a a wobbler and changes the fine to up to \$10,000, plus penalty assessments, for the felony or up to \$5,000, plus penalty assessments, for misdemeanor for a first conviction.

This bill makes subsequent conviction for any of the offenses in Penal Code 11411 punishable by an enhanced fine of up to \$15,000 for a felony conviction and up to \$10,000 for a misdemeanor conviction.

This bill includes codified legislative intent stating that t is the intent of the Legislature to criminalize the placement or display of the Nazi Hakenkreuz (hooked cross), also known as the

Nazi swastika that was the official emblem of the Nazi party, for the purpose of terrorizing a person. This legislation is not intended to criminalize the placement or display of the ancient swastika symbols that are associated with Hinduism, Buddhism, and Jainism and are symbols of peace.

COMMENTS

1. Need for This Bill

According to the author:

Existing law treats the swastika, the noose, and the desecrated cross as symbols of terror, but metes out different criminal penalties for the use of each symbol. Right now, at least one of these three terror symbols can be used legally in cemeteries, places of worship, public spaces, and public facilities. Using a noose is penalized the most lightly of the three while a burning cross is the most penalized and is barred only from schools and private property.

Those who seek to intimidate and terrorize racial, ethnic, and religious minorities use the noose, burning cross, and swastika strategically. The presence of any of these three symbols can cause an equal level of panic in entire communities and prevent them from feeling safe. When we punish a burning cross more than a swastika, we are negating the psychological impact on and physical threat to a targeted group. With hate crimes increasing across the state, it's critical to recognize the power and destructiveness of these symbols, and restrict their use accordingly.

AB 2282 makes the criminal penalties the same for using each symbol and increases the locations where they are banned to include K-12 schools, colleges, cemeteries, places of worship, places of employment, private property, public parks, public spaces, and public facilities. By updating this code, we ensure that individuals who spread terror are punished to the proper and full extent of the law, regardless of the symbol they may choose to demonstrate hate.

2. Hate Crimes

According to a 2020 report by, the Department of Justice (DOJ) reported hate crime events increased 31.0 percent from 1,015 in 2019 to 1,330 in 2020. The report also found hate crime offenses increased 23.9 percent from 1,261 in 2019 to 1,563 in 2020. (DOJ, Hate Crime in California 2020 < <https://data-openjustice.doj.ca.gov/sites/default/files/2021-06/Hate%20Crime%20In%20CA%202020.pdf> > [as of Feb. 28, 2022].)

Hate crimes severely impact victims. The emotional effect can be significant, with victims experiencing “more psychological distress than victims of other violent crimes.” California State Auditor, Hate Crimes in California (May 2018) at p. 11 <<https://www.auditor.ca.gov/pdfs/reports/2017-131.pdf>> [as of March 23, 2022]) Hate crimes also impact the victim’s community. According to the California State Auditor, “[T]hese crimes likely had a significant impact on the groups to which victims belonged... [by] communicat[ing] to members of the victims’ groups that they are unwelcome and unsafe in their communities.” (*Ibid.*)

The author and sponsor believe that the emotional effect is not more or less significant for hanging a noose, displaying a symbol of hate, including a Nazi swastika, and burning or desecrating religious symbols for the purpose of terrorizing, and therefore it makes no sense to have different penalties for these offenses as is the case under the current statute. This bill equalizes those penalties.

3. The First Amendment

“Congress shall make no law . . . abridging the freedom of speech.’ (U.S. Const., 1st Amend.) This proscription, as incorporated through the Fourteenth Amendment's due process clause, likewise binds the states. [Citation.] The provision is not absolute, however. Not within the First Amendment's protection are ‘certain well-defined and narrowly limited classes of speech’—those” of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.” [Citations.] Falling into that category are what the United States Supreme Court has described as ‘true threats.’ [Citations.]” (*People v. Lowery* (2011) 52 Cal.4th 419, 423.)

A state may ban a “true threat.” (*Virginia v. Black* (2003) 538 U.S. 343, 358.) “‘True threats’ encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals.” (*Id.* at 359 [citations omitted].) Our Supreme Court has held, “When a reasonable person would foresee that the context and import of the words will cause the listener to believe he or she will be subjected to physical violence, the threat falls outside First Amendment protection.” (*In re M.S.* (1995) 10 Cal.4th 698, 710; see also *People v. Toledo* (2001) 26 Cal.4th 221, 233.) “Violence and threats of violence . . . fall outside the protection of the First Amendment because they coerce by unlawful conduct, rather than persuade by expression, and thus play no part in the ‘marketplace of ideas.’ As such, they are punishable because of the state's interest in protecting individuals from the fear of violence, the disruption fear engenders and the possibility the threatened violence will occur. [Citation.]” (*In re M.S., supra*, 10 Cal.4th at p. 714.)

In *In re Steven S.* (1994) 25 Cal.App.4th 598 (*In re Steven S.*), a former version of California’s prohibition on burning a religious symbol was challenged on First Amendment grounds. Former subdivision (c) of Penal Code section 11411, provided: “Any person who burns or desecrates a cross or other religious symbol, knowing it to be a religious symbol, on the private property of another without authorization for the purpose of terrorizing the owner or occupant of that private property or in reckless disregard of the risk of terrorizing the owner or occupant of that private property” is guilty of a crime, which may be prosecuted as a misdemeanor or a felony. Former subdivision (d) defined “‘terrorize’” as “to cause a person of ordinary emotions and sensibilities to fear for personal safety.” The Court of Appeal concluded that the conduct “does more than convey a message. It inflicts immediate injury by subjecting the victim to fear and intimidation, and it conveys a threat of future physical harm.” (*Id.* at p. 607.) Consequently, it falls within the category of a “true threat” which is not protected by the First Amendment. (*Ibid.*) The court also concluded the conduct fell within the scope of “fighting words” which is also not protected First Amendment speech. Malicious cross burning is directed at individuals and “goes far beyond hurt feelings, offense, or resentment. It causes terror in specific victims. (*Id.* at p. 609.)

The court also concluded the statute did not unlawfully discriminate on the basis of content because the intent of the statute was to protect specific victims from immediate injury; it targeted secondary effects of malicious cross burning and was not intended to suppress ideas. (*In re Stevenson, supra*, 25 Cal.App.4th at pp. 610-613.) The statute was not found to be vague because

it required that the offender have specific mental states – know the symbolism of the desecrated object and have acted to terrorize or in reckless disregard of the risk. “An offender who has a purpose, or recklessly disregards a risk, of terrorizing--that is, of causing ‘a person of ordinary emotions and sensibilities to fear for personal safety’ (§ 11411, subd. (d))--can have no doubt that the treatment of the religious symbol is desecrating and threatening.” (*In re Stevenson*, *supra*, 25 Cal.App.4th at p. 614)

The question is are changes to the statute under this bill – expanding the properties on which conduct is prohibited -- directed at conduct done with a specific mental state (for the purpose of terrorizing) and to protect specific victims (persons associated with the specified property) from immediate injury.

Since it may not be as clearly directed at a specific victim, is the expansion to all public property enough to pass the test in *Stevenson*? The Public Defenders Association believe that the expansion to all public property is overbroad. They are also concerned that the use of sign, symbol, etc. is vague. Specifically they state:

AB 2282 is overbroad and vague in that it extends existing law which prohibits a person from placing or displaying “a sign, mark, symbol, emblem, or other physical impression, including, but not limited to, a Nazi swastika, on the private property of another, without authorization, for the purpose of terrorizing the owner or occupant of that private property or in reckless disregard of the risk of terrorizing the owner or occupant of that private property” to all public property.

This is worrisome because there is no requirement that the individual have any knowledge that the “... sign, mark, symbol, emblem, or other physical impression, including, but not limited to, a Nazi swastika” is likely to produce terror. In the provisions proscribing nooses and cross burnings there are knowledge requirements; i.e, “hangs a noose, knowing it to be a symbol representing a threat to life, ...” and “burns or desecrates a cross...knowing it to be a religious symbol...”

More troubling is that AB 2282’s ambit is not limited to the Nazi swastika but any “... sign, mark, symbol, emblem, or other physical impression, including, but not limited to, a Nazi swastika” that is likely to produce terror. It is a mistake to assume that such a law once on the books will only be used against Nazis.

For example, an individual might fly a rainbow flag in the public square across the street from a QAnon gathering spot to let the QAnon members know that there are LGBTQ people everywhere. Unbeknownst to the LGBTQ flag carriers, QAnon members may be terrorized and believe that the LGBTQ flag symbolizes pedophiles coming for their children. Unfortunately given the national political debate, this is not a far-fetched example.

4. Legislative intent

This bill includes codified legislative intent stating that it is the intent of the Legislature to criminalize the placement or display of the Nazi Hakenkreuz (hooked cross), also known as the Nazi swastika that was the official emblem of the Nazi party, for the purpose of terrorizing a person. This legislation is not intended to criminalize the placement or display of the ancient

swastika symbols that are associated with Hinduism, Buddhism, and Jainism and are symbols of peace.

There is a disagreement between Hindu groups about whether this language suffices to deal with the use of the word swastika in association with the Nazi symbol. Those positions are set forth in the support and opposition below.

5. Argument in Support

The Hindu American Foundation supports this bill stating:

HAF is proud to support the decriminalization of the Hindu, Buddhist, and Jain communities' sacred swastika. HAF applauds the California Assembly in its endeavor for California to lead the nation as the first state to formally recognize the distinction between the Nazi Hakenkreuz ("hooked cross") and the Hindu, Buddhist, and Jain communities' sacred Swastika in its penal code, ensuring the California Penal Code is equitable and respectful of all Californians, regardless of race or religion.

AB.2282 aligns with the FBI Uniform Crime Reporting Hate Crime Training Manual, released March 2022, which explicitly defines the swastika as "*a holy symbol in the Hindu, Buddhist, and Jain faiths.*" The swastika has been a sacred symbol in the Hindu, Buddhist, and Jain faiths for +4,000 years, used in cultural and religious contexts to invoke peace and prosperity by more than one billion people worldwide. In addition to equalizing penalties against perpetrators of hate crimes, AB.2282 will also educate the public and law enforcement about the differences between the Nazi hakenkreuz white nationalists use to terrorize, and the Hindu, Buddhist, and Jain communities' sacred swastika, a Sanskrit word literally translated to "good existence."

6. Argument in Opposition (unless amended)

The Coalition of Hindus of North America object to the use of the word "swastika" in relation to the Nazi symbol stating:

...First, let me be clear that we fully support the intention of the bill to combat hate and stamp out bigotry. However, the bill also contains language that falsely associates our sacred and religious symbol of Swastika with hate and creates problems for Americans of Hindu, Buddhist, and Jain backgrounds.

The fact is that the Nazis never used the word "Swastika". They called it "Hakenkreuz." How "Hakenkreuz" got mistranslated to "Swastika" is an unfortunate chapter of post-WW2 history based on faulty scholarship and media coverage, which this bill can help correct. Currently, the words "Nazi Swastika" create the wrong idea that there is a "good Swastika" and a "bad Swastika."

So, I urge you to work on modifying the language of the existing bill.

- Remove the words “Nazi Swastika”. Instead use generic words such as “Nazi emblem” or “Nazi hate symbol”.
- If the bill must refer to the old Penal Code (which contains “Nazi Swastika”), it should add words such as – “incorrectly or falsely known as the Nazi Swastika.”
- The word “Swastika” should only be used when referring to the sacred symbol used by Hindus, Buddhists, and Jains.
- For context -- The amended bill already inserts some new language with the phrase “...that was the official emblem of the Nazi party” to clarify reference to “Nazi Swastika.”

If new language can be inserted here, it is also surely possible to clarify things further by adding the words “incorrectly or falsely known as the Nazi Swastika.” – this is a simple demand. The above will ensure that the bill is more inclusive and doesn’t trigger hate against our religious traditions and symbols. We must all condemn hate - so, let us condemn the Hakenkreuz or the “Nazi Hooked Cross”. We urge you to support our simple demands.

Are there further amendments that could be taken to alleviate the concerns of the Coalition of Hindus and still meet the author’s objectives?

-- END --