



# Legislative Testimony

Oregon Criminal Defense Lawyers Association

March 15 2017

The Honorable Floyd Prozanski, Chair  
Senate Judiciary Committee, Members

**RE: Senate Bill 356 – testimony in opposition**

Dear Chair Prozanski and Members,

The Oregon Criminal Defense Lawyers Association is an organization of attorneys who represent juveniles and parents in juvenile dependency proceedings, juvenile delinquency proceedings, adult criminal prosecutions and appeals, and civil commitment proceedings throughout the state of Oregon. Thank you for the opportunity to submit the following comments in opposition to Senate Bill 356.

**Comments in opposition to intimidation / bias crimes in general.** Admittedly, by enacting existing ORS 166.165, this legislative body has already embraced the policy that committing a physical assault with a particular motivation justifies punishing the assault more harshly than it would be punished had the assault been committed without that particular animus. As a general proposition, OCDLA is opposed to intimidation (or bias) crimes for the following reasons:

- Criminal jurisprudence is typically focused on the performance of an *act* or of an *omission*, and with the corresponding *intent* of the actor in doing completing the *act* or the *omission*. It is not typically concerned with the *why* the actor acted.
- It is difficult, as it is, to discern with accuracy the *intent* of the actor at the time of an assault. (Did the actor act *intentionally*? Or *knowingly*? Or *recklessly*?) It is even more difficult to discern with accuracy *why* an actor committed the act, i.e., why was the actor *motivated* to commit the assault? Was it done because the actor hated the person's race? Or because the actor found himself irritated by something the person said or did? Or because the actor was generally in a bad mood?
- Additionally complicating this mix is the fact that bias crimes are based on the actor's *perception* of the other person's character traits (such as race, color, religion, etc.) rather than the victim's *actual* characteristics. Separating out the actor's *intent* as distinct from the actor's *motivation* based on the actor's *perceptions* is a complicated process of cognitive dissection leading to inexact analysis and mixed results.

**Comments in opposition to SB 356 specifically.** Senate Bill 356 makes the following significant changes to Oregon's existing intimidation crime statutes:

- Two or more acting together versus acting alone: Existing Intimidation in the First Degree makes a physical assault a C felony only if two or more persons act together. SB 356 changes this paradigm and elevates an A misdemeanor Assault IV to the level of a Class C felony if the actor acted alone but with the requisite motivation. This will felonize a significant amount of misdemeanor assaults to felony status.
- “Gender” versus domestic violence assaults: Adding the characteristic of “gender” raises a host of issues with respect to domestic violence assaults. While no domestic violence assault should be deemed “typical,” nonetheless there is usually a gender difference between the parties of a domestic violence assault. How will an Intimidation in the First Degree assault based on “gender” differ in any significant way from an A misdemeanor Assault IV domestic violence assault? OCDLA anticipates that district attorneys will readily charge both theories of crime whenever possible, thereby increasing their already formidable leverage in the plea bargaining process and to the cost of prosecution and defense.
- “Ethnicity”: Adding the characteristic of “ethnicity” introduces a host of issues related to the contours of the term. “Ethnicity” is traditionally defined as cultural factors that cause members of a population group to identify with each other on the basis of common nationality or shared cultural traditions.<sup>1</sup> “National origin” is already a listed characteristic in the Intimidation statutes so it will be difficult in some instances to discern how “ethnicity” will differ from “national origin” or what cultural traditions or norms rise to a sufficient level to qualify as an “ethnic” identification.

**Neutral on the remaining provisions in SB 356.** OCDLA is neutral on the renaming of these crimes to be “bias” crimes. OCDLA is further neutral on Sections 3, 4, 5 and 6 of the bill.

Thank you for your consideration of these comments. Please do not hesitate to contact me if you have any questions.

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<sup>1</sup> Diffen: Compare Anything. [http://www.diffen.com/difference/Ethnicity\\_vs\\_Race](http://www.diffen.com/difference/Ethnicity_vs_Race)