

House Bill 6052 as enrolled
Public Act 475 of 2000
Second Analysis (2-6-01)

Sponsor: Rep. Jim Howell
House Committee: Criminal Law and
Corrections
Senate Committee: Judiciary

THE APPARENT PROBLEM:

The Internet and other telecommunications technologies are leading to significant changes in virtually every aspect of society and every corner of the globe: fostering commerce, improving education and health care, promoting participatory democracy in the United States and abroad, and facilitating communications among family and friends, whether across the street or around the world. Unfortunately, as with almost all technological advances, not all of the changes are constructive. From fraudulent scams to child pornography, the Internet has provided opportunities for unsavory behavior along with the myriad of business and personal benefits.

One such abuse has been the use of the Internet to engage in a form of harassment by proxy. This occurs where an individual attempts to encourage others to harass a particular victim. It can range from putting someone on a mailing list for a group that person might find offensive to pretending to be the victim and asking others to call in the middle of the night. [See BACKGROUND INFORMATION]. While such behavior is not limited solely to the Internet, the Internet -- due to its anonymity and ability to reach large numbers of people -- is easily the best place to attempt to engage in this type of harassment.

Legislation has been introduced to prohibit and provide for the punishment of this sort of harassment.

THE CONTENT OF THE BILL:

The bill would amend the Michigan Penal Code to prohibit "posting a message" through the use of any medium of communication where the provision of that information leads to the person or the person's family being harassed or threatened. The harassing or threatening actions would not have to be committed by the wrongdoer or anyone directly associated or even

known to the wrongdoer. "Posting a message" would mean transferring, sending, posting, publishing, disseminating, or otherwise communicating or attempting to transfer, send, post, publish, disseminate, or otherwise communicate information, whether truthful or untruthful, about the victim. The victim of such a crime would be the individual who was the target of the conduct that was caused by the posted message or a member of that person's immediate family.

More specifically, the bill would make it a crime to post a message without the victim's consent if the person posting the message knows or has reason to know that the information could cause "2 or more separate noncontinuous acts of repeated or continuing unconsented contact" with the victim. Furthermore, posting of the message would have to be intended to cause conduct that will terrorize, frighten, intimidate, threaten, harass, or molest the victim; and the actual conduct that results would have to be of a sort that would not only cause a reasonable person to suffer emotional distress and feel these emotions, but would also actually have to have such an impact on the victim. However, the bill's provisions would not prohibit constitutionally protected speech or activity.

"Emotional distress" would be defined within the bill to mean significant mental suffering or distress that could, but doesn't necessarily have to, require medical or other professional treatment or counseling. "Unconsented contact" would be defined as any contact that was initiated or continued without the victim's consent or in disregard of his or her expressed desire to avoid or discontinue the contact. Unconsented contact would include any of the following:

- a) Following or appearing within the victim's sight.

b) Approaching or confronting the victim in a public place or on private property.

c) Appearing at the victim's workplace or residence.

d) Entering onto, remaining, or placing, delivering, or having something delivered to, property owned, leased, or occupied by the victim.

e) Contacting the victim by telephone, e-mail, regular mail or any other medium.

In order to be prosecuted under the bill's provisions, one of the following would have apply:

1) the wrongdoer was present within the state when he or she posted the message, 2) the conduct that arose from the message occurred within the state, 3) the victim was present in the state when offense or any element of the offense occurred, or 4) the wrongdoer knew that the victim resided in this state. However, the bill would specifically exclude from prosecution Internet or computer network service providers who, in good faith and without knowledge of the nature of the defendant's actions, merely provided the medium for the dissemination of the information or communication.

Generally, violation of the bill's provisions would be a felony punishable by imprisonment for no more than two years and/or a fine of no more than \$5,000. The bill would also provide for an enhanced felony penalty of up to 5 years imprisonment and/or a fine of up to \$10,000 under certain circumstances. The enhanced penalty would apply under the following circumstances:

1) The wrongdoer had a previous conviction for a violation of the bill's provisions or for violations of the stalking or aggravated stalking law, the prohibitions against using the Internet or a computer to commit a crime or to commit a crime against a minor, or a substantially similar law.

2) The wrongdoer's actions resulted in a credible threat (a threat to kill or inflict serious physical injury that leads the person who receives the threat to reasonably fear for his or her or another person's safety) being communicated to the victim, his or her family or someone living in the victim's household.

3) The wrongdoer's actions are in violation of a restraining order of which he or she had received actual notice, or was in violation of an injunction or preliminary injunction.

4) The wrongdoer's actions are in violation of a condition of probation, parole, pre-trial release, or release on bond pending appeal.

5) If the victim was under the age of 18 and the defendant was more than five years older than the victim.

Any violator of the bill's provisions could also be charged with, convicted of, or punished for any other violation of law that he or she had committed while committing the crime created by the bill. Furthermore, a person who was convicted under the bill's provisions could also be ordered to reimburse the state or a local unit of government for the expenses incurred as a result of the violation in the same manner that expenses may be reimbursed under the Code of Criminal Procedure.

The bill would take effect on April 1, 2001.

MCL 750.411s

BACKGROUND INFORMATION:

In February of 1999, Vice President Al Gore asked the Attorney General of the United States to study the problem of "cyberstalking" and to report back with recommendations on how to protect people from this threat. The Attorney General's report issued in August of 1999 (Cyberstalking: A New Challenge for Law Enforcement and Industry) provided a couple of examples of the type of "harassment by proxy" incidents that are the intended target of the bill.

In one instance, a successful prosecution under a new California law, a 50-year-old former security guard "used the Internet to solicit the rape of a woman who rejected his romantic advances. The defendant terrorized his 28-year-old victim by impersonating her in various Internet chat rooms and online bulletin boards, where he posted, along with her telephone number and address, messages that she fantasized of being raped. On at least six occasions, sometimes in the middle of the night, men knocked on the woman's door saying they wanted to rape her."

In another instance a man posted information on a website claiming that the victim's nine-year-old daughter was available for sex. The web posting included the victim's home telephone number with instructions to call 24 hours a day, and led to numerous phone calls.

FISCAL IMPLICATIONS:

According to the House Fiscal Agency, the bill would have an indeterminate impact on the state and local units of government. The impact would depend upon how the bill affected the number of convictions, sentence types and lengths of imprisonment for convicted offenders, the amounts of reimbursement obtained by the state and local units of government, and the collection of penal fine revenues (which are constitutionally dedicated to libraries). (2-6-01)

ARGUMENTS:**For:**

The bill is clearly needed to deal with a growing form of harassment. Current law provides little or no ability to prosecute someone for purposely leading or encouraging others to engage in behavior that will harass or terrorize another person. This behavior is likened to writing "for a good time call . . ." on a bathroom wall. But with the growth of the Internet, this sort of activity can be done on a much larger and far more damaging scale. Often in these cases, the people who are actually engaging in the harassing behavior are not intending to harass the victim. A person could create an advertisement for a car, include the victim's phone number and the instructions to call after midnight. The resulting calls would have the effect of harassing the victim, but the callers would be attempting to purchase a non-existent car, not trying to harass the victim. The malicious nature of the act stems from the behavior and ill-will of the person who sets the others in motion. The actions can range from something as blunt as a direct call for others to harass someone to something more subtle, like using the victim's identity to solicit contact at odd hours or from persons that the victim would sooner avoid.

Against:

The bill is overly broad. It could be applied in political contexts and thereby could have a chilling effect upon speech regarding certain issues. For example, in the abortion debate, some abortion opponents have used the practice of identifying doctors who perform abortions as a means of encouraging public disapproval. Unfortunately, this activity has allegedly led some abortion opponents to engage in threatening and occasionally violent behavior. Since this activity obviously could (and has) led to the harassment of those doctors, the law could be used to silence that avenue of protest for abortion foes. Abortion is by no means the only political issue on which proponents and

opponents have similar zeal and which could lead to similar situations.

Further, the bill should be limited to electronic means of communication. The Internet provides higher risk of harm because of the vast numbers of people that can be reached quickly and easily. Providing similar punishment for writing on a bathroom wall seems excessive given the limited impact that such a means of communication could have.

Response:

The bill is necessarily broad to deal with many types of harassment by proxy. However, it is limited by the provisions requiring that the defendant have intended to cause the victim to feel terrorized, frightened, intimidated, threatened, harassed, or molested.

The bill would have no chilling effect on legitimate speech. If the person posting information about a doctor who performs abortions intends to encourage others to harass, threaten or terrorize that doctor, then he or she should be punished. Some instances will clearly need to be determined by the intent (admitted or apparent) of the alleged wrongdoer. In the gray areas, a jury should be trusted to weigh the evidence and determine whether or not a particular actor was engaged in political speech or was encouraging others to harass someone. Furthermore, the bill itself specifically states that it does not prohibit constitutionally protected speech or activity.

Further, the bill should not be limited to electronic means of communication. A billboard or a newspaper or magazine advertisement would all reach large numbers of people but are not electronic media. Limiting the provisions to electronic media would in essence give a free pass to such actions as long as the wrongdoer didn't use some form of electronic media.

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