

Date of Hearing: March 29, 2022  
Counsel: Cheryl Anderson

ASSEMBLY COMMITTEE ON PUBLIC SAFETY  
Reginald Byron Jones-Sawyer, Sr., Chair

AB 2282 (Bauer-Kahan) – As Introduced February 16, 2022

**As Proposed to be Amended in Committee**

**SUMMARY:** Equalizes 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. Specifically, **this bill:**

- 1) Makes the first conviction of all three crimes punishable by imprisonment in a county jail for 16 months or two or three years under realignment (felony), by a fine of not more than \$10,000, or both the fine and imprisonment, or by imprisonment in a county jail not to exceed one year (misdemeanor), by a fine not to exceed \$5,000, or by both the fine and imprisonment.
- 2) Makes a subsequent conviction of all three crimes punishable by an enhanced fine of up to \$15,000 for a felony conviction and up to \$10,000 for a misdemeanor conviction.
- 3) Makes all three crimes applicable to the same property: schools, generally, a college campus, a public place, a place of worship, a cemetery, and a place of employment.
- 4) Deletes the provision making a “pattern of conduct” of displaying a symbol for the purpose of terrorizing subject to increased punishment of 16 months or two or three years in a county jail under realignment, a fine not to exceed \$10,000, or both.

**EXISTING LAW:**

- 1) 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. (Pen. Code, § 11411, subd. (b).)
- 2) 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 exceed \$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. (Pen. Code, § 11411, subd. (b).)

- 3) 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. (Pen. Code, § 11411, subd. (c).)
- 4) 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. (Pen. Code, § 11411, subd. (d).)
- 5) Defines “terrorize” as meaning to cause a person of ordinary emotions and sensibilities to fear for personal safety. (Pen. Code, § 11411, subd. (e).)
- 6) 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:
  - a) Disability;
  - b) Gender;
  - c) Nationality;
  - d) Race or ethnicity;

- e) Religion;
  - f) Sexual orientation; or,
  - g) Association with a person or group with one or more of these actual or perceived characteristics. (Pen. Code, § 422.55.)
- 7) 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. (Pen. Code, § 422.6, subs. (a) & (c).)
- 8) 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. (Pen. Code, § 422.6, subd. (b).)
- 9) 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. (Pen. Code, § 422.6, subd. (c).)

**FISCAL EFFECT:** Unknown

**COMMENTS:**

- 1) **Author's Statement:** 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 Crime Laws:** Although hate crimes make a small percentage of total reported crimes, the number of reported hate crimes in California has increased. In 2020, 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.*)

Because 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, it makes no sense to have different penalties for these offenses as is the case under the current statute.

- 3) **Constitutional Considerations:** "'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 changes to the statute under this bill – expanding the properties on which conduct is prohibited -- are 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. In particular, this bill pertains to the conduct of hanging a noose, displaying a symbol, including a Nazi swastika, and burning or desecrating religious symbols for the purpose of terrorizing any person who attends, works at, or is otherwise associated with the specified property. (Pen. Code, § 11411, subds. (a)-(d).) The current definition of “terrorize” remains the same as that analyzed by the court in *In re Steven S.* (See Pen. Code, § 11411, subd. (e).)

- 4) **Argument in Support:** According to the *Jewish Congregation of the San Geronimo Valley*, “We have witnessed many incidents of anti-Semitism and other hate incidents in our county, which have increased in the past few years.

“Current law makes it illegal to post symbols of hate on private property for the purpose of terrorizing; however, it is currently legal to display hate symbols for the purpose of terrorizing in most public spaces. AB2282 expands locations where it would be illegal to display the swastika, hang the noose, or burn religious symbols.

“Current law makes the penalties for posting of three hate symbols unequal and needs to align penalties for using terror symbols for equity in punishments.

“This bill will accomplish this.

“Those who seek to intimidate and terrorize racial, ethnic, and religious minorities consistently use the noose, burned cross, and swastika strategically. All three are symbols associated with white supremacist violence. In recent years, the appearance of these symbols has increased in California’s cities.

“Each of these symbols can traumatize and prevent entire communities from feeling safe. Until now the law has practically given tacit permission to their use.

“The rise in white supremacy and extremism is connected to increases in anti-democratic behavior in our state and reflected in the increased appearance of these symbols.

“We agree that any of these three symbols can cause panic in entire communities and prevent them from feeling safe. This legislation will ameliorate this significantly.”

- 5) **Argument in Opposition:** According to the *California Public Defenders Association*, “While sympathetic to the goal of deterring racial and religious animus, AB 2282 is overbroad, unnecessary and increases penalties with no concomitant benefit.

“AB 2282 is overbroad and vague in that it extends existing Penal Code section 11411(b) 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 public property.

“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.

“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.

“Penal Code section 11411 already proscribes most of this conduct. Current law punishes these offenses with misdemeanors or felonies with increasing penalties for a pattern of conduct. Additionally, hate crimes resulting in violence or attempted violence are punished with a separate enhancement ranging from one to four years in state prison.

“AB 2282 is bad public policy because it increases punishment and does not deter hate symbols. California has rejected mass incarceration for non-violent offenses in the wake of decades of prison and jail expansion, while schools, hospitals and mental health facilities struggled without adequate funding. Only in the last year, due to the coronavirus pandemic has the state prison population finally been reduced below capacity.”

- 6) **Related Legislation:** AB 1947 (Ting) would require each local law enforcement agency to adopt a hate crimes policy with specific parameters and requires the Commission on Peace Officers Standards and Training (POST) to develop a model hate crimes policy. AB 1947 is pending in the Assembly Appropriations Committee.
- 7) **Prior Legislation:** AB 412 (Carter), Statutes of 2009, Chapter 106, created a misdemeanor when any person hangs a noose, knowing it to be a symbol representing a threat to life for the purpose of terrorizing.

## **REGISTERED SUPPORT / OPPOSITION:**

### **Support**

Anti-defamation League  
California District Attorneys Association  
California School Boards Association  
California State Sheriffs' Association  
City of Napa  
City of Novato  
City of San Rafael  
Disability Justice Marin  
Jewish Congregation of the San Geronimo Valley - Gan Halev  
Marin Center for Independent Living  
Marin Community College District  
Noah Marin- Name, Oppose & Abolish Hate in Marin  
Peace Officers Research Association of California (PORAC)

3 Private Individuals

### **Opposition**

ACLU California Action  
California Public Defenders Association

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