AGENDA

9:00 a.m. – April 23, 2019
State Capitol, Room 126

PART III

AB 1280 (Grayson) – AB 1599 (Cunningham)
SUMMARY: Codifies the term “deepfake” to mean “a recording that has been created or altered in a manner that it falsely appears to a reasonable person to be an authentic record of the actual speech or conduct of the individual depicted in the recording,” and creates three new crimes for the creation and distribution of a deepfake video, as specified. Specifically, this bill:

1) Makes it a misdemeanor to knowingly, and without the consent of the depicted person, prepare, produce, or develop, with the intent to distribute, exhibit to, or exchange with, others, or to offer to distribute, or distribute, exhibits to, or exchanges with, others, any deepfake that depicts an individual personally engaging in sexual conduct, as defined.

2) Makes it an alternate felony or misdemeanor for a person to knowingly prepare, produce, or develop, with the intent to distribute, exhibit to, or exchange with, others, or to offer to distribute, or distribute, exhibit to, or exchange with, others, any deepfake that depicts a person under the age of 18 personally engaging in sexual conduct, as defined.

3) Makes it an alternate felony or misdemeanor for a person, within 60 days before an election, knowingly and without the consent of the depicted person, to prepare, produce, or develop, any deepfake with the intent that the deepfake coerce or deceive any voter into voting for or against a candidate or measure in that election, and to distribute to, exhibit to, or exchange with, others, or offer to distribute to, exhibit to, or exchange with others, that deepfake.

4) States that no person shall be held liable under this section for any activity protected by the First Amendment to the Constitution of the United States.

5) Defines “deepfake” to mean “any audio or visual media in an electronic format, including any motion-picture film, video recording, or sound recording that is created or altered in a manner that it would falsely appear to a reasonable observer to be an authentic record of the actual speech or conduct of the individual depicted in the recording.”

6) Appropriates $25,000,000 from the General Fund to the University of California to fund research to identify and combat the inappropriate use of deepfake technology. Permits the UC to elect whether to access the appropriation, and if it does, requires the UC to, by January 1, 2022, prepare and submit a report to the Legislature, detailing its research and findings.

EXISTING LAW:

1) States that every person may freely speak, write and publish their sentiments on all subjects, being responsible for the abuse of this right. (Cal. Const., art. I, § 2.)
2) Makes it an alternate felony or misdemeanor for a person to possess or publish with the intent to distribute or exhibit media which depicts a person under the age of 18 years personally engaging in or simulating sexual conduct, including by a computer-generated image. (Pen. Code, § 311.1, subd. (a).)

3) Makes it a misdemeanor for a person to engage in sexual exploitation of a child by knowingly developing, duplicating, printing, or exchanging any representation of information, data, or image, including by a computer-generated image, that depicts a person under the age of 18 years engaged in an act of sexual conduct. A second offense of this provision is a felony. (Pen. Code, § 311.3, subd. (a).)

4) Makes it a felony for a person to, with knowledge that a person is a minor under the age of 18 years or who reasonably should know, knowingly promote, employ, use, persuade, induce, or coerce a minor under the age of 18 years, to engage in either posing or modeling alone or with others for purposes of preparing any representation of information, data, or image, or a live performance involving, sexual conduct by a minor under the age of 18 years alone or with other persons or animals. It is not necessary to prove commercial purposes in order to establish a violation. (Pen. Code, § 311.4, subd. (c).)

5) Defines “sexual conduct” to mean “any of the following, whether actual or simulated: sexual intercourse, oral copulation, anal intercourse, anal oral copulation, masturbation, bestiality, sexual sadism, sexual masochism, penetration of the vagina or rectum by any object in a lewd or lascivious manner, exhibition of the genitals or pubic or rectal area for the purpose of sexual stimulation of the viewer, any lewd or lascivious sexual act as defined in Section 288, or excretory functions performed in a lewd or lascivious manner, whether or not any of the above conduct is performed alone or between members of the same or opposite sex or between humans and animals. An act is simulated when it gives the appearance of being sexual conduct.” (Pen. Code, § 311.4, subd. (d)(1).)

6) Makes it a crime to make any return, statement, or report, under oath, or willfully make and deliver any such return, statement, or report, purporting to be under oath, knowing the same to be false in any particular. (Pen. Code, § 129.)

7) Makes it a crime to practice any fraud or deceit, or knowingly make or exhibit any false statement, representation, token, or writing, to any witness or person about to be called as a witness upon any trial, proceeding, inquiry, or investigation whatever, authorized by law, with intent to affect the testimony of such witness. (Pen. Code, § 133.)

8) Makes it a crime to inform a person, as specified, that a bomb or other explosive has been or will be placed or secreted in any public or private place, knowing that the report is false. (Pen. Code, § 148.1.)

9) Makes it a crime to report or cause to be reported to any city, county, city and county, or state department, district, agency, division, commission, or board, that an “emergency” exists, knowing that the report is false (Pen. Code, § 148.3.)

10) Makes it a crime to willfully make or publish any false statement, spread any false rumor, or employ any other false or fraudulent means or device, with intent to affect the market price of any kind of property. (Pen. Code, § 395.)
11) Establishes libel as a false and unprivileged publication by writing, printing, picture, effigy, or other fixed representation to the eye, which exposes any person to hatred, contempt, ridicule, or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in his occupation. (Civ. Code, § 45.)

12) Provides that a libel which is defamatory of the plaintiff without the necessity of explanatory matter, such as an inducement, innuendo or other extrinsic fact, is said to be a libel on its face. Defamatory language not libelous on its face is not actionable unless the plaintiff alleges and proves that he has suffered special damage as a proximate result thereof. (Civ. Code, § 45a.)

13) Creates civil liability for slander if there is a false and unprivileged publication, orally uttered, or communicated by radio or any mechanical or other means which:

   a) Charges any person with crime, or with having been indicted, convicted, or punished for crime;

   b) Imputes in him the present existence of an infectious, contagious, or loathsome disease;

   c) Tends directly to injure him in respect to his office, profession, trade or business, either by imputing to him general disqualification in those respects which the office or other occupation peculiarly requires, or by imputing something with reference to his office, profession, trade, or business that has a natural tendency to lessen its profits;

   d) Imputes to him impotence or a want of chastity; or,

   e) Which, by natural consequence, causes actual damage. (Civ. Code, § 46.)

14) Provides that any person who photographs or records by any means the image of another identifiable person with his or her consent who is in a state of full or partial undress in an area in which the person has a reasonable expectation of privacy, and subsequently distributes the image with the intent to cause serious emotional distress, and where the person depicted does suffer serious emotional distress, is guilty of a misdemeanor. (Pen. Code, § 647, subd. (j)(3)(A).)

15) Makes it a crime to intentionally distribute the image of the intimate body part or parts of another identifiable person, or an image of the person depicted engaged in an act of sexual intercourse, sodomy, oral copulation, sexual penetration, or an image of masturbation by the person depicted or in which the person depicted participates, under circumstances in which the persons agree or understand that the image shall remain private, the person distributing the image knows or should know that distribution of the image will cause serious emotional distress, and the person depicted suffers that distress. (Pen. Code, § 647, subd. (j)(4)(A).)

16) Establishes a right to seek damages against a person who knowingly uses another’s name, voice, signature, photograph, or likeness, in any manner, on or in products, merchandise, or goods, or for purposes of advertising or selling, or soliciting purchases of, products, merchandise, goods or services, without such person’s prior consent, or, in the case of a
minor, the prior consent of his parent or legal guardian. (Civ. Code, § 3344 subd. (a.).)

17) Makes a person who engaged in the authorized use of another person’s likeness liable to the injured party or parties in an amount equal to the greater of seven hundred fifty dollars ($750) or the actual damages suffered by him or her as a result of the unauthorized use, and any profits from the unauthorized use that are attributable to the use and are not taken into account in computing the actual damages. The prevailing party in any action under this section shall also be entitled to attorney’s fees and costs. (Civ. Code, § 3344 subd. (a.).)

18) Exempts from civil liability for violating a person’s right of publicity the owners or employees of any medium used for advertising, including, but not limited to, newspapers, magazines, radio and television networks and stations, cable television systems, billboards, and transit ads, by whom any advertisement or solicitation in violation of this section is published or disseminated, unless it is established that such owners or employees had knowledge of the unauthorized use of the person’s name, voice, signature, photograph, or likeness as prohibited by this section. (Civ. Code, § 3344, subd. (f.).)

19) Makes it unlawful for a person, with bad faith intent, to register, traffic in, or use a domain name that is identical or confusingly similar to the personal name of another living person or deceased personality, without regard to the goods and services of the parties. (Bus. & Prof. Code, § 17525.)

20) Recognizes a “false light” claim permitting a person to sue for false light if something highly offensive is implied to be true about that person that is actually false. Gill v. Curtis Publ’g Co., 239 P.2d 630 (Cal. 1952); See also, Solano v. Playgirl, Inc., 292 F.3d 1078 (9th Cir. 2002)

21) Makes it a misdemeanor to, with actual knowledge and intent to deceive, cause to be distributed or to distribute, including mail, radio or television broadcast, telephone call, text message, email, or any other electronic means, including over the Internet, literature or any other form of communication to a voter that includes any of the following:

a) The incorrect location of a vote center, office of an elections official, satellite office of an elections official where voting is permitted, vote by mail ballot drop box, or vote by mail ballot drop-off location.

b) False or misleading information regarding the qualifications to vote or to register to vote.

c) False or misleading information regarding the date of an election or the days, dates, or times voting may occur. (Elec. Code, § 18302 subd. (b.).)

22) Makes it unlawful for a person, with intent to mislead, deceive, or defraud, to commit an act of political cyberfraud, defined as a knowing and willful act concerning a political Web site that is committed with the intent to deny a person access to a political Web site, deny a person the opportunity to register a domain name for a political Web site, or cause a person reasonably to believe that a political Web site has been posted by a person other than the person who posted the Internet Web site, and would cause a reasonable person, after reading the Internet Web site, to believe the site actually represents the views of the proponent or opponent of a ballot measure or of a candidate for public office. Political cyberfraud
includes, but is not limited to, any of the following acts: (A) Intentionally diverting or redirecting access to a political Web site to another person’s Internet Web site by the use of a similar domain name, meta-tags, or other electronic measures; (B) Intentionally preventing or denying exit from a political Web site by the use of frames, hyperlinks, mousetrapping, popup screens, or other electronic measures; (C) Registering a domain name that is similar to another domain name for a political Web site; or (D) Intentionally preventing the use of a domain name for a political Web site by registering and holding the domain name or by reselling it to another with the intent of preventing its use, or both. (Elec. Code, § 18320.)

23) Makes it a unlawful for a person to, firm, association, corporation, campaign committee, or organization, with actual malice, produce, distribute, publish, or broadcast campaign material that contains (1) a picture or photograph of a person or persons into which the image of a candidate for public office is superimposed or (2) a picture or photograph of a candidate for public office into which the image of another person or persons is superimposed. “Campaign material” includes, but is not limited to, any printed matter, advertisement in a newspaper or other periodical, television commercial, or computer image. For purposes of this section, “actual malice” means the knowledge that the image of a person has been superimposed on a picture or photograph to create a false representation, or a reckless disregard of whether or not the image of a person has been superimposed on a picture or photograph to create a false representation. (Elec. Code, § 20010, subd. (a).)

24) Permits a person, firm, association, corporation, campaign committee, or organization may produce, distribute, publish, or broadcast campaign material that contains a picture or photograph prohibited by subdivision (a) only if each picture or photograph in the campaign material includes the following statement in the same point size type as the largest point size type used elsewhere in the campaign material: “This picture is not an accurate representation of fact.” The statement shall be immediately adjacent to each picture or photograph prohibited by subdivision (a). (Elec. Code, § 20010, subd. (b).)

25) Permits a registered voter to seek a temporary restraining order and an injunction prohibiting the publication, distribution, or broadcasting of any campaign material in violation of this section. (Elec. Code, § 20010, subd. (c)(1).)

26) Permits a candidate for public office whose likeness appears in a picture or photograph prohibited by subdivision (a) to bring a civil action against any person, firm, association, corporation, campaign committee, or organization that produced, distributed, published, or broadcast the picture or photograph prohibited by subdivision (a). The court may award damages in an amount equal to the cost of producing, distributing, publishing, or broadcasting the campaign material that violated this section, in addition to reasonable attorney’s fees and costs. (Elec. Code, § 20010, subd. (c)(2).)

27) Exempts from the prohibition on publishing material prohibited by subdivision (a) the publisher or an employee of a newspaper, magazine, or other periodical that is published on a regular basis for any material published in that newspaper, magazine, or other periodical. (Elec. Code, § 20010, subd. (d)(2).)
EXISTING FEDERAL LAW

1) Provides that “Congress shall make no law... abridging the freedom of speech...” (U.S. Const., Amend. 1.)

2) Applies the First Amendment to the states through operation of the Fourteenth Amendment. (Gitlow v. New York (1925) 268 U.S. 652; NAACP v. Alabama (1925) 357 U.S. 449.)

3) “No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.” (47 U.S.C. 230.)

4) Defines “child pornography” to mean “any visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture, whether made or produced by electronic, mechanical, or other means, of sexually explicit conduct, where (A) the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct; (B) such visual depiction is a digital image, computer image, or computer-generated image that is, or is indistinguishable from, that of a minor engaging in sexually explicit conduct; or such visual depiction has been created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct. 18 U.S.C. Sec. 2256(8)(C).

FISCAL EFFECT: Unknown

COMMENTS:

1) Author’s Statement: According to the author, “The technology to create fake videos in which a person’s likeness, including their face and voice, can be realistically swapped with someone else’s has arrived. One of several serious dangers associated with this technology is the creation of pornographic videos using someone’s likeness without his or her consent, an act that can cause severe emotional distress and reputational harm for the individual whose identity has been misappropriated, especially minors. Assembly Bill 1280 (Grayson) is a narrowly tailored, targeted measure to deter the production of these harmful pornographic videos by adding criminal liability for those that create and distribute them.”

2) Background According to the author, “Deepfakes are forged or fake videos created via deep learning, a form of machine learning, where a person’s likeness, including their face and voice, can be realistically swapped with someone else’s.

“Deepfake technology first appeared in November 2017 when an anonymous user on the online forum Reddit posted an algorithm that leveraged existing artificial intelligence algorithms to create hyper-realistic fake videos. Other users then shared the code on GitHub, a major code sharing service, where it became free software and publicly available. Applications, like FakeApp, soon appeared to simplify the programming process.

“Since its introduction, deepfake technology has been mainly used to create fake pornographic videos most often using the likeness of female celebrities without their consent. As the technology improves and becomes more accessible, the scope of its victims will continue to expand outside of Hollywood with likely targets including the most vulnerable of...
Californians, such as survivors of abusive relationships and minors. The technology will unleash waves of cyberbullying, revenge, and extortion cases that create widespread emotional trauma, lasting reputational damage, and severe mental anguish.

"While using deepfake technology to produce pornographic videos with misappropriated identities may incur civil liability in a few cases, unfortunately, tort law will be insufficient to deter this danger and inadequate as a remedy to the victims. The reasons include:

"To initiate a civil suit against an individual, the plaintiff needs to be able to identify and serve the defendant, but creators of deepfake pornography can and most often do distribute their product anonymously. Without being able to determine the perpetrator, victims will be left without remedy, and perpetrators will know they can operate with impunity so long as they hide their identities.

"Proving damages from deepfake pornography in the context of a civil lawsuit will be especially difficult. Severe emotional distress and reputational damage, particularly in the case of minors, are harder to prove and calculate than physical or economic injuries. These challenges will create a high degree of uncertainty with regard to monetary recovery, and in light of the high cost of initiating civil lawsuits, this dynamic will most likely prevent victims from hiring attorneys on a contingency basis, precluding legal representation for most.

"Once a deepfake pornographic video is published online, it essentially becomes widely and permanently available. Civil suits directed at a deepfake creator will be ineffective in removing the offending material and victims will likely suffer ongoing and repeated injury as a result.

"These obstacles are why even wealthy celebrities have not pursued civil action against deepfake creators. Because of these serious limitations with civil law, victims of deepfake pornographic videos will be left to suffer without protection or remedy."

3) **First Amendment Requires Narrow Tailored Laws Regulating False Speech:** The First Amendment to the United States Constitution guarantees to all citizens the right to freedom of speech and association. At the core of the exercise of these First Amendment rights is the freedom to engage in interpersonal relationships. Increasingly in modern society, relationships proliferate online.

In *Reno v. ACLU* (1997) 521 U.S. 844, the Supreme Court declared, "As a matter of constitutional tradition, in the absence of evidence to the contrary, we presume that governmental regulation of the content of speech is more likely to interfere with the free exchange of ideas than to encourage it. The interest in encouraging freedom of expression in a democratic society outweighs any theoretical but unproven benefit of censorship." *(Id. at 885).*

Anytime a Legislature seeks to limit speech in statute, the measure should face exacting scrutiny. In *Ashcroft v. The Free Speech Coalition* (2002) 535 U.S. 234, the Supreme Court cautioned that "the mere tendency of speech to encourage unlawful acts is not a sufficient
reason for banning it. The government ‘cannot constitutionally premise legislation on the desirability of controlling a person's private thoughts,’ [cite] First Amendment freedoms are most in danger when the government seeks to control thought or to justify its laws for that impermissible end. The right to think is the beginning of freedom, and speech must be protected from the government because speech is the beginning of thought.”

“[T]he government may not prohibit speech because it increases the chances that an unlawful act will be committed at some indefinite future time,” Ashcroft v. The Free Speech Coalition, supra, at 253, citing Hess v. Indiana (1973) 414 U.S. 105, 108. “[T]he government has shown no more than a remote connection between speech that might encourage thoughts or impulses and any resulting child abuse. Without a significantly stronger, more direct connection, the Government may not prohibit speech on the ground that it may encourage pedophiles to engage in illegal conduct.”

When content-based speech regulation is in question, exacting scrutiny is required. Statutes suppressing or restricting speech must be judged by the sometimes inconvenient principles of the First Amendment. Historically, content-based restrictions on speech have been permitted only in a few specific categories that are well-defined. These categories include: speech to incite imminent lawless action, obscenity, defamation, speech integral to criminal conduct, so-called “fighting words,” child pornography, fraud, true threats, and speech presenting some grave and imminent threat the Government has the power to prevent. Outside these limited categories, content based restrictions on speech are constitutionally suspect. For example, the government cannot pass a law to ban lies, false statements, or hate speech. This means that “new” kinds of speech that the Legislature might identify as a result of emerging technology, if they do not fall into an “old” category of prohibited speech, are likely to fail constitutional muster.

Absent from those few categories where the law allows content-based regulation of speech is any general exception to the First Amendment for false statements. United States v. Alvarez (2012) 567 U.S. 709. “Where false claims are made to effect a fraud or secure moneys or other valuable considerations, say offers of employment, it is well established that the Government may restrict speech without affronting the First Amendment.” “The remedy for speech that is false is speech that is true. This is the ordinary course in a free society. The response to the unreasoned is the rational; to the uninformed, the enlightened; to the straight-out lie, the simple truth.”

4) **Strict Scrutiny Review**: The government may only impose a content-based regulation of speech if it can satisfy the strict scrutiny standard; that is, whether the law “is necessary to serve a compelling state interest,” “that it is narrowly drawn to achieve that end,” and that no “less speech-restrictive means exist to achieve the interest.”

5) **Existing Laws Already Regulate the Behavior Targeted by this Bill**: There are numerous criminal and civil laws that address the harms this bill seeks to address.

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a) **Applicable Criminal Statutes:** As the *American Civil Liberties Union of California* notes in its opposition to this bill, there are numerous Penal Code provisions that prohibit the possession and distribution of child pornography, including any computer-generated image, like a deepfake. (See Penal Code Section 311.1 et. seq.) Of the three crimes this bill creates, the least problematic is the provision criminalizing a deepfake of a person under 18, because that speech has less protection generally and is already criminalized to various degrees. However, this bill would make the mere possession, without any distribution, of an image of person under 18 engaged in sexual conduct an alternate felony or misdemeanor. Of the various crimes related to child pornography, the Legislature has specifically made some crimes, which create greater harm in their commission, felonies, and some crimes misdemeanors, at least on the first offense.

This bill would eliminate the careful weighing that the Legislature has already conducted in creating these crimes. Moreover, there are enforceability problems—how can law enforcement distinguish between a computer generated image of a 17 year old versus and 18 year old?[^3] Additionally, the definition of “deepfake” is so broad, it could be read to criminalize the depiction of a fictional character—that cannot be narrowly tailored.[^4]

b) **Unfair Practices Act:** By creating new speech crimes, the bill would pose a risk that publishers will be sued for reporting on or reproducing an image criminalized by this bill. For example, by running a political advertisement that a person believes violates the criminal provisions this bill would create, a newspaper could be sued under Business and Professions Code Section 17200 based on claims that the publisher violated a criminal law. Thus, this bill would have a chilling effect on both the creation and distribution of swaths of speech by opening the door to new civil lawsuits.

c) **Defamation:** California eliminated criminal defamation in 1986. This measure essentially re-criminalizes defamation, opening up libel laws in areas of political speech and speech that may be newsworthy, or have scientific, artistic or other value. False speech is not unlawful unless it does damage to a person’s reputation, and in those cases, there can be civil liability. There are various libel claims that can be brought to address the conduct this bill seeks to criminalize, including slander, defamation, and false light torts.

Existing defamation law is well-suited to address, in particular, the concern about the distribution of deepfakes of a person over 18 engaged in sexual conduct. If the false video does damage to a person’s reputation, civil remedies exist, including injunctive relief to require the video be taken down, and civil harassment laws to stop ongoing harassment.


[^4]: See *Ashcroft*, supra, at 247: “Both themes—teenage sexual activity and the sexual abuse of children—have inspired countless literary works. William Shakespeare created the most famous pair of teenage lovers, one of whom is just 13 years of age. See Romeo and Juliet, act I, sc. 2, l. 9 (‘She hath not seen the change of fourteen years’). In the drama, Shakespeare portrays the relationship as something splendid and innocent, but not juvenile. The work has inspired no less than 40 motion pictures, some of which suggest that the teenagers consummated their relationship. *E. g.*, Romeo and Juliet (B. Luhrmann director, 1996).”
The provision criminalizing false speech about political figures is also already addressed civilly. As the ACLU notes, “Many political deepfakes addressed under this bill would already be subject to that statute. Where no government regulation of the speech would be allowed, the speaker may still be found civilly liable for damages in certain circumstances.” However, this bill would open the door to criminalizing new categories of speech—that which may sway voters in any way on both a candidate and a measure. Under this bill, the act of editing a politician’s speech for soundbites would be a potential crime. Even more troubling, speech that is not even about a person, but about a ballot measure before the voters, would be criminalized by this bill as well.

Enforcement of First Amendment norms is in the eye of the beholder. Both civil and criminal enforcement of this bill would be left to individual jurisdictions and officials to determine where the line for unlawful speech lands. This bill could normalize candidates suing each other regularly, it could permit an elected district attorney to criminally prosecute their opponent in a campaign, or it could cause an uptick in court battles over speech about ballot measures. This bill is overbroad and vague as to what speech would ultimately rise to the level of warranting criminal enforcement and, as such, would have a significant chilling effect on legitimate speech.

6) **Misdemeanor Charges Do Not Support the Issuance of a Warrant**: Proponents of this bill argue that civil actions are insufficient for a person to protect their rights in these cases because the identity of the person who creates the deepfake may be anonymous and that it is impractical and expensive for a person seeking discovery to determine, by subpoena, who the person is who posts the videos. Even if that were the case, this bill does not cure this problem because the crime this bill creates regarding a deepfake of a person over 18 is a misdemeanor. As such, this bill would not authorize the issuance of a warrant by law enforcement to seek information from a third party, such as an Internet Service Provider, to seek subscriber or personally identifying information about an anonymous poster of content.

However, as noted, existing law does allow a person suing for a violation of civil law to seek information from a third party, such as an ISP, by subpoena. That person is able to initiate the lawsuit against a “doe” defendant if the defendant’s identity is unknown at the time of filing the complaint, and a plaintiff may conduct discovery to determine that person’s identity.

In cases of a deepfake related to a person under 18, that activity is already a criminal matter under existing law, and law enforcement officials may obtain warrants in those cases that rise to the level of felony criminal conduct.

7) **Exemption for First Amendment Activity**: This bill purports to cure any potential First Amendment conflicts by including an exemption to exclude from criminal liability any First Amendment protected speech. However, this provision is so overbroad and vague that it fails to put a person or entity on notice of what actually is and is not lawful activity. As such, this provision does not cure the underlying issues that this bill raises, and indeed, arguably exacerbates them.

8) **Static and Moving Images**: This bill applies to both static and moving images, so it includes commonplace photo-shopped images generally. While this bill purports to tackle a new
problem, it is really addressing old conduct in new clothing. As technology advances, the courts and lawmakers should be careful not to “embarrass the future” \(^5\) by making decisions that are in discord with the “progress of science.”\(^6\)

9) **Argument in Support**: According to the *Organization for Social Media Safety*, “As a consumer protection organization focused on social media and its related dangers, the Organization for Social Media Safety is very concerned about the threat posed by deepfake technology. “Deepfakes” are forged videos created via artificial intelligence where a person’s likeness, including their face and voice, is realistically swapped with someone else’s. One of the many dangers posed by this new technology is the ability to create malicious pornographic deepfakes, pornographic videos that misappropriate an individual’s likeness. In response, the Organization for Social Media Safety is very proud to sponsor AB 1280, which will protect individuals from severe emotional harm and reputational damage by criminalizing the creation and distribution of malicious pornographic deepfakes.

“We agree with the current, prevailing philosophy in California of creating criminal liability only with great hesitancy. Importantly, this caution is not a total bar to new criminal provisions but rather calls for a careful analysis of each proposal. In sponsoring AB 1280, we have asked ourselves the following questions:

- Does the proposal respond to a new danger?
- Is that danger severe?
- Are there no viable alternatives to the proposal?
- Will the proposal accomplish its objective in deterring the danger and protecting Californians?
- Is the proposal constitutional?

“Criminal legislation drafted in response to new, technology-driven dangers and approved in California in recent years has satisfied these criteria. For example, in 2013, California approved SB 255, a bill prohibiting revenge porn, the nonconsensual distribution of consensually obtained, sexually graphic images or videos, a new danger created by the popularization of smartphones that can capture quality video and then mass distribute such video through social media. Like SB 255, AB 1280 is also the only effective, targeted response to a similar, emerging, and severe threat.

**“Malicious Pornographic Deepfakes Are A New Threat**

“While the ability to swap a person’s likeness into a video has for several years been available only to movie and television studios, it has now suddenly and rapidly become accessible to the general masses. Deepfake technology first appeared in late 2017 when an anonymous user on the online forum Reddit posted an algorithm that leveraged existing artificial intelligence algorithms to create hyper-realistic fake videos. Other users then shared the code on GitHub, a major code sharing service, where it became free software and publicly available. Applications, like FakeApp, soon appeared to simplify the programming


process. And today, deepfake technology continues to improve and spread.

"Malicious Pornographic Deepfakes Are A Severe Danger"

"The danger of deepfake technology lies in its ability to generate fake videos so realistic that one cannot distinguish the actual from the forged. Since its introduction, the technology has been used extensively to create fake pornographic videos of women without their consent. And, as the technology improves and becomes more accessible, this malicious deepfake pornography will include more of the most vulnerable of Californians, such as survivors of abusive relationships and minors. It has already targeted women with the intent to cyberbully, take revenge, and extort, spurring emotional trauma, lasting reputational damage, and severe mental anguish.

"The extent of the potential harm of malicious pornographic deepfakes cannot be underestimated. Since deepfake technology enables a form of revenge porn, though one not requiring the need to capture actual footage, previous research on the dangers of revenge porn serves as a foundation for understanding the potential effects of deepfakes. In a 2015 study from the Cyber Civil Rights Initiative, 51 percent of victims of revenge porn indicated that they had considered committing suicide, and 39 percent said the crime affected their career and professional lives. And, since deepfakes do not have the limiting factor of requiring actual footage, their potential impact is far more widespread.

"The statements of victims of malicious pornographic deepfakes further clarify their potential harms:

- ‘I was sent to the hospital with heart palpitations and anxiety, the doctor gave me medicine. But I was vomiting, my blood pressure shot up, my body had reacted so violently to the stress,’ said Rana Ayyub, an investigative journalist.

- ‘I just cannot explain the level of violation and also shame that I felt,’ said Noelle Martin, an 18-year-old student.

"AB 1280 Is the Only Policy Option"

"The unique dynamics of deepfake technology also render other traditional policy options ineffective. While using deepfake technology to produce pornographic videos with misappropriated identities may incur civil liability in a few cases, tort law will be insufficient to deter this danger and inadequate as a remedy to the victims. The reasons include:

- To recover in a civil suit against an individual, the plaintiff ultimately needs to be able to identify the defendant, but creators of deepfake pornography can and almost always do distribute their product anonymously. Identifying the creator through the civil discovery process when the offending material has likely passed through thousands of computers, and thousands of different IP addresses, would be onerous, costly, and time consuming to the point of futility in an overwhelming majority of cases.

- Proving and recovering damages from deepfake pornography in the context of a civil lawsuit will be especially difficult. Severe emotional distress and reputational damage, particularly for younger victims, are harder to prove and calculate than physical or economic
injuries. In addition, the prospect of even obtaining full compensation from individual deepfake creators is often slim. These challenges will create a high degree of uncertainty with regard to monetary recovery and, in conjunction with the high cost of both initiating civil lawsuits generally and pursuing deepfake lawsuits specifically, will prevent most victims from obtaining legal representation and/or initiating civil cases.

"These obstacles are why even wealthy celebrities have not pursued civil litigation with existing, applicable causes of action like defamation or false light claims. And so, relying solely on civil law will leave victims of malicious deepfake pornographic videos without protection or remedy.

"AB 1280 Is an Effective Solution"

"AB 1280 will prove an effective policy against the production of malicious pornographic deepfakes. Criminal liability is simply an effective deterrent. And, in many cases, particularly the most severe, law enforcement officials will be able to identify and prosecute malicious pornographic deepfake creators. That is because law enforcement officials, unlike civil litigants, have more powerful investigative tools at their disposal, including the ability to issue timely warrants and conduct interviews, and they can leverage the resources, skill and experience of existing cybercrime units.

"AB 1280 Is a Constitutional Solution"

"Finally, AB 1280 is constitutional. Proposed subsection 644(b) protects minors from having their likeness used in pornographic deepfakes. This provision is a more targeted version of existing federal law, the Child Pornography Protection Act and the Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act, that prohibits any computer image or computer-generated image that is "indistinguishable from" an actual minor engaging in sexually explicit conduct. The 8th Circuit in United States v. Anderson, 759 F.3d 891 (8th Cir. 2014) directly upheld the provisions’ constitutionality under a strict scrutiny analysis.

"Proposed subsection 644(a) of AB 1280 prohibits the use of adults in pornographic deepfakes without their consent. The logic in Anderson as applied to minors should be no different as applied to adults. As the Court reasoned, the harm to minors from pornographic depictions comes from the product and not from the process of production. Since, when it comes to malicious pornographic deepfakes, adult victims suffer essentially the same injuries as minors do, the state of California certainly has a similar compelling interest in protecting these adults from such serious harm as it does minors."

10) Argument in Opposition: According to the California News Publishers Association, “[AB 1280] would criminalize the creation and distribution of certain types of ‘deepfake’ recordings. While CNPA does not condone the type of conduct the bill is intended to address, CNPA believes the bill is overbroad as currently written and is vulnerable to constitutional challenge.

"The Scope of AB 1280 Should be Limited to Avoid First Amendment Issues"
“AB 1280 addresses 3 [distinct] types of deepfakes: (1) recordings depicting sexual conduct of minors, (2) recordings depicting sexual conduct by adults, and (3) recordings intended to coerce or deceive voters. Each of these categories raise unique First Amendment issues.

“Recordings Depicting Sexual Conduct by Minors

“The prohibition on deepfakes that depict a minor engaging in sexual conduct is the least likely to run afoul of the First Amendment as similar prohibitions on using a minor’s image to make it appear that the minor engaged in sexual conduct are included in federal law, and have been upheld. See 18 U.S.C. Sec. 2256(8)(C); U.S. v. Anderson (8th Cir. 2014) 759 F.3d 891.

“That being said, it does appear that the absolute prohibition on deepfakes that depict a minor engaging in sexual conduct – without any consideration as to the specific circumstances – could be vulnerable to challenge in certain cases. The U.S. Supreme Court raised concerns in Ashcroft v. Free Speech Coalition (2002) 535 U.S. 234 about the constitutionality of broad prohibitions that fail to consider the “serious literary, artistic, political, or scientific value” of the covered works:

“If these films, or hundreds of others of lesser note that explore those subjects, contain a single graphic depiction of sexual activity within the statutory definition, the possessor of the film would be subject to severe punishment without inquiry into the work's redeeming value. This is inconsistent with an essential First Amendment rule: The artistic merit of a work does not depend on the presence of a single explicit scene. [citations omitted]. Under Miller, the First Amendment requires that redeeming value be judged by considering the work as a whole. Where the scene is part of the narrative, the work itself does not for this reason become obscene, even though the scene in isolation might be offensive.” Id. at 248.

“Recordings Depicting Sexual Conduct by Adults

Though prohibitions on altering photos and video to make it appear that a minor is engaging in sexual conduct have passed constitutional muster in at least some circumstances, it’s not clear that the same result would follow for a prohibition on deepfakes that depict adults engaging in sexual conduct.

“Because AB 1280 “expressly aims to curb a particular category of expression... by singling out the type of expression based on its content and then banning it,” it is considered a content-based regulation of speech, and is thus presumptively unconstitutional. Free Speech Coalition v. Reno (9th Cir. 1999) 198 F.3d 1083, 1090-91, aff'd sub nom. Ashcroft v. Free Speech Coalition (2002) 535 U.S. 234.

“To overcome this presumption, a content-based regulation of speech, such as the one found in AB 1280, must serve a compelling state interest that it is narrowly drawn to achieve that end. Id. It is not clear that AB 1280’s prohibition on deepfakes depicting adult sexual conduct would clear this hurdle.

“Cases, such as U.S. v. Anderson (8th Cir. 2014) 759 F.3d 891, which have upheld prohibitions on child pornography have relied on the government’s interest in safeguarding the physical and psychological well-being of minors as the compelling interest that supports
the restriction on expression. Because depictions of adult sexual conduct do not implicate the same interest in protecting the well-being of minors, it’s not clear that a compelling government purpose would support the prohibition.

“In addition, as discussed below, because existing laws provide remedies to individuals whose images have been used in deepfakes, it’s not clear that the government’s interest in enacting a criminal prohibition is compelling.

“Likewise, the prohibition is not narrowly tailored. Though the bill includes a nod to the First Amendment by stating that it shall not prohibit any conduct protected by the First Amendment, it does not clearly exempt categories of protected speech, such as parody and satire. See Hustler Magazine v. Falwell (1988) 485 U.S. 46 (holding that a parody ad published in Hustler magazine depicting televangelist Jerry Falwell as an incestuous drunk was protected speech).

“To reduce the risk of AB 1280’s prohibition on deepfakes that depict adult sexual conduct from being held unconstitutional the bill should, at a minimum, clearly exempt categories of First Amendment protected expression, such as commentary, criticism, satire, and parody.

“Recordings Intended to Coerce or Deceive Voters

“CNPA believes that the provision in the bill which prohibits the use of deepfake videos to attempt to coerce or deceive voters is the most vulnerable to constitutional challenge. This is because “the First Amendment ‘has its fullest and most urgent application’ to speech uttered during a campaign for political office.” Eu v. San Francisco Cty. Democratic Central Comm. (1989) 489 U.S. 214, 223 (quoting Monitor Patriot Co. v. Roy (1971) 401 U.S. 265, 272).

“The prohibition on political deepfakes is a content-based regulation, and as such it must pass strict scrutiny review to be constitutional. As part of this review, ‘[t]he State must specifically identify an ‘actual problem’ in need of solving.’ Brown v. Entertainment Merchants Ass'n (2011) 564 U.S. 786, 799 (quoting United States v. Playboy Entm't Grp. Inc. (2000) 529 U.S. 803, 822). As far as CNPA is aware, the problem of deepfakes being used to influence elections is a troubling, but still theoretical, problem.

“CNPA is also skeptical that a prohibition on any deepfake which is created with the intent to deceive voters would be considered a narrowly tailored solution. While CNPA certainly does not support the use of false information to coerce or deceive voters, the provisions of the bill are ambiguous enough that it could be read to prohibit everyday activities of news outlets, political campaigns, and politically-active individuals, such as editing a video or sound-clip in a manner that another person may believe is deceptive due to a lack of context.

“As discussed with respect to the prohibition on adult sexual conduct deepfakes, the failure to clearly exempt categories of protected expression also makes the prohibition on political deepfakes vulnerable to constitutional challenge as a result of the failure to narrowly tailor the prohibition.

“For these reasons, CNPA believes that inclusion of the prohibition on political deepfakes in AB 1280 is problematic and that the provision should be removed.
“Existing Laws Provide Remedies to Individuals Who Are Depicted in Deepfakes

“Existing California law provides several remedies to an individual whose image or voice is misappropriated for use in a deepfake.

“Defamation and false light laws allow an individual whose reputation is harmed as a result of the publication of false information to sue. The tort of false light is particularly well-suited to address the issue of sexual conduct deepfakes, as it has already been recognized as an appropriate cause of action where an individual’s image was used to imply that the individual had engaged in sexual conduct when they had not in fact done so. See Solano v. Playgirl, Inc., 292 F.3d 1078 (9th Cir. 2002) (recognizing false light cause of action where use of actor’s image on cover of Playgirl magazine together with suggestive headline gave misleading impression that the actor had appeared nude in the magazine).

“While defamation and false light laws may ultimately vindicate an individual’s rights, CNPA recognizes that in the case of a deepfake a more immediate remedy may be needed. Fortunately, California’s civil harassment restraining order statute could be used by an individual who is the subject of a deepfake. California Code of Civil Procedure Section 527.6 allows an individual to obtain a civil harassment restraining order, including a temporary restraining order pending a full hearing, when they have been the subject of a ‘knowing and willful course of conduct… that seriously alarms, annoys, or harasses the person, and that serves no legitimate purpose.’

“The civil harassment restraining order statute could be incredibly beneficial to an individual depicted in a deepfake because it allows that individual to obtain quick relief. The civil harassment retaining order process has the added benefit of being user-friendly, even without the assistance of an attorney, because the Judicial Council has developed easy to understand fill-in-the-blank forms, similar to those used in small claims cases, for filing a request for a restraining order. If an individual chose to hire an attorney, the statute allows the court to award attorney’s fees to the prevailing party.

The Bill Should be Clarified to Ensure Distribution of Deepfakes is Not Criminalized

“CNPA understands and appreciates that the amendments proposed to be made to AB 1280 as of April 15, 2019 are intended to remove criminal liability for the act of merely distributing a deepfake. This is a matter of the utmost importance for CNPA, as the act of sharing a deepfake between colleagues attempting to discern the authenticity of the recording or to make an editorial decision of whether to report on the recording, or unknowingly running an advertisement that includes a deepfake, could incur criminal liability.”

11) Related Legislation:

a) AB 928 (Grayson), would create an exemption from the warrant requirement imposed by the California Electronic Communications Privacy Act (CalECPA), when a law enforcement officer seeks subscriber information about a person suspected of engaging in the exploitation or attempted exploitation of a child, and instead permits a law enforcement officer to access subscriber information through a subpoena. AB 928 will be heard in this committee today.
b) AB 1598 (Fong), would create a new misdemeanor for knowingly and credibly impersonating another person by electronic means for the purpose of initiating a sexual relationship with another person. AB 1598 is pending before this committee.

12) Prior Legislation:

a) SB 1411 (Simitian), Chapter 335, Statutes of 2010, made it a crime for a person to knowingly and without consent credibly impersonate another actual person through electronic means for the purpose of harming, intimidating, threatening, or defrauding another person.

REGISTERED SUPPORT / OPPOSITION:

Support

Organization For Social Media Safety (Sponsor)
California Statewide Law Enforcement Association

Oppose

American Civil Liberties Union of California
California News Publishers Association
California Public Defenders Association

Analysis Prepared by: Nikki Moore / PUB. S. / (916) 319-3744
SUMMARY: Requires various law enforcement entities to report, on a weekly basis in 2020, specific data points regarding: 1) every individual arrested, 2) every criminal court proceeding, 3) each screening of an individual by a district attorney, 4) every person detained by a county, 5) every person under the jurisdiction of a probation officer or being actively supervised, 6) every person in the custody of the Department of Corrections and Rehabilitation, and 7) every person before the Board of Parole Hearings. Specifically, this bill:

1) Requires the Department of Justice (DOJ) to collect data from various law enforcement entities from January 1, 2020 to January 1, 2021 related to every person involved in the criminal justice system.

2) Requires local law enforcement, local courts, district attorneys, county and state detention facilities, and probation and parole supervisors to report data about every individual in their custody, jurisdiction or supervision. This information includes individually identifying personal information, along with any charges that person faces or is convicted of, any fines, fees or restitution that person has been ordered to pay, and information about a person’s parole terms.

3) States that, effective January 1, 2021, DOJ shall use a “CII number” to merge person level data, and incident report and docket numbers to merge case level data, when populating the Automated Criminal History System database for criminal records.

4) Requires DOJ to develop regulations regarding how the data is compiled, processed, structured, used, and shared; and requires all data received to be comparable, machine readable, transferable, and readily usable.

5) Makes the database created pursuant to this bill available to the public, with identifying information removed, without any licenses or fees, and makes data received pursuant to this section available to eligible public agencies and bona fide researchers.

6) Requires DOJ to provide technical assistance to entities reporting information pursuant to this section, including the creation of data taxonomy and the establishment and publication of data collection standards, to assist those entities in building and sharing that information in a consistent manner.

7) Requires DOJ annually on and after January 1, 2022, to report to the Legislature which entities, by county, are reporting the data elements required by this section.
EXISTING LAW:

1) Requires law enforcement agencies to report every arrest to DOJ, and shall include in the report personally identifying information and arrest data, as specified, and fingerprints, except as otherwise provided by law or as prescribed by the Department of Justice. (Pen. Code, § 13150.)

2) Requires a superior court to send to DOJ a disposition report regarding every case it disposes of resulting from an arrest that was reported to DOJ. (Pen. Code, § 13151.)

3) Mandates that when a disposition report is in regards to a charge that is dismissed, the report shall state whether dismissal was based on one of the following reasons: 1) dismissal in furtherance of justice, 2) case compromised, defendant discharged because restitution or other satisfaction was made to the injured person, 3) court found insufficient cause to believe defendant guilty of a public offense; 4) dismissal due to delay; 5) accusation set aside as specified; 6) defective accusation; 7) defendant became a witness for the people and was discharged; 8) insufficient evidence; 9) judgment arrested; 10) mistrial; or, 11) any other dismissal by which the case was terminated. In addition to the dismissal label, the court shall set forth the particular reasons for the disposition. (Pen. Code, § 13151.1.)

4) Mandates a detention facility report to DOJ all admissions and releases from detention facilities within 30 days of that action. (Pen. Code, § 13152.)

5) Requires a report to DOJ regarding each arrest for the commission of a public offense while in custody in any local detention facility, or any state prison, for inclusion in that person’s state summary criminal history record. The report shall include the public offense committed and a reference indicating that the offense occurred while the person was in custody in a local detention facility or state prison. (Pen. Code, § 13154.)

6) Requires a criminal justice agency that supplies fingerprints, or a fingerprint identification number, or such other personal identifiers to the DOJ to, upon request, provide DOJ with identification, arrest, and, where applicable, final disposition data relating to such person within 72 hours of receipt by DOJ. (Pen. Code, § 13175.)

7) Requires a criminal justice agency entitled to such information supplies fingerprints, or a fingerprint identification number, or such other personal identifiers as DOJ deems appropriate, to DOJ, such agency shall, upon request, be provided with the criminal history of such person, or the needed portion thereof, within 72 hours of receipt by DOJ. (Pen. Code, § 13176.)

8) Defines “local summary criminal history information” means the master record of information compiled by any local criminal justice agency pertaining to the identification and criminal history of any person, such as name, date of birth, physical description, dates of arrests, arresting agencies and booking numbers, charges, dispositions, and similar data about the person. Requires a local law enforcement agency to share local summary criminal history information with state agencies and other authorized entities, as specified. (Pen. Code, § 13300.)
9) Makes it a misdemeanor for an employee of a local criminal justice agency to knowingly furnish a record or information obtained from a record to a person who is not authorized by law to receive the record or information. (Pen. Code, § 13302.)

10) Provides that it is not a violation of the law to disseminate statistical or research information obtained from a record, provided that the identity of the subject of the record is not disclosed; provides that it is also permissible to disseminate information obtained from a record for the purpose of assisting in the apprehension of a person wanted in connection with the commission of a crime; provides that it is permissible to include information obtained from a record in (1) a transcript or record of a judicial or administrative proceeding or (2) any other public record when the inclusion of the information in the public record is authorized by a court, statute, or decisional law. (Pen. Code, § 13305.)

11) Permits every public agency or bona fide research body immediately concerned with the prevention or control of crime, the quality of criminal justice, or the custody or correction of offenders access to criminal offender record information as is required for the performance of its duties, provided that any material identifying individuals is not transferred, revealed, or used for other than research or statistical activities and reports or publications derived therefrom do not identify specific individuals, and provided that such agency or body pays the cost of the processing of such data as determined by the Attorney General. (Pen. Code, § 13202.)

**FISCAL EFFECT:** Unknown

**COMMENTS:**

1) **Author's Statement:** According to the author, “AB 1331 is critical in ensuring accurate data in criminal records in order to provide lawmakers with the information they need to make necessary changes to the criminal justice system. If criminal outcomes are not fair and just, they undermine public safety goals and prevent people from achieving liberty in their personal lives. AB 1331 will work to provide more just outcomes in the criminal legal system by redesigning the data collection process at the local and state level.”

2) **Gaps in Criminal History Records:** According to the author, “California's criminal history records suffer from pervasive data gaps that undermine their accuracy and reliability, including missing and/or delayed arrest and case dispositions, missing information regarding failures to appear, and missing or incomplete sentencing information. These gaps are becoming critical threats to our state’s public safety.

“The Bureau of Firearms relies on timely accurate reporting of convictions to support the Armed & Prohibited Persons System (APPS) and ensure that prohibited persons do not possess or acquire guns.

“Pretrial risk assessment tools require timely and accurate information about convictions, failures to appear, and incarceration to predict risk and inform pretrial release decisions. Missing information could result in high risk individuals being released and low risk individuals being detained.

“The interest of justice in criminal outcomes is also critical in ensuring that the criminal legal
system is functioning properly and not discriminating against a certain class of persons. By assuring that the information and data collected on criminal cases is accurate, researchers and law makers can evaluate the system and propose fixes. Most importantly, the system must ensure that people are not being disproportionately punished or treated unfairly. More accurate information will ensure more fair outcomes for those attempting to move forward and reintegrate themselves into society.

“The Department of Justice estimates that 60% of arrest records are missing disposition information. Missing arrest disposition information means that many arrests that have not been filed or resulted in conviction appear as pending cases and remain on criminal records that are disseminated to employers and licensing boards, effectively criminalizing a person who may in fact be innocent.

“Solution: AB 1331 will address data gaps and improve access to criminal justice data by establishing comprehensive reporting requirements and clarifying existing law regarding access to the information, so that California can achieve its full potential as a state committed to data-driven criminal justice operations and policy, as well as transparency.”

It is likely that a statewide database system that permits the public to see arrests and adjudication of every case in the state, without personally identifying information, would facilitate a greater understanding of the criminal system generally. It would expand the ability for non-profits and new organizations to analyze statistical and de-identified data to monitor the efficacy of California’s legal systems. It would also likely reveal whether there are disparities in enforcement based on various factors including location, race, ethnicity, sex and other characteristics. It may also help the public identify whether there is an over or under enforcement of certain crimes in a particular area. By requiring a unique identifier and scrubbing of a person’s personal information from the records, this database should not present any privacy concerns.

3) **Criminal Investigation and Identification Number:** The bill states that a “CII number” shall be used as unique identifier for each case received from the clerks of the court which identifies the person who is the subject to the criminal case. The unique identifier shall be the same for that person in any court case and used across local and state entities for all information related to that person. The number shall be selected randomly and would be used to merge person level data, and the incident report and docket numbers to merge case level data, when populating the Automated Criminal History System database for criminal records.

The term “CII number” is defined twice in the Penal Code to mean “Criminal Investigation and Identification number.” However, the term is not defined in this bill. The author may want to consider defining the term CII to provide clarity regarding the reference.

4) **Creation of a Database:** This bill appears to require DOJ to create a new database to track, statewide, information related to all persons arrested, in custody, or under supervision by a criminal justice system. It is unclear whether DOJ has existing infrastructure to collect the data as mandated. This bill would require DOJ to draft and pass regulations regarding how law enforcement agencies and the courts will report the requested data to DOJ in a way that is machine readable, standardized, transferable and readily usable. Regulations will also be required to determine how the data will be compiled, processed, structured, used and shared.
5) **Argument in Support:** According to *Californians for Safety and Justice*, “For more than 60 years, California has promoted the collection and dissemination of criminal justice data, however, significant gaps still exist in the State’s criminal history records. These records are critical to day to day operations for local and state law enforcement agencies, and data gaps undermine their efforts to promote public safety. Data limitations, as well as obstacles to accessing this data, also undercut the government’s ability to analyze criminal justice policy proposals and interventions. Even as California pushes its criminal justice system to embrace major reforms, legislators and independent researchers are deprived of essential data to predict and evaluate their impact.

“AB 1331 addresses data gaps and improves access to criminal justice data by establishing reporting requirements across the system and clarifying existing law regarding access. Comprehensive collection of criminal statistics is essential to advancing public safety; builds the foundation for efficient record clearance efforts; and, advances independent research, a core component of effective criminal justice reform.”

6) **Argument in Opposition:** According to the *California Law Enforcement Association of Records Supervisors*, “We believe that the goals of the proposed legislation are already accomplished by requirements specified under existing law. Currently, under the direction of the DOJ, local law enforcement agencies are required to fill out an itemized report, and submit the data to the Monthly Arrest and Citation Register (MACR). It’s not clear what additional, relevant, or useful criminal justice data would be gained by requiring another weekly itemized report to the DOJ as proposed by AB 1331.”

7) **Related Legislation:** AB 972 (Bonta), would establish a process for courts to automatically redesignate felony convictions which are eligible to be reduced to misdemeanors because of the passage of Proposition 47 (2014) as misdemeanors. AB 972 is pending hearing in the Assembly Appropriations Committee.

**REGISTERED SUPPORT / OPPOSITION:**

**Support**

San Francisco District Attorney’s Office (Co-Sponsor)  
ALEC Action  
California for Safety and Justice  
National Institute for Criminal Justice Reform  
Right on Crime

**Oppose**

California Law Enforcement Association of Records Supervisors

**Analysis Prepared by:**  Nikki Moore  / PUB. S. / (916) 319-3744
SUMMARY: Prohibits the revocation of any type of supervised release for failure to pay fines, fees, or assessments, unless the failure to pay is willful and the defendant has the ability to pay.

EXISTING STATE LAW:

1) Prohibits the imposition of excessive fines. (Cal. Const., art. 1, § 17.)

2) Authorizes the court to revoke, modify, extend, or terminate an order of supervised release, including probation, mandatory supervision, post-release, or parole. (Pen. Code, §§ 1203.2.)

3) Prohibits the revocation of any type of supervised release for failure to pay restitution, unless the failure to pay is willful and the defendant has the ability to pay. (Pen. Code, § 1203.2, subd. (a).)

4) Authorizes the court to incarcereate a defendant until an imposed criminal fine is satisfied, but limits such imprisonment to the maximum term permitted for the particular offense of conviction. (Pen. Code, § 1205, subd. (a).)

5) Requires that the time of imprisonment for failure to pay a fine be calculated as no more than one day for every $125 of the fine. (Pen. Code, § 1205, subd. (a).)

EXISTING FEDERAL LAW:

1) Prohibits the imposition of excessive fines. (U.S. Const., 8th Amend.)

2) Provides that no one shall be “deprived of life, liberty or property without due process of law.” (U.S. Const., 5th Amend.)

3) Prohibits the states from depriving any person of life, liberty, or property, without due process of law; or denying to any person within its jurisdiction the equal protection of the laws. (U.S. Const., 14th Amend.)

FISCAL EFFECT: Unknown

COMMENTS:

1) Author's Statement: According to the author, "Under current law an individual on probation may not be re-arrested or incarcerated for their inability to pay court ordered restitution. This is not the same for those individuals whom the court orders fines, fees, or
assessments on.

"This is not smart justice.

"By revoking probation to any individual who lacks the ability to pay and who otherwise is meeting all terms of supervision, the court and probation in essence are driving individuals deeper into poverty.

"AB 1421 fixes inequities in law by clarifying that an individual, who is on probation and lacks the ability to pay court ordered fines, fees, and assessments, will not have their probation revoked while providing the state significant savings."

2) **Authority to Revoke Probation**: Upon finding the defendant has violated probation, the court may modify, revoke, or terminate the defendant's probation. (§ 1203.2, subds. (a), & (b)(1).) The court may reinstate probation on the same terms, reinstate probation with modified terms, or terminate probation and execute the prison or jail sentence. (*People v. Bolian* (2014) 231 Cal.App.4th 1415, 1420.) The decision whether to reinstate or terminate probation rests within the broad discretion of the trial court. (*Id.* at p. 1421.)

Despite the court’s broad authority in this area, the court is expressly prohibited from revoking a defendant’s probation based on the failure to pay restitution ordered as a condition of probation, unless the defendant had the ability to pay and willfully failed to do so. (*People v. Self* (1991) 233 Cal.App.3d 414, 417; *People v. Ryan* (1988) 203 Cal.App.3d 189, 199; see also Pen. Code, 1203.2, subd. (a).)

"This provision of Penal Code section 1203.2, subdivision (a), not only protects someone whose ability to pay was not considered at the time restitution was made a condition of probation, but a person who had the ability to pay at the time the condition was imposed but due to factors beyond his or her control is at some later time unable to comply with the condition of probation that he make restitution. Thus, although a condition of probation may be imposed that the defendant make restitution without an express finding of ability to pay, probation may not be revoked without such a finding. The period of probation may not be extended for failure to make full restitution to the victim unless said failure is willful and the defendant has the ability to pay. The amount of the restitution which is unpaid at end of the defendant's probationary period may be enforced in the same manner as a civil action. (Pen. Code, § 1203, subd. (j).) Therefore, a defendant will not be incarcerated for failure to make restitution pursuant to a condition of probation when he does not have the financial ability to comply with such a condition of probation.” (*People v. Ryan*, supra, 203 Cal.App.3d at p. 199.)

This bill would codify the same protection for probationers (and other persons on supervised release) with regards to payment of fines and fees imposed as a condition of probation.

3) **Constitutional Underpinnings**: Jailing a person for failure to pay a fine when the failure to pay stems from an inability to pay, rather than willfulness, implicates the constitutional rights to equal protection and due process.
In *In re Antazo* (1970) 3 Cal.3d 100, the California Supreme Court invalidated the practice of requiring convicted defendants to serve jail time if they were unable to pay a fines. (Id. at pp. 115-116.) The Court presented the question before it as follows:

We are confronted here with the question whether a convicted indigent defendant upon being sentenced or otherwise ordered to pay a fine and a penalty assessment can be required to serve them out in jail at a specified rate per day because he is unable to pay them. As we explain infra, such a defendant has no choice at all and in reality is being imprisoned for his poverty. Although a direction for confinement for default in payment of a fine may appear to apply equally to both the rich offender and the poor one, actually the former has the opportunity to escape his confinement while the right of the latter to pay what he cannot, is a hollow one. We cannot countenance such a difference in treatment and, absent any compelling state interest necessitating it, we conclude that it constitutes an invidious discrimination on the basis of wealth in violation of the equal protection clause of the Fourteenth Amendment. We will not permit this petitioner to be given such a Hobson's choice. (Id. at pp. 103-104.)

Citing *In re Antazo*, *supra*, 3 Cal.3d 100 with approval, the United States Supreme Court subsequently held that the federal Constitution prohibits the state from automatically revoking an indigent defendant's probation for failure to pay a fine and restitution. (See *Bearden v. Georgia* (1983) 461 U.S. 660 [76 L. Ed. 2d 221, 103 S. Ct. 2064].) “If the probationer has willfully refused to pay the fine or restitution when he has the means to pay, the State is perfectly justified in using imprisonment as a sanction to enforce collection. ... But if the probationer has made all reasonable efforts to pay the fine or restitution, and yet cannot do so through no fault of his own, it is fundamentally unfair to revoke probation automatically without considering whether adequate alternative methods of punishing the defendant are available.” (Id. at pp. 668–669, citations and footnotes omitted.)

This bill would codify both California and United States Supreme Court case law.

4) **Penal Code Section 1205**: Pen. Code, § 1205 gives the court power to enforce payment of fine in a criminal case by imprisonment. However, as noted above, imprisonment pending payment of a fine is unconstitutional as applied to a convicted indigent defendant if the failure to pay is due to indigence and not to willfulness. (*In re Antazo*, *supra*, 3 Cal.3d 100, 103-104.)

5) **Argument in Support**: According to *Ella Baker Center for Human Rights*, “Existing law imposes burdensome fines and fees on people who have served their sentences and are striving to move forward. These fees, including those for probation supervision, presentence investigations, drug and alcohol testing, and court-ordered programs, are charged on top of other costs and can quickly amount to thousands of dollars. Because of systemic bias throughout the criminal legal system, these fines and fees disproportionately harm low-income people of color.

People with convictions are saddled with copious fees, fines, and debt at the same time that their economic opportunities are diminished, resulting in a lack of economic stability and mobility. Forty-eight percent of families in our survey overall were unable to afford the costs associated with a conviction, while among poor families (making less than $15,000), 58% were unable to afford these costs. Sixty-seven percent of formerly incarcerated individuals associated with our survey were still unemployed or underemployed five years after their release.

‘Estimates indicate formerly incarcerated people owe as much as 60% of their income to criminal debts. According to one source, ‘up to 85% of people returning from prison owe some form of criminal justice debt’ (compared to 25% in 1991).

“One of the many harmful consequences of these fees is that they can result in the revocation of an individual’s parole or probation simply because they are too poor to pay them off. By prohibiting revocation of supervision for inability to pay, AB 1421 will reduce the harm caused by these unaffordable and unfair fees.”

6) Related Legislation:

a) AB 927 (Jones-Sawyer), would prohibit the court in a criminal or juvenile proceeding involving a misdemeanor or felony from imposing fines, fees, and assessments, without making a finding that the defendant has the ability to pay. AB 927 is pending in the Assembly Appropriations Committee.

b) SB 144 (Mitchell), would repeal various administrative fees that agencies and courts are authorized to impose to fund elements of the legal system. SB 144 will be heard in the Senate Public Safety Committee today.

7) Prior Legislation:

a) AB 2839 (Thurmond), Chapter 769, Statutes of 2016, clarified that when a criminal defendant is ordered imprisoned for non-payment of a non-restitution criminal fine, only the base fine is used when determining the term of imprisonment.

b) AB 1375 (Thurmond), Chapter 209, Statutes of 2015, increased the rates to be applied, when a criminal defendant is ordered imprisoned for non-payment of a non-restitution criminal fine, from a credit of not less than $30 to not less than $125 per day for each day served pursuant to a judgment for non-payment of a criminal fine.

REGISTERED SUPPORT / OPPOSITION:

Support

American Civil Liberties Union of California
California Public Defenders Association
Ella Baker Center for Human Rights
Opposition

None

Analysis Prepared by:  Sandy Uribe / PUB. S. / (916) 319-3744
SUMMARY: Makes it a hate crime if a crime was committed in whole or in part because of the victim’s actual or perceived “homeless status.” Specifically, **this bill:**

1) Adds “homeless status” to the list of people covered by hate crimes laws.

2) Defines “homeless status” to mean an individual’s lack of a fixed, regular, and adequate nighttime residence, or an individual’s use of a primary nighttime residence that is one of the following:

   a) A supervised shelter, either publicly or privately operated, that is designed to provide temporary living accommodations, including, but not limited to, welfare hotels, congregate shelters, and transitional housing for persons with a mental illness;

   b) An institution that provides a temporary residence for individuals who are intended to be institutionalized; or,

   c) A public or private place not designed for, or ordinarily used as, a regular sleeping accommodation for human beings.

3) Specifies that “homeless status” does not include a person who is imprisoned or otherwise involuntarily detained pursuant to state or federal law.

EXISTING LAW:

1) Defines “hate crime” as any 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; and,
g) Association with a person or group with one or more of these actual or perceived characteristics. (Pen. Code, § 422.55, subd. (a).)

2) Provides that it is a hate crime to violate or interfere with the exercise of civil rights, or knowingly deface, destroy, or damage property because of actual or perceived characteristics of the victim that fit the hate crime definition. (Pen. Code, § 422.6, subds. (a) and (b).)

3) Provides that a conviction for violating or interfering with the civil rights of another of the basis of actual or perceived characteristics of the victim that fit the hate crime definition shall be punished by imprisonment in a county jail not to exceed one year, or by a fine not to exceed five thousand dollars ($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).)

4) Provides that a person who commits a felony that is a hate crime by virtue of the fact it was committed in whole or in part because of actual or perceived characteristics that fit the hate crime definition, or attempts to do so, shall receive an additional term of one, two, or three years in the state prison, at the court's discretion. (Pen. Code, § 422.75, subd. (a).)

5) Provides that a person who commits a felony that is a hate crime by virtue of the fact it was committed in whole or in part because of actual or perceived characteristics that fit the hate crime definition, or attempts to do so, except as specified, and who voluntarily acted in concert with another person in the commission of the crime shall receive an additional term of two, three, or four years in the state prison, at the court's discretion. (Pen. Code, § 422.75, subd. (b).)

6) Provides that a person who commits first-degree murder that is a hate crime shall be punished by imprisonment in the state prison for life without the possibility of parole. (Pen. Code, § 190.03, subd. (a).)

FISCAL EFFECT: Unknown

COMMENTS:

1) Author's Statement: According to the author, “Across California, there have been increasing cases of which the homeless have been victims of crimes such as: aggravated assault, robbery, rape and homicide. This has become a common, unacceptable tone of hate for our state’s most vulnerable community. We allow those with property an amount of protection for that very property, yet for our homeless brothers and sisters, while they already struggle to find safe places to rest day-to-day, there are basic inefficiencies in providing them with the security that is awarded to those who are more fortunate. They’re left vulnerable to deplorable acts of abuse by those deliberately targeting them due to circumstances shared by more and more of those in our communities across the state do to its high cost of living. We need to lead the way to maintain a fixed focus on elevating the most vulnerable, not on excluding those who are most in need of solutions to provide them reasonable protection against those who specifically prey on them.”
2) **Crimes Against the Homeless:** The National Coalition for the Homeless (NCH) has documented 1,769 acts of violence against homeless individuals by housed perpetrators over nearly 20 years. (NCH, *Vulnerable to Hate*, Dec., 2018, [https://nationalhomeless.org/wp-content/uploads/2019/01/hate-crimes-2016-17-final_for-web2.pdf](https://nationalhomeless.org/wp-content/uploads/2019/01/hate-crimes-2016-17-final_for-web2.pdf).) According to that organization, these crimes are believed to have been motivated by the perpetrators’ biases against people experiencing homelessness or by their ability to target homeless people with relative ease. (Id. at 4.) Over a period of 18 years the NCH found that 1,758 acts of violence were committed against the homeless, resulting in 476 victims losing their lives. (Ibid.) The NCH found that perpetrators of these attacks were generally male and under the age of 30. (Ibid.) The report provides further detail on state-by-state basis noting that California had 26 such lethal attacks and 11 non-lethal. (Id. at 41.)

3) **Hate Crime Laws:** Hate crimes, referred to in some jurisdictions as “bias crimes,” are generally defined as crimes that are “committed not out of animosity toward the victim as an individual, but out of hostility toward the group to which the victim belongs.” (Pendo, *Recognizing Violence Against Women: Gender and the Hate Crimes Statistics Act* (1994) 17 Harv. Women's L.J. 157, 159.) Looking at a more specific definition, a hate crime is defined as "a crime in which the defendant intentionally selects a victim because of the actual or perceived race, color, religion, national origin, ethnicity, gender, disability, or sexual orientation of any person." (Violent Crime Control and Law Enforcement Act of 1994, Pub. L. 103-322, 108 Stat. 1796 Section 280003 (1994) emphasis added (codified in part at 28 U.S.C. Section 994 (1994).)

According to the California State Auditor (CSA), hate crimes in California increased by more than 20 percent from 2014 to 2016, from 758 to 931. (CSA, *Hate Crimes in California*, May, 2018, available at: [https://www.auditor.ca.gov/pdfs/reports/2017-131.pdf](https://www.auditor.ca.gov/pdfs/reports/2017-131.pdf), [as of Apr. 18, 2019].) More than half of the reported hate crimes were on the basis of race, with crimes against persons on account of their sexual orientation or religion made up most of the other half, with bias crimes due to gender and disability accounting for 2 percent. (Id. at 10.) It must be noted, that the CSA report was based upon all reported hate crimes, not only violent offenses like the NCH Report.

California’s hate crime laws work to protect against the targeting of individuals on account of their actual or perceived belonging to a specific group in two important ways. As an initial matter, it is a misdemeanor offense to interfere with the free exercise of a person’s civil rights on account of their belonging to a protected group. For example, if an employer allows all of his or her Christian workers to vote on Election Day, but denies Jewish workers the same ability, the employer would likely be guilty of interfering with the free exercise of his Jewish worker’s right to vote. It is also a misdemeanor offense to destroy property or use force to accomplish that same sort of interference.

In addition, if a person commits a felony offense against a person in a protected class, and the prosecutor is able to prove that the felony was committed on account of the fact that victim was part of that class, the felon will be subjected to additional punishment. On top of applying the applicable penalty for the underlying felony, there will be an additional one, two, or three year prison term. If the defendant acted in concert with someone else to commit a felony hate crime, the additional punishment is two, three, or four years in state prison.
4) **Immutability**: Hate crime perpetrators target their victims based on discrimination against immutable characteristics such as age, disability, gender, national origin, race, sex, and sexual orientation. Immutability can be characterized in one of two ways. Some characteristics, such as age, disability, and race, cannot be altered by an individual's voluntary act. However, other characteristics, such as religion and gender, can only be altered with substantial cost or difficulty to the individual. Although not literally immutable, scholars contend that "the power of a constructed category can be so overwhelming, and its terms, assumptions, and normative social requirements so deeply ingrained into the members of society, that it is experienced at the individual level as immutable." [Marcoson, *Constructive Immutability* (2001) 3 U. Pa. J. Const. L. 646, 650.] This implies that some characteristics that are entirely possible for individuals to change, such as religion, have such a powerful impact on the construction of individual identity that they effectively operate as if they were unchangeable.

This bill would add "homeless status" to the list of classes that have been identified as being immutable for purposes of California's hate crimes laws. While being homeless is undoubtedly a challenging and complex problem, it is arguably different from the classes that are currently protected by hate crimes laws. Unlike race, religion, gender, etc., the state, local governments, and community-based organizations are actively attempting to address homelessness by providing food, shelter and services to the homeless population. The City of Sacramento, for example, invests over $3 million in housing and services to help people experiencing homelessness. ([http://www.cityofsacramento.org/City-Manager/Divisions-Programs/Homeless-Coordination/What-The-City-is-Doing.](http://www.cityofsacramento.org/City-Manager/Divisions-Programs/Homeless-Coordination/What-The-City-is-Doing.) Each session, the Legislature hears dozens of bills that are directed at getting homeless persons off of the street. By contrast, there are no state or local programs dedicated to changing the race, religion, or sexual orientation of California residents, and any such program would likely run afoul of the First Amendment to the United States Constitution. The Legislature has previously rejected attempts to include homeless status, peace officers, and political affiliation in the hate crimes statute.

5) **Prison Overcrowding**: In January 2010, a three-judge panel issued a ruling ordering the State of California to reduce its prison population to 137.5% of design capacity because overcrowding was the primary reason that CDCR was unable to provide inmates with constitutionally adequate healthcare. (*Coleman/Plata* vs. *Schwarzenegger* (2010) No. Civ S-90-0520 LKK JFM P/NO. C01-1351 TJE.) The United State Supreme Court upheld the decision, declaring that "without a reduction in overcrowding, there will be no efficacious remedy for the unconstitutional care of the sick and mentally ill" inmates in California's prisons. (*Brown v. Plata* (2011) 131 S.Ct. 1910, 1939; 179 L.Ed.2d 969, 999.)

After continued litigation, on February 10, 2014, the federal court ordered California to reduce its in-state adult institution population to 137.5% of design capacity by February 28, 2016, as follows: 143% of design bed capacity by June 30, 2014; 141.5% of design bed capacity by February 28, 2015; and, 137.5% of design bed capacity by February 28, 2016.

CDCR's February 2019 monthly report on the prison population notes that the in-state adult institution population is currently 113,656 inmates, which amounts to 133.6% of design capacity. Additionally, there are still 1,463 prisoners being housed out of state. ([https://www.cdcr.ca.gov/Reports_Research/Offender_Information_Services_Branch/Monthly/TOPOP1A/TOPOP1Ad1902.pdf](https://www.cdcr.ca.gov/Reports_Research/Offender_Information_Services_Branch/Monthly/TOPOP1A/TOPOP1Ad1902.pdf))
The Governor’s January proposed budget for 2019-2020 anticipates that “The average daily adult inmate population is now projected to be 128,334, an increase of 1.1 percent over spring projections. However, current projections show the adult inmate population is trending downward and is expected to decrease by approximately 1,360 offenders between 2018-19 and 2019-20. Proposition 57, the Public Safety and Rehabilitation Act of 2016, established a durable solution to end federal court oversight and create more incentives for inmates to participate in rehabilitative programs. Proposition 57 is currently estimated to reduce the average daily adult inmate population by approximately 6,300 in 2019-20, growing to an inmate reduction of approximately 10,500 in 2021-22. The estimated impact of Proposition 57 has been incorporated into the aforementioned total population projections.” (http://www.ebudget.ca.gov/2019-20/pdf/BudgetSummary/PublicSafety.pdf.)

Thus, while CDCR is currently in compliance with the three-judge panel’s order on the prison population, the state needs to maintain a “durable solution” to prison overcrowding “consistently demanded” by the court. (Opinion Re: Order Granting in Part and Denying in Part Defendants’ Request For Extension of December 31, 2013 Deadline, NO. 2:90-cv-0520 LKK DAD (PC), 3-Judge Court, Coleman v. Brown, Plata v. Brown (2-10-14).)

As mentioned above, one of the effects of adding a protected class to the hate crimes list is that any felony hate crime can be subjected to additional punishment in the state prison. Specifically, a felony hate crime is punishable by an additional term of up to two, three, or four years in the state prison. Unfortunately, many felonies are committed against people who are homeless. Therefore, this bill has the potential to exacerbate California’s prison overcrowding issues.

6) **Argument in Support:** According to *Disability Rights California*, “Existing law makes specified criminal acts punishable as a hate crime if it is committed in whole or in part because of one or more actual or perceived designated characteristics of the victim, including disability, gender, nationality, race or ethnicity, religion, or sexual orientation. This bill would add “homeless status,” as defined, to the list of hate crime categories.

“The number of attacks against persons experiencing homelessness nationwide has increased over the years, even though crimes against the homeless are reported at lower rates than other crimes. California has had serious and unaddressed problems of crime against homeless persons, including homeless persons with disabilities. In its 2016-17 annual report, for example, the National Coalition for the Homeless (NCH) documented 112 violent attacks against homeless individuals across 30 states, 48 of which resulted in death. NCH notes that “[a]n astonishing 33% of attacks reported in 2016-2017 took place in California.” Several jurisdictions including Florida, Maryland, Maine and Washington D.C., have enacted laws making attacks on homeless people a hate crime. It is time that California follow suit.”

7) **Argument in Opposition:** According to the *Anti-Defamation League*, “Founded in 1913, ADL (Anti-Defamation League) is the nation’s leading anti-hate and human relations organization, combating anti-Semitism and all forms of bigotry, discrimination, and extremism. ADL drafted the nation’s first model hate crime statute in the early 1980s. To date, 45 states plus Washington DC have adopted hate crime laws, mostly based on ADL’s model, and we continue to advocate for effective legislation wherever needed. Federally, we led the multiyear coalition effort to achieve passage of the landmark Matthew Shepard and
James Byrd, Jr., Hate Crimes Prevention Act in 2009. Today, ADL is the leading non-governmental organization training law enforcement in all aspects of hate crime, including investigations, reporting, and community engagement.

"Hate crime laws are designed to enhance penalties for crimes committed because of the victim’s immutable, or core, personal characteristic. As defined in Penal Code Section 422.56, they are disability, gender, nationality, race or ethnicity, religion, and sexual orientation. These are fundamental personal traits which an individual either cannot, or should not have to, change or hide to be free from targeted and violent bigotry. Homelessness, by contrast, is a status and a challenge that society needs to solve. Notably unlike the existing categories, it is not a core or immutable personal trait, and an individual’s homelessness status should indeed be changed. As such, crimes against homeless individuals are not what hate crime laws were designed to address.

"We are also concerned about the counterproductive impact that could result should the Legislature expand the hate crime law to include a mutable and, one hopes, short-lived status such as homelessness. To wit, hate crime convictions are notoriously challenging to attain because of the high burden of proof – prosecutors must prove the offender’s subjective bias motivation for selecting the victim beyond a reasonable doubt. This is far higher than a mere general intent standard, or the even higher specific intent standard, that the Penal Code usually demands.”

8) Prior Legislation:

a) AB 2 (Obermoltz), of the 2017 - 2018 Legislative Session, would have made any crime, except the crime of resisting arrest, a hate crime if it was committed in whole or in part because of the victim’s status as a peace officer. AB 2 failed passage in the Assembly Public Safety Committee.

b) AB 39 (Bocanegra), of the 2017 – 2018 Legislative Session, would have required local law enforcement agencies to forward a summary of any hate crime to the human relations commission in their jurisdiction. AB 39 died in the Assembly Appropriations Committee.

c) AB 246 (Rodriguez), of the 2015 – 2016 Legislative Session, would have made the assassination, rape, and kidnap, as well as an attempt to commit these crimes, a hate crime when the crime is committed against a peace officer or an immediate family member and the crime was knowingly committed because of that status. AB 246 died in the Assembly Appropriations Committee.

d) AB 1206 (Miller), of the 2008-2009 Legislative Session, would have added political affiliation to the list of classes in the hate crimes statute. AB 1206 was never heard in committee.

e) SB 122 (Steinberg), of the 2007 – 2008 Legislative Session, was identical to this bill and would have made it a hate crime if a crime was committed in whole or in part because of the victim’s actual or perceived homeless status. SB 122 died in the Senate Public Safety Committee.
REGISTERED SUPPORT / OPPOSITION:

Support

AIDS Healthcare Foundation
California Association of Human Relations Organizations
Center for the Study of Hate & Extremism
Disability Rights California
Green Party of Sacramento County
National Coalition for the Homeless
Sacramento Regional Coalition to End Homelessness
Southern Poverty Law Center

Oppose

Anti-Defamation League
California Public Defenders Association
Santa Clara County District Attorney
Yolo County District Attorney

Analysis Prepared by: Matthew Fleming / PUB. S. / (916) 319-3744
Date of Hearing: April 23, 2019
Counsel: Sandy Uribe

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

AB 1510 (Reyes) – As Amended April 10, 2019

SUMMARY: Revives time-barred claims for civil damages arising out of a sexual assault or other sexual misconduct by a physician occurring at a student health center. Specifically, this bill:

1) Revives any claim for damages arising out of a sexual assault or other sexual misconduct committed by a physician at a student health center, even though the claim would otherwise be barred prior to January 1, 2020, solely because the applicable statute of limitations has or had expired. Specifies that this revived cause of action may proceed if already pending in court or, if not filed, may be commenced within one year of January 1, 2020.

2) Specifies that the provisions above do not revive either of the following claims:
   a) A claim litigated to finality in a court of competent jurisdiction before January 1, 2020
   and
   b) A claim that has been compromised by a written settlement agreement entered into before January 1, 2020, between the plaintiff and the defendant.

3) Clarifies that in order to bring a civil action for recovery of damages suffered as a result of sexual assault, as described in Code of Civil Procedure Section 340.16, it is not necessary that sexual assault resulted in a criminal proceeding, prosecution, or conviction.

EXISTING LAW:

1) Provides that in any civil action for recovery of damages suffered as a result of sexual assault, where the assault occurred on or after the plaintiff’s 18th birthday, the time for commencement of the action shall be the later of the following:
   a) Within 10 years from the date of the last act, attempted act, or assault with the intent to commit the act, of sexual assault by the defendant against the plaintiff; or
   b) Within three years from the date the plaintiff discovers or reasonably should have discovered that an injury or illness resulted from an act, attempted act, or assault with the intent to commit the act, of sexual assault by the defendant against the plaintiff. (Code Civ. Proc., § 340.16 subd. (a).)

2) Defines “sexual assault,” for purposes of the statute of limitations, to mean any of the crimes of sexual battery, rape, sexual penetration by a foreign object, spousal rape, rape or other sexual penetration acting in concert, sodomy, or oral copulation, assault with the intent to
commit any of those crimes, or an attempt to commit any of those crimes. (Code Civ. Proc., § 340.16, subd. (b).)

3) Specifies that the above provisions apply to any action that is commenced on or after January 1, 2019. (Code Civ. Proc., § 340.16, subd. (c).)

FISCAL EFFECT: Unknown

COMMENTS:

1) Author's Statement: According to the author, “Victims deserve justice, which means having the opportunity to be seen and heard in a court of law. AB 1510 provides survivors of Dr. Tyndall the opportunity to file their civil sexual assault claims by explicitly reviving those claims for a period of 1 year. This bill ensures that dignity is given back to the survivors.”

2) Impetus for this Bill: This bill is a response to the actions of Dr. George Tyndall, a USC gynecologist who was accused of sexually abusing hundreds of students during three decades at a campus clinic. Because the victims were young women, many experiencing their first gynecological exam, some did not know that Tyndall’s exams were often unnecessary and extremely improper, and sometimes amounting to sexual assault. Complaints against Tyndall began decades ago when co-workers alleged he was photographing students’ genitals, touching students inappropriately during pelvic exams, and making sexually suggestive remarks. But it was not until 2016, when nurse complained to the university’s rape crisis center, that the university suspended him. Although Tyndall was fired after an internal investigation, the university failed to report the matter to the medical board. (See H. Ryan, M. Hamilton, P. Pringle, A USC Doctor was Accused of Bad Behavior with Young Women for Years. The University Let Him Continue Treating Students, Los Angeles Times, May 16, 2018, available at: https://www.latimes.com/local/california/la-me-usc-doctor-misconduct-complaints-20180515-story.html.)

3) Statute of Limitations Generally: “Statutes of limitation reach back to Roman law and were specifically enshrined in the English common law by the Limitations Act of 1623. Ever since, and in every state, including California, various limits have been imposed on the time when lawsuits may still be initiated. Even though valid and profoundly important claims are at stake, all jurisdictions have seen fit to bar actions after a lapse of years.

“The reason for such a universal practice is one of fairness. There comes a time when an individual or organization should be secure in the reasonable expectation that past acts are indeed in the past and not subject to further lawsuits. With the passage of time, evidence may be lost or disposed of, memories fade and witnesses move away or die.” (See Former Governor Jerry Brown’s Veto Message of SB 131 (Hill), of the 2013-2014 Legislative Session.)

Thus statutes of limitations serve an important function in our legal system. According to the U.S. Supreme Court, they promote justice “by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared.” (See Order of R.R. Telegraphers v. Ry. Express Agency (1944) 321 U.S. 342.)
That being said, many states, including California, have extended the statute of limitations for sexual abuse claims. The rationale for this is because of the unique nature of sexual abuse, the difficulty that younger victims may have in fully understanding that abuse has occurred, and come to terms with what has happened, and then report in a timely fashion. In fact, last year the Legislature extended the statute of limitations for adult victims of sexual assault from two years to ten years after the sexual assault, or three years after its discovery, whichever comes later. (See AB 1619 (Berman) Chapter 939, Statutes of 2018; see also Civ. Proc. Code, § 340.16.) However, the extended statute of limitations only applies prospectively to actions commenced on or after January 1, 2019. Therefore, while last year’s legislation might help some USC victims with their claims, it would not help those victims whose assaults occurred before 2009.

This bill would amend last year’s AB 1619 by creating a one-year window to revive time-barred civil actions, but only for claims for damages “arising out of sexual assault or misconduct by a physician occurring at a student health center.” Specifically, victims whose claims had expired prior to January 1, 2020, would have until January 1, 2021, to file their lapsed claim for damages. This one-year revival window would not apply to any claim litigated to finality in court, or to any case settled to finality, before January 1, 2020. In other words, this is not an extension of the statute of limitation, but rather a statute reviving time-barred claims.

While in the criminal context, a law enacted after expiration of a previously applicable limitations period violates the Ex Post Facto Clause when it is applied to revive a previously time-barred prosecution (Stogner v. California (2003) 539 U.S. 607), courts have affirmed the Legislature’s power to revive civil causes of action, even if the actions were otherwise barred by the running of the statute of limitations. (See e.g., Liebich v. Superior Court (1989) 209 Cal.App.3d 828; Lent v. Doe (1995) 40 Cal.App.4th 1177; Hellingen v. Farmers Group, Inc. (2001) 91 Cal.App.4th 1049.) And yet, that the Legislature may enact a reviving statute, does not necessary mean that it should do so. The question becomes whether the Legislature believes that there are sufficient public policy reasons to support reviving the otherwise-barred claims at issue, balancing the interests of the victims with the defendants’ ability to defend against the claims. In this respect, one thing the Legislature should consider is that there is a pending class action settlement in federal court.

4) **Class Action Settlement in Federal Court:** In February 2019, a $215 million class action settlement agreement between the USC and several law firms representing women sexually abused by Tyndall was filed in federal court. Eligible class members include all women who saw Tyndall for health issues; who received an examination of their breasts or genitals by him; and those woman who were photographed or videotaped by Tyndall in full or partial state of undress. The settlement covers the period between August 14, 1989 and June 21, 2016. Victim compensation is broken down into three tiers. (See S. Elam and R. Nieves, USC Settles Class Action Lawsuit Against Gynecologist Accused of Sexual Misconduct, CNN, Feb. 13, 2019, available at: https://www.cnn.com/2019/02/13/us/usc-gynecologist-tyndall-settlement-agreement/index.html)

Tier 1 applies to all women who saw Tyndall at the USC Student Health Center. Women identified as part of this class through USC’s health center records will automatically receive an initial $2,500. Individuals who believe they belong in
this class but aren't identified through USC's health center records will need their student status verified via the university's registrar's office or "submit credible evidence of Class Membership," according to the document. These women are still eligible to be included in Tier 2 and Tier 3 claims, the filing says.

To be included in Tier 2, victims will have to submit a written form "describing her experience with Tyndall, the impact to her, and the harm she suffered," according to a release from the plaintiffs' lawyers. Compensation will range between $7,500 and $20,000 for each woman who falls in this category.

Women willing to share more details about their experience with Tyndall will have to submit a written claim as well as be interviewed by the special master's team to be included in Tier 3. Payment to this class will range between $7,500 and $250,000. (Ibid.)

The settlement is still pending court approval. (Ibid.)

Thus, it appears that despite the fact that many of Tyndall's victims would be barred by the statute of limitations from filing a civil cause of action, the proposed settlement gives them recourse. Should the Legislature enact a statute reviving time-barred claims?

In fact, it may be much easier for victims to receive damages through the settlement than through the separate court cases. It may be the case that even if the reviving statute is enacted, the plaintiffs may not have sufficient evidence to prove their cases in court because memories fades, witnesses become unavailable, and physical evidence becomes unobtainable. Establishing proof of victimization within the proposed tiered may be much easier.

5) **Claims of Sexual Misconduct:** This bill would revive otherwise time-barred claims "arising out of sexual assault or other sexual misconduct by a physician occurring at a student health center." The bill previously defined "sexual misconduct" as "inappropriate contact, communication, or activity of a sexual nature." This definition was deleted from the bill by the Assembly Judiciary Committee. However, as currently drafted, there is no definition for the term "sexual misconduct." Thus it is an open question as to what type of claims can be filed pursuant to this clause. Should the bill be amended to disallow claims based on other sexual misconduct not amounting to assault? Alternatively, should the bill be amended to define the term "sexual misconduct."

6) **Argument in Support:** According to the Consumer Attorneys of California, the sponsor of this bill, "AB 1510 (Reyes), ... will give sexual assault student victims of the University of Southern California's Dr. George Tyndall a chance to have their civil claims heard in court by clearly reviving potentially lapsed claims for a short period of one year.

To date, approximately 650 women have filed individual civil lawsuits against Dr. Tyndall and USC for sexual battery and related sexual abuse as well as certain negligence and fraud-based torts. These women are expected to opt out of the tentative USC federal class action settlement, should it be preliminarily approved, as that proposed settlement does not address and meet their individual needs.
“However, USC, despite covering up the abuse for years, will seek dismissal of these state civil sexual assault claims, claiming they are time-barred. Thus, it is vital to giving these women an opportunity to have their day in court. In fact, giving sexual assault survivors ample time to come forward is the direction that the California Legislature has taken in recent years....

“Last year, California enacted Code of Civil Procedure section 340.16 to extend the statute of limitations for any civil action for recovery of damages suffered as a result of sexual assault to ten years from the date of the last act, attempted act, or assault with the intent to commit an act, or within 3 years from the date the plaintiff discovers or reasonably should have discovered that an injury or illness resulted there from. (AB 1619 Berman, Chapter 939, 2018). That bill received nearly unanimous bipartisan support.

“Unfortunately, Section 340.16 was expressly limited to actions that are ‘commenced on or after January 1, 2019’ and did not contain revival language for time-barred claims. AB 1510 addresses these issues by amending Section 340.16 to clearly give USC sexual assault and abuse survivors, whose claims may be time barred, a short window to file their claims for sexual assault....

“Michigan’s SB 872 passed last year to protect Dr. Larry Nassar gymnastic student victims; California must follow Michigan’s lead and protect Dr. Tyndall’s sexual assault victims. SB 872 was prompted by the revelations that Dr. Larry Nassar, former Michigan State University and US Olympics doctor, was sexually abusing his patients, including minors, for decades. SB 872 allows an individual who, while a minor is the victim of criminal sexual conduct, to commence a civil action at any time before the later of: 1) the individual reaching the age of 28 years old; or 2) three years after reasonable discovery of the injury. Also, it added a revival clause that allows people victimized between December 31, 1996 and 2016, a 90 day window to file civil claims regardless of statute of limitations concerns....

“California has always been in the forefront of ensuring sexual assault victims obtain justice and we must continue to act. AB 1510 is needed to give over 650 student survivors of Dr. Tyndall a small window to file their civil sexual assault claims. Our “MeToo” efforts must continue and should certainly cover students; California should finally do right by these survivors and give them their day in court.”

7) **Argument in Opposition:** According to the *University of Southern California*, “We are aware that California has led the nation in enacting progressive legislation in support of survivors of sexual assault and sexual misconduct. However, in this particular instance, the proposed legislation is unnecessary and harmful to California plaintiffs. All of the plaintiffs that are the focus of this legislation have the option for a fair, respectful and certain remedy available to them, even if their claim arose twenty years ago.

“Effectively, a statute of limitations is a requirement to commence legal proceedings (either civil or criminal) within a specific period of time. Statutes of limitations are tailored to the cause of action at issue. For example, cases involving injury must be brought within two years from the date of injury and cases relating to written contracts must be brought within four years from the date the contract was breached.

“The statute of limitations for any civil action for recovery of damages suffered as a result of
sexual assault was just extended in the last legislative session. See Assembly Bill 1619 (Chapter 939, Statutes of 2018). This measure extended the statute of limitation for a cause of action within 10 years from the date of the last act or within three years from when the plaintiff knew or should have discovered an injury or illness that resulted from the act. Although it may appear unfair to bar actions after the statute of limitations has lapsed, the limitations period serves important policy goals that help to preserve both the integrity of our legal system and the due process rights of individuals.

“Further, the recent amendments to Assembly Bill 1510 are a poorly veiled attempt to destroy the federal court settlement that was carefully and thoughtfully crafted to provide more than 14,000 women a monetary award coupled with support, compassion and sensitivity. In contrast, the amendments make it clear that there are members of the plaintiffs’ bar that are seeking to remove the choice from those women who would prefer an expedited, private and respectful resolution and force them to participate in public, speculative and time-consuming state court actions in order to have any chance of recovery. This path would likely be incredibly difficult for plaintiffs who might have to overcome a lack of evidence and/or witnesses to support their claim. Not only does this raise ethical questions, but it is a perversion of our civil justice process. This is illustrated by the amendments on page 4 lines 7-11 of the bill. It states that the provisions of the bill do not apply to settlements in which a party was represented by an attorney in California and signed the settlement agreement. This is not a limitation on who may participate but actually a dramatic expansion now that the bill’s language includes a broad and vague definition of sexual misconduct.

“The sponsors of AB 1510 know full well that the proposed federal settlement allows for a plaintiff to participate in the settlement without legal representation and that many settlements, particularly class action cases, do not require the party to sign. Hence, the language actually allows virtually every individual claiming to have been impacted by some “sexual misconduct” to bypass the statute of limitations and go to state court, perhaps even if they receive compensation under the federal settlement. Candidly, it is bad enough that the sponsors want to extend the statute of limitations, but to retroactively rewrite the law for what constitutes a basis for a claim, i.e., the definition of sexual misconduct, and use it to eviscerate settlements reached in other venues, is abhorrent.

“Proponents of the bill will argue that this bill helps women whose claims are facially barred under California law, and that the only way to justly address this is to revive expired claims and allow for new filings until December 31, 2020. However, this is simply not accurate. USC does not dispute that there are plaintiffs that should be compensated, and that some cases may have occurred before the statute of limitations expired. However, those individuals can participate in the federal settlement. AB 1510 changes the rules because some in the plaintiffs’ bar are seeking larger settlements and more leverage. Why should the rules be changed for them?

“There is a pending $215 million settlement that will offer a remedy to every single plaintiff that has been impacted by Dr. Tyndall. Apart from certain administrative costs, all of that amount will be available for distribution to the more than 14,000 class members. Any residual balance in the settlement fund after all class members are compensated would be contributed to charitable organizations that benefit women’s health and well-being. All confirmed class members will be compensated a minimum of $2,500, without the necessity of providing any information about their individual encounter. Patients willing to provide
further details about their experience may be eligible for additional damage awards up to $250,000. The federal settlement includes a monetary remedy for every single member of the class regardless of whether the claim is facially barred by the statute of limitation. The University of Southern California and the vast majority of the plaintiffs have already created an avenue whereby all those who interacted with Dr. Tyndall in the medical setting of the health center can receive compensation, closure and meaningful institutional change and there is no legislative action required for plaintiffs to receive these benefits.

"Perhaps, the most egregious consequence of this newly proposed language is the elimination of real choice for the women impacted. Without the option of a private, respectful and expedited settlement as a means to relief and some modicum of closure, plaintiffs that want to pursue relief will have no choice but to pursue public, often invasive and time-consuming litigation that may never yield relief. Or, worse yet, remain in the shadows with no vehicle for dignified relief.

"Lastly, this bill impacts every college and university in California who almost without exception provide some sort of health services to students. It will revive claims against small, liberal arts or other colleges who may have had an incident or physician 15 or 20 years ago and open those schools up to floodgates of liability, potentially bankrupting them. In addition, this bill discourages physicians from working at colleges and universities in California treating students. Many colleges and universities in California do not employ student health physicians full-time, but rather rely on community primary care physicians to staff the student health center part-time. College students will be harmed because high quality physicians will simply be unwilling to take on this type of open-ended liability for the remainder of their medical career. This bill will undoubtedly increase insurance malpractice premiums for primary care physicians, and sends the wrong message — discouraging physicians from one type of primary care specialty (student health), at a time when the legislature should be focused on encouraging the next generation of physicians to practice primary care, including student health.

"The University understands and in no way wishes to understate the gravity of this matter. It has worked diligently with plaintiffs to rectify the harm done and to minimize the discomfort or trauma a plaintiff often encounters in seeking compensation. As evidence of this, the proposed settlement also includes non-monetary, equitable relief provisions such as, the appointment of an independent women’s health advocate that will ensure any complaints of improper conduct are adequately investigated and resolved. The settlement also requires the University to implement student health operating and oversight procedures which will include pre-hiring background checks for all new personnel, annual education and performance reviews in conjunction with the independent women’s health advocate. Expanded sexual misconduct/violence prevention programs, an independent consultant to serve on a task force and free counseling and support services are also a part of the settlement.

"Assembly Bill 1510 is a blatant attempt to interfere with the proposed federal settlement and all the beneficial provisions found within the settlement which resulted from a collaborative process that included the University, plaintiffs, attorneys, abuse experts and a federal judge."

8) Related Legislation: AB 218 (Gonzalez) would extend the civil statute of limitations for childhood sexual assault by 14 years, and revives old claims for three years. AB 218 is
pending referral by the Senate Rules Committee.

9) **Prior Legislation:** AB 1619 (Berman) Chapter 939, Statutes of 2018, extended the statute of limitations for any civil action for recovery of damages suffered as a result of sexual assault.

**REGISTERED SUPPORT / OPPOSITION:**

**Support**

Consumer Attorneys of California (Sponsor)
California Nurses Association
California Protective Parents Association
California Teamsters Public Affairs Council
California Women's Law Center
Child Abuse Prevention Center
Consumer Federation of California
Consumer Watchdog
Courage Campaign
Crime Victims United of California
Equal Rights Advocates
Faculty Association of California Community Colleges
National Nurses United
Stop Educator Sexual Abuse, Misconduct & Exploitation
Student Senate for California Community Colleges
Weideman Group

**Opposition**

University of Southern California

**Analysis Prepared by:** Sandy Uribe / PUB. S. / (916) 319-3744
Date of Hearing: April 23, 2019
Counsel: Matthew Fleming

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

AB 1537 (Cunningham) – As Amended March 28, 2019

As Proposed to be Amended in Committee

SUMMARY: Expands a prosecutor’s ability to request to access, inspect, or use specified juvenile records that have been sealed by the juvenile court if the prosecutor has reason to believe that the record may be necessary to meet a legal obligation to disclose favorable or exculpatory evidence to a defendant in a criminal case. Specifically, this bill:

1) Allows a prosecutor to access, inspect, or use the sealed records of a minor who was arrested for a misdemeanor and subsequently no charges were brought against the minor, the proceedings were dismissed, or the minor was acquitted of the charge in order to meet a statutory or constitutional obligation to disclose favorable or exculpatory evidence to a defendant in a criminal case in which the prosecuting attorney has reason to believe that access to the record may be necessary to meet the disclosure obligation.

2) Allows a prosecutor to access, inspect, or use the sealed records of a minor who performed satisfactorily in a deferred entry of judgment program in order to meet a statutory or constitutional obligation to disclose favorable or exculpatory evidence to a defendant in a criminal case in which the prosecuting attorney has reason to believe that access to the record may be necessary to meet the disclosure obligation.

3) Requires the juvenile court to approve the prosecutor’s request if it finds that the sealed record is necessary for the prosecutor to comply with a disclosure obligation and to state its reasons for approving the prosecutor’s request on the record.

4) Specifies that a ruling by the juvenile court to allow a prosecutor to access, inspect, or utilize a sealed juvenile record does not affect whether the information is admissible in a criminal proceeding and that the provisions of this bill do not impose any discovery obligations upon a prosecuting attorney that do not already exist.

5) Specifies that a prosecutor’s ability to access, inspect, or utilize sealed juvenile records does not apply to the records of a person who has become a dependent child of the juvenile court as a result of neglect or abuse by the child’s parents or guardians, as specified.

EXISTING LAW:

1) Provides that five years or more after the jurisdiction of the juvenile court has terminated over a person adjudged a ward of the court or after a minor appeared before a probation officer, or, in any case, at any time after the person has reached the age of 18, the person or county probation officer, with specified exceptions, may petition the juvenile court for sealing of the records, including arrest records, relating to the person’s case, in the custody of
the juvenile court, the probation officer, or any other agency or public official. (Welf. & Inst. Code, § 781, subd. (a)(1)(A).)

2) Allows a minor to petition the juvenile court to seal his or her record relating to an offense that is considered serious or violent and was committed after the minor attained 14 years of age only in the following circumstances:

   a) The person was committed to the Department of Corrections and Rehabilitation, has attained 21 years of age, and has completed his or her probation after being released from the Department of Corrections and Rehabilitation; or

   b) The person was not committed to the Department of Corrections and Rehabilitation, has attained 18 years of age and has completed any period of probation imposed by the court. (Welf. & Inst. Code, § 781, subd. (a)(1)(D)(i)(I) – (II).)

3) Allows a prosecutor to access the juvenile record relating to an offense that is serious or violent and was committed after the minor attained 14 years of age if the prosecutor believes that the records are necessary to fulfill a disclosure obligation to a defendant in a criminal case. (Welf. & Inst. Code, § 781, subd. (a)(1)(D)(iii).)

4) Provides that, if a minor satisfactorily completes an informal program of supervision, probation as specified, or a term of probation, then the court shall order the petition dismissed and shall order sealed all records pertaining to the dismissed petition in the custody of the juvenile court, and in the custody of law enforcement agencies, the probation department, or the Department of Justice. (Welf. & Inst. Code, § 786, subd. (a).)

5) States that upon the order of dismissal under the court-initiated sealing process, the arrest and other proceedings in the case must be deemed not to have occurred and the person who was the subject of the petition may reply accordingly to an inquiry by employers, educational institutions, or other persons or entities regarding the arrest and proceedings in the case. (Welf. & Inst. Code, § 786, subd. (b).)

6) Prohibits automatic sealing upon probation completion if the petition was sustained on the basis of a specified serious or violent offense committed when the individual was 14 years of age or older, unless the finding on the offense was dismissed or reduced to a lesser non-serious and non-violent offense. (Welf. & Inst. Code, § 786, subd. (d).)

7) Allows the court, the prosecuting attorney, the probation department, the person whose record has been sealed, and a child welfare agency to access a record that was sealed by the court-initiated process for limited purposes, as specified. (Welf. & Inst. Code, § 786, subd. (f) – (g).)

8) Allows a prosecutor to access, inspect, or utilize a juvenile records because the juvenile completed an informal supervision program or a term of probation if the prosecutor believes that the records are necessary to fulfill a disclosure obligation to a defendant in a criminal case. (Welf. & Inst. Code, § 786, subd. (g)(1)(K).)

9) Specifies that “access” shall not be deemed an unsealing of the record and shall not require notice to any other agency. (Welf. & Inst. Code, § 786, subd. (g)(3); Welf. & Inst. Code, §
781, subd. (a)(1)(D)(iv.).

10) Allows any person who has been arrested for a misdemeanor, with or without a warrant, while a minor, may, during or after minority, petition the court in which the proceedings occurred or, if there were no court proceedings, the court in whose jurisdiction the arrest occurred, for an order sealing the records in the case, including any records of arrest and detention, if any of the following occurred:

a) The person was released because charges were not feasible or desirable, as specified;

b) The charges were dismissed without a conviction; or,

c) The person was acquitted. (Pen. Code, § 851.7, subd. (a).)

11) States that a minor who has performed satisfactorily during the period in which deferred entry of judgment was granted, at the end of that period the charge or charges in the wardship petition shall be dismissed and the arrest upon which the judgment was deferred shall be deemed never to have occurred and any records in the possession of the juvenile court shall be sealed. (Welf. & Inst. Code, § 793, subd. (c).)

12) States that the prosecuting attorney and the probation department of any county shall have access to records sealed following the successful completion of a deferred entry of judgment after they are sealed for the limited purpose of determining whether a minor is eligible for another deferred entry of judgment. (Welf. & Inst. Code, § 793, subd. (c).)

**FISCAL EFFECT:** Unknown

**COMMENTS:**

1) **Author’s Statement:** According to the author, “AB 1537 amends two statutes (W&I Code, § 793 and Pen. Code, § 851.7) to allow prosecutors to seek access to, inspect, or use sealed juvenile records in order to meet a statutory or constitutional obligation to disclose favorable or exculpatory evidence to a defendant in a criminal case. It also adds language to two other juvenile sealing statutes that already allow the prosecutors to seek such access to address the problem of excessive delays in getting cases to trial when witnesses have sealed juvenile records, to ensure new discovery obligations are not created by the amendments, and to distinguish between access to and admissibility of the records. This will allow defense counsel easier access to impeachment and exculpatory evidence necessary for competent defense.”

2) **Sealing Procedures in Juvenile Court:** The statutes for sealing juvenile records in California are fairly complicated. In general, most juvenile records of arrests and adjudications are eligible to be sealed and treated as though they never occurred. For less serious offenses, the juvenile court will often seal the record automatically. This is especially true for arrests that did not result in determination of guilt, or if the juvenile satisfactorily completed a probation term or a deferred entry of judgment program. For more serious cases, or when a juvenile does not satisfactorily complete probation or a deferred entry of judgment, he or she can still petition the court in order to have his or her records sealed.
When a juvenile court hears a petition to seal a serious juvenile offense, it looks to a number of factors in order to determine whether or not sealing is appropriate. Among them is whether the juvenile has subsequently been convicted of a felony or of any misdemeanor involving moral turpitude, and whether rehabilitation has been attained to the satisfaction of the court.

3) **The Brady Case and the right to a fair trial:** In a criminal trial, a defendant is presumed innocent and the prosecution has the burden to prove beyond a reasonable doubt that the defendant is guilty. In order to ensure a fair trial, the prosecuting attorney has a constitutional and statutory duty to disclose specified information to the defendant.

In the landmark case of *Brady v. Maryland* (1963), the U.S. Supreme Court held that where a prosecutor in a criminal case withholds material evidence from the accused person that is favorable to the accused, this violates the Due Process Clause of the 14th Amendment. (373 U.S. 83, at 87, see also *Giglio v. United States* (1972) 405 U.S. 150.) *Brady* and *Giglio* impose on prosecutors a duty to disclose to the defendant material evidence that would be favorable to the accused. The Supreme Court in a later case explained “under the Due Process Clause of the Fourteenth Amendment, criminal prosecutions must comport with prevailing notions of fundamental fairness. We have long interpreted this standard of fairness to require that criminal defendants be afforded a meaningful opportunity to present a complete defense. To safeguard that right, the Court has developed ‘what might loosely be called the area of constitutionally guaranteed access to evidence.’ Taken together, this group of constitutional privileges delivers exculpatory evidence into the hands of the accused, thereby protecting the innocent from erroneous conviction and ensuring the integrity of our criminal justice system.” (*California v. Trombetta* (1984) 467 U.S. 479, 485, (citation omitted).)

Even in the absence of a specific request, the prosecution has a constitutional duty to turn over exculpatory evidence that would raise a reasonable doubt about the defendant’s guilt. (*United States v. Agurs* (1996) 427 U.S. 97,112.) Generally, a specific request is not necessary for parties to receive discovery, however, an informal discovery request must be made before a party can request formal court enforcement of discovery.

This bill would provide the prosecutor in a criminal case with the ability to access otherwise sealed records in order to meet a disclosure requirement imposed by *Brady*. For example, a prosecutor may wish to call a witness in a criminal case who had previously been charged with juvenile conduct in a separate proceeding that may indicate the witness has been deceitful or dishonest with law enforcement. In that circumstance, the prosecutor may be aware of the fact that the witness was arrested as a juvenile or that the juvenile had some kind of sealed record, but he or she would need to access the facts surrounding that juvenile arrest to ascertain whether it is necessary to provide it to defense counsel in order to comply with *Brady*.

This bill would provide the prosecutor with such access for juvenile misdemeanor arrests that resulted in no charges, dismissed charges, or acquittal, and would also provide access to juvenile records that were sealed following a deferred entry of judgment. Existing law already covers prosecutor access to sealed juvenile records in circumstances where a juvenile has had their records sealed following successful completion of probation or petition to seal that had been granted. This bill would make the law pertaining to access to sealed juvenile
records consistent in order to meet a disclosure obligation consistent across two additional provisions.

4) **Proposition 21**: On March 7, 2000, California voters approved Proposition 21 (Prop 21), known as the “The Gang Violence and Juvenile Crime Prevention Act.” The purpose of Prop 21 was to change the treatment of juvenile offenders, particularly youths engaged in gang-related criminal activity or who had committed other serious offenses. Among other things, Prop 21 increased sentences for specified gang-related crimes, required adult trial for juvenile offenders 14 years of age or older charged with murder or specified sex offenses, prohibited the sealing of juvenile records involving offenses on the 707(b) list (list of serious offenses in juvenile court), and designated additional crimes as violent and serious felonies. (http://vigarchive.sos.ca.gov/2000/primary/propositions/21analysis.htm [as of Apr. 15, 2019].)

Most importantly for the purposes of this bill, Prop 21 required that if a minor has performed satisfactorily during the period in which deferred entry of judgment was granted, the petition against him or her must be dismissed and the arrest upon which the judgment was deferred must be deemed never to have occurred and any records in the possession of the juvenile court to be sealed.

Because Proposition 21 was a voter initiative, the Legislature may not amend the statute without subsequent voter approval unless the initiative permits such amendment, and then only upon whatever conditions the voters attached to the Legislature’s amendatory powers. (*People v. Superior Court (Pearson)* (2010) 48 Cal.4th 564, 568; see also Cal. Const., art. II, § 10, subd. (c).) The California Constitution states, “The Legislature may amend or repeal referendum statutes. It may amend or repeal an initiative statute by another statute that becomes effective only when approved by the electors unless the initiative statute permits amendment or repeal without their approval.” (Cal. Const., art. II, § 10, subd. (c).) Therefore, unless the initiative expressly authorizes the Legislature to amend, only the voters may alter statutes created by initiative.

As to the Legislature’s authority to amend the initiative, Proposition 21 states: “The provisions of this measure shall not be amended by the Legislature except by a statute passed in each house by rollcall vote entered in the journal, two-thirds of the membership of each house concurring, or by a statute that becomes effective only when approved by the voters.” (<http://vigarchive.sos.ca.gov/2000/primary/propositions/21text.htm> [as of June 15, 2017].) This bill would allow a prosecutor to access and utilize the records of a juvenile whose record was sealed following the successful completion of a deferred entry of judgment program. Under Prop 21, those sealed records are supposed to be deemed to have never occurred. It appears that this bill has been keyed to require a two thirds vote in order to pass because it allows the access and utilization of those records.

5) **Argument in Support**: According to the bill’s sponsor, the *California District Attorneys Association*: “This bill will help solve the dilemma created when prosecutors are aware of information in a witness’ juvenile records, but those records have been sealed. As you know, there are a number of statutes that allow for the sealing of juvenile records. Two of the most commonly used sealing statutes have exceptions permitting prosecutors to seek access to the records to meet potential discovery obligations. (See W&I §§ 781(a)(1)(D)(iii) and
However, two others do not. (See W&I § 793 and PC § 851.7.)

"AB 1537 would create exceptions to sections 793 and 851.7 allowing prosecutors to seek access to records sealed pursuant to those sections. The exceptions would be akin to those existing in the juvenile sealing statutes of sections 781 and 786."

6) **Related Legislation:**

   a) **AB 1394** (Daly) would prohibit a superior court or probation department from charging an applicant a fee for filing a petition to seal juvenile records, as specified. **AB 1394** is pending hearing in the Assembly Judiciary Committee.

   b) **SB 377** (McGuire) would require a juvenile court judicial officer, upon the approval of a request for authorization for the administration of psychotropic medication, require the juvenile court judicial officer to also authorize the Medical Board of California to review the patient medical record of the child authorized to receive psychotropic medication. **SB 377** is pending in the Senate Judiciary Committee.

7) **Prior Legislation:**

   a) **AB 2952** (Stone) Chapter 1002, Statutes of 2018, provided that a prosecutor may access, inspect, or use certain juvenile records that have been sealed by the court if the prosecutor believes that it is necessary to meet a legal obligation to provide evidence to a defendant in a criminal case.

   b) **AB 2659** (Cooley), of the 2017-2018 Legislative Session, would have authorized a prosecutor or criminal defense attorney to petition the criminal court to release information in juvenile child dependency case files, if such information is material to a criminal prosecution. **AB 2659** was held in the Assembly Appropriations Committee.

   c) **SB 312** (Skinner), Chapter 679, Statutes of 2017, authorized a sealing procedure for juveniles convicted of a serious or violent felony and allowed for access by the prosecutor in order to determine whether he or she has a disclosure obligation similar to the provisions proposed by this bill.

   d) **AB 1945** (Stone), Chapter 858, Statutes of 2016, authorized a child welfare agency to access sealed juvenile records for limited purposes.

   e) **AB 666** (Stone), Chapter 368, Statutes of 2015, among other things, specified that the prohibition against automatic sealing of a record or dismissing a petition if the petition was sustained based on the commission of a specified serious or violent offense that was committed when the individual was 14 years of age or older does not apply if the finding on that offense was dismissed or was reduced to a lesser offense.

   f) **SB 1038** (Leno), Chapter 249, Statutes of 2014, provides for the automatic dismissal of juvenile petitions and sealing of records in cases where a juvenile offender successfully completes probation for any offense other than a specified violent or serious offense.
REGISTERED SUPPORT / OPPOSITION:

Support

California District Attorneys Association (Sponsor)

Opposition

None

Analysis Prepared by: Matthew Fleming / PUB. S. / (916) 319-3744
Amended Mock-up for 2019-2020 AB-1537 (Cunningham (A))

Mock-up based on Version Number 98 - Amended Assembly 3/28/19
Submitted by: Matthew Fleming, Assembly Committee on Public Safety

THE PEOPLE OF THE STATE OF CALIFORNIA DO ENACT AS FOLLOWS:

SECTION 1. Section 851.7 of the Penal Code is amended to read:

851.7. (a) Any person who has been arrested for a misdemeanor, with or without a warrant, while a minor, may, during or after minority, petition the court in which the proceedings occurred or, if there were no court proceedings, the court in whose jurisdiction the arrest occurred, for an order sealing the records in the case, including any records of arrest and detention, if any of the following occurred:

(1) The person was released pursuant to paragraph (1) of subdivision (b) of Section 849.

(2) Proceedings against the person were dismissed, or the person was discharged, without a conviction.

(3) The person was acquitted.

(b) If the court finds that the petitioner is eligible for relief under subdivision (a), it shall issue its order granting the relief prayed for. Thereafter, the arrest, detention, and any further proceedings in the case shall be deemed not to have occurred, and the petitioner may answer accordingly any question relating to their occurrence.

(c) This section applies to arrests and any further proceedings that occurred before, as well as those that occur after, the effective date of this section.

(d) This section does not apply to any person taken into custody pursuant to Section 625 of the Welfare and Institutions Code, or to any case within the scope of Section 781 of the Welfare and Institutions Code, unless, after a finding of unfitness for the juvenile court or otherwise, there were criminal proceedings in the case, not culminating in conviction. If there were criminal proceedings not culminating in conviction, this section shall be applicable to the criminal proceedings if the proceedings are otherwise within the scope of this section.

(e) This section does not apply to arrests for, and any further proceedings relating to, any of the following:

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(1) Offenses for which registration is required under Section 290.

(2) Offenses under Division 10 (commencing with Section 11000) of the Health and Safety Code.

(3) Offenses under the Vehicle Code or any local ordinance relating to the operation, stopping, standing, or parking of a vehicle.

(f) In any action or proceeding based upon defamation, a court, upon a showing of good cause, may order any records sealed under this section to be opened and admitted in evidence. The records shall be confidential and shall be available for inspection only by the court, jury, parties, counsel for the parties, and any other person who is authorized by the court to inspect them. Upon the judgment in the action or proceeding becoming final, the court shall order the records sealed.

(g) (1) A record that has been sealed pursuant to this section may be accessed, inspected, or utilized by the prosecuting attorney in order to meet a statutory or constitutional obligation to disclose favorable or exculpatory evidence to a defendant in a criminal case in which the prosecuting attorney has reason to believe that access to the record is necessary to meet the disclosure obligation. A request to access information in the sealed record for this purpose, including the prosecutor’s rationale for believing that access to the information in the record may be necessary to meet the disclosure obligation and the date by which the records are needed, shall be submitted by the prosecuting attorney to the juvenile court. If the juvenile court is unable to rule before the date by which the records are needed, the juvenile court may designate the court hearing the criminal case for which the records are requested to hear and rule on the request. The juvenile court or designated criminal court shall notify the person having the sealed record, including the person’s attorney of record, that the court is considering the prosecutor’s request to access the record, and the court shall provide that person with the opportunity to respond, in writing or by appearance, to the request prior to making its determination. The juvenile court or designated criminal court may require the prosecuting attorney to provide notice to the juvenile and juvenile’s attorney of record if the court provides the address of the juvenile and the juvenile’s attorney of record. The juvenile court or designated criminal court shall review the case file and records that have been referenced by the prosecutor as necessary to meet the disclosure obligation and any response submitted by the person having the sealed record. The court shall approve the prosecutor’s request to the extent that the court has, upon review of the relevant records, determined that access to a specific sealed record or portion of a sealed record is necessary to enable the prosecuting attorney to comply with the disclosure obligation. If the juvenile court or designated criminal court approves the prosecuting attorney’s request, the court shall state on the record appropriate limits on the access, inspection, and utilization of the sealed record information in order to protect the confidentiality of the person whose sealed record is accessed pursuant to this subdivision. A ruling allowing disclosure of information pursuant to this subdivision does not affect whether the information is admissible in a criminal or juvenile proceeding. This subdivision does not impose any discovery obligations on a prosecuting attorney that do not already exist.

(2) This subdivision shall not apply to juvenile case files pertaining to matters within the jurisdiction of the juvenile court pursuant to Section 300.

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(h) This section shall apply in any case in which a person was under 21 years of age at the time of the commission of an offense to which this section applies if that offense was committed prior to March 7, 1973.

SEC. 2. Section 781 of the Welfare and Institutions Code is amended to read:

781. (a) (1) (A) If a petition has been filed with a juvenile court to commence proceedings to adjudge a person a ward of the court, if a person is cited to appear before a probation officer or is taken before a probation officer pursuant to Section 626, or if a minor is taken before any officer of a law enforcement agency, the person or the county probation officer may, five years or more after the jurisdiction of the juvenile court has terminated as to the person, or, if a petition is not filed, five years or more after the person was cited to appear before a probation officer or was taken before a probation officer pursuant to Section 626 or was taken before any officer of a law enforcement agency, or, in any case at any time after the person has reached 18 years of age, petition the court for sealing of the records, including records of arrest, relating to the person’s case, in the custody of the juvenile court and probation officer and any other agencies, including law enforcement agencies, entities, and public officials as the petitioner alleges, in the petition, to have custody of the records. The court shall notify the district attorney of the county and the county probation officer, if they are not the petitioner, and the district attorney or probation officer or any of their deputies or any other person having relevant evidence may testify at the hearing on the petition. If, after hearing, the court finds that since the termination of jurisdiction or action pursuant to Section 626, as the case may be, the person has not been convicted of a felony or of any misdemeanor involving moral turpitude and that rehabilitation has been attained to the satisfaction of the court, it shall order all records, papers, and exhibits in the person’s case in the custody of the juvenile court sealed, including the juvenile court record, minute book entries, and entries on dockets, and any other records relating to the case in the custody of the other agencies, entities, and officials as are named in the order. Once the court has ordered the person’s records sealed, the proceedings in the case shall be deemed never to have occurred, and the person may properly reply accordingly to any inquiry about the events, the records of which are ordered sealed.

(B) The court shall send a copy of the order to each agency, entity, and official named in the order, directing the agency or entity to seal its records. Each agency, entity, and official shall seal the records in its custody as directed by the order, shall advise the court of its compliance, and thereupon shall seal the copy of the court’s order for sealing of records that the agency, entity, or official received.

(C) If a ward of the juvenile court is subject to the registration requirements set forth in Section 290 of the Penal Code, a court, in ordering the sealing of the juvenile records of the person, shall also provide in the order that the person is relieved from the registration requirement and for the destruction of all registration information in the custody of the Department of Justice and other agencies, entities, and officials.

(D) (i) A petition to seal the record or records relating to an offense listed in subdivision (b) of Section 707 that was committed after attaining 14 years of age and resulted in the adjudication of

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wardship by the juvenile court may only be filed or considered by the court pursuant to this section under the following circumstances:

(I) The person was committed to the Department of Corrections and Rehabilitation, Division of Juvenile Facilities, has attained 21 years of age, and has completed their period of probation supervision after release from the division.

(II) The person was not committed to the Department of Corrections and Rehabilitation, Division of Juvenile Facilities, has attained 18 years of age, and has completed any period of probation supervision related to that offense imposed by the court.

(ii) A record relating to an offense listed in subdivision (b) of Section 707 that was committed after attaining 14 years of age that has been sealed pursuant to this section may be accessed, inspected, or utilized in a subsequent proceeding against the person under any of the following circumstances:

(I) By the prosecuting attorney, as necessary, to make appropriate charging decisions or to initiate prosecution in a court of criminal jurisdiction for a subsequent felony offense, or by the prosecuting attorney or the court to determine the appropriate sentencing for a subsequent felony offense.

(II) By the prosecuting attorney, as necessary, to initiate a juvenile court proceeding to determine whether a minor shall be transferred from the juvenile court to a court of criminal jurisdiction pursuant to Section 707, and by the juvenile court to make that determination.

(III) By the prosecuting attorney, the probation department, or the juvenile court upon a subsequent finding by the juvenile court that the minor has committed a felony offense, for the purpose of determining an appropriate disposition of the case.

(IV) By the prosecuting attorney, or a court of criminal jurisdiction, for the purpose of proving a prior serious or violent felony conviction, and determining the appropriate sentence pursuant to Section 667 of the Penal Code.

(iii) (I) A record relating to an offense listed in subdivision (b) of Section 707 that was committed after attaining 14 years of age that has been sealed pursuant to this section may be accessed, inspected, or utilized by the prosecuting attorney in order to meet a statutory or constitutional obligation to disclose favorable or exculpatory evidence to a defendant in a criminal case in which the prosecuting attorney has reason to believe that access to the record may be necessary to meet the disclosure obligation and the date by which the records are needed. A request to access information in the sealed record for this purpose, including the prosecutor's rationale for believing that access to the information in the record may be necessary to meet the disclosure obligation and the date by which the records are needed, shall be submitted by the prosecuting attorney to the juvenile court. If the juvenile court is unable to rule before the date by which the records are needed, the juvenile court may designate the court hearing the criminal case for which the records are requested to hear and rule on the request. The juvenile court or designated criminal court shall notify the person having the sealed record, including the person's attorney of record, that the court

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is considering the prosecutor's request to access the record, and the court shall provide that person with the opportunity to respond, in writing or by appearance, to the request prior to making its determination. The juvenile court or designated criminal court may require the prosecuting attorney to provide notice to the juvenile and juvenile's attorney of record if the court provides the address of the juvenile and the juvenile's attorney of record. The juvenile court or designated criminal court shall approve the prosecutor's request to the extent that the court has, upon review of the relevant records, determined that access to a specific sealed record or portion of a sealed record is necessary to enable the prosecuting attorney to comply with the disclosure obligation. If it determines that access to the record is necessary to enable the prosecuting attorney's compliance with the disclosure obligation. If the juvenile court or designated criminal court approves the prosecuting attorney's request, the court shall state on the record appropriate limits on the access, inspection, and utilization of the sealed record information in order to protect the confidentiality of the person whose sealed record is accessed pursuant to this clause. A ruling allowing disclosure of information pursuant to this subdivision does not affect whether the information is admissible in a criminal or juvenile proceeding. This clause does not impose any discovery obligations on a prosecuting attorney that do not already exist.

(II) This clause shall not apply to juvenile case files pertaining to matters within the jurisdiction of the juvenile court pursuant to Section 300.

(iv) A sealed record that is accessed, inspected, or utilized pursuant to clause (ii) or (iii) shall be accessed, inspected, or utilized only for the purposes described therein, and the information contained in the sealed record shall otherwise remain confidential and shall not be further disseminated. The access, inspection, or utilization of a sealed record pursuant to clause (ii) or (iii) shall not be deemed an unsealing of the record and shall not require notice to any other entity.

(E) Subparagraph (D) does not apply in cases in which the offense listed in subdivision (b) of Section 707 that was committed after attaining 14 years of age was dismissed or reduced to a misdemeanor by the court. In those cases, the person may petition the court to have the record sealed, and the court may order the sealing of the record in the same manner and with the same effect as otherwise provided in this section for records that do not relate to an offense listed in subdivision (b) of Section 707 that was committed after the person had attained 14 years of age.

(F) Notwithstanding subparagraphs (D) and (E), a record relating to an offense listed in subdivision (b) of Section 707 that was committed after attaining 14 years of age for which the person is required to register pursuant to Section 290.008 of the Penal Code shall not be sealed.

(2) An unfulfilled order of restitution that has been converted to a civil judgment pursuant to Section 730.6 shall not be a bar to sealing a record pursuant to this subdivision.

(3) Outstanding restitution fines and court-ordered fees shall not be considered when assessing whether a petitioner’s rehabilitation has been attained to the satisfaction of the court and shall not be a bar to sealing a record pursuant to this subdivision.
(4) The person who is the subject of records sealed pursuant to this section may petition the superior court to permit inspection of the records by persons named in the petition, and the superior court may order the inspection of the records. Except as provided in subdivision (b), the records shall not be open to inspection.

(b) In any action or proceeding based upon defamation, a court, upon a showing of good cause, may order any records sealed under this section to be opened and admitted into evidence. The records shall be confidential and shall be available for inspection only by the court, jury, parties, counsel for the parties, and any other person who is authorized by the court to inspect them. Upon the judgment in the action or proceeding becoming final, the court shall order the records sealed.

(c) (1) Subdivision (a) does not apply to Department of Motor Vehicles records of any convictions for offenses under the Vehicle Code or any local ordinance relating to the operation, stopping and standing, or parking of a vehicle where the record of any such conviction would be a public record under Section 1808 of the Vehicle Code. However, if a court orders a case record containing any such conviction to be sealed under this section, and if the Department of Motor Vehicles maintains a public record of such a conviction, the court shall notify the Department of Motor Vehicles of the sealing and the department shall advise the court of its receipt of the notice.

(2) Notwithstanding any other law, subsequent to the notification, the Department of Motor Vehicles shall allow access to its record of convictions only to the subject of the record and to insurers which have been granted requestor code numbers by the department. Any insurer to which a record of conviction is disclosed, when the conviction record has otherwise been sealed under this section, shall be given notice of the sealing when the record is disclosed to the insurer. The insurer may use the information contained in the record for purposes of determining eligibility for insurance and insurance rates for the subject of the record, and the information shall not be used for any other purpose nor shall it be disclosed by an insurer to any person or party not having access to the record.

(3) This subdivision does not prevent the sealing of any record which is maintained by any agency or party other than the Department of Motor Vehicles.

(4) This subdivision does not affect the procedures or authority of the Department of Motor Vehicles for purging department records.

(d) Unless for good cause the court determines that the juvenile court record shall be retained, the court shall order the destruction of a person's juvenile court records that are sealed pursuant to this section as follows: five years after the record was ordered sealed, if the person who is the subject of the record was alleged or adjudged to be a person described by Section 601; or when the person who is the subject of the record reaches 38 years of age if the person was alleged or adjudged to be a person described by Section 602, except that if the subject of the record was found to be a person described in Section 602 because of the commission of an offense listed in subdivision (b) of Section 707 when the person was 14 years of age or older, the record shall not be destroyed. Any other agency in possession of sealed records may destroy its records five years after the record was ordered sealed.

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(e) The court may access a file that has been sealed pursuant to this section for the limited purpose of verifying the prior jurisdictional status of a ward who is petitioning the court to resume its jurisdiction pursuant to subdivision (e) of Section 388. This access shall not be deemed an unsealing of the record and shall not require notice to any other entity.

(f) This section shall not permit the sealing of a person’s juvenile court records for an offense where the person is convicted of that offense in a criminal court pursuant to the provisions of Section 707.1. This subdivision is declaratory of existing law.

(g) (1) This section does not prohibit a court from enforcing a civil judgment for an unfulfilled order of restitution obtained pursuant to Section 730.6. A minor is not relieved from the obligation to pay victim restitution, restitution fines, and court-ordered fines and fees because the minor’s records are sealed.

(2) A victim or a local collection program may continue to enforce victim restitution orders, restitution fines, and court-ordered fines and fees after a record is sealed. The juvenile court shall have access to any records sealed pursuant to this section for the limited purposes of enforcing a civil judgment or restitution order.

(h) (1) On and after January 1, 2015, each court and probation department shall ensure that information regarding the eligibility for and the procedures to request the sealing and destruction of records pursuant to this section shall be provided to each person who is either of the following:

(A) A person for whom a petition has been filed on or after January 1, 2015, to adjudge the person a ward of the juvenile court.

(B) A person who is brought before a probation officer pursuant to Section 626.

(2) The Judicial Council shall, on or before January 1, 2015, develop informational materials for purposes of paragraph (1) and shall develop a form to petition the court for the sealing and destruction of records pursuant to this section. The informational materials and the form shall be provided to each person described in paragraph (1) when jurisdiction is terminated or when the case is dismissed.

SEC. 3. Section 786 of the Welfare and Institutions Code is amended to read:

786. (a) If a person who has been alleged or found to be a ward of the juvenile court satisfactorily completes (1) an informal program of supervision pursuant to Section 654.2, (2) probation under Section 725, or (3) a term of probation for any offense, the court shall order the petition dismissed. The court shall order sealed all records pertaining to the dismissed petition in the custody of the juvenile court, and in the custody of law enforcement agencies, the probation department, or the Department of Justice. The court shall send a copy of the order to each agency and official named in the order, direct the agency or official to seal its records, and specify a date by which the sealed records shall be destroyed. If a record contains a sustained petition rendering the person ineligible

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to own or possess a firearm until 30 years of age pursuant to Section 29820 of the Penal Code, then the date the sealed records shall be destroyed is the date upon which the person turns 33 years of age. Each agency and official named in the order shall seal the records in its custody as directed by the order, shall advise the court of its compliance, and, after advising the court, shall seal the copy of the court’s order that was received. The court shall also provide notice to the person and the person’s counsel that it has ordered the petition dismissed and the records sealed in the case. The notice shall include an advisement of the person’s right to nondisclosure of the arrest and proceedings, as specified in subdivision (b).

(b) Upon the court’s order of dismissal of the petition, the arrest and other proceedings in the case shall be deemed not to have occurred and the person who was the subject of the petition may reply accordingly to an inquiry by employers, educational institutions, or other persons or entities regarding the arrest and proceedings in the case.

(c) (1) For purposes of this section, satisfactory completion of an informal program of supervision or another term of probation described in subdivision (a) shall be deemed to have occurred if the person has no new findings of wardship or conviction for a felony offense or a misdemeanor involving moral turpitude during the period of supervision or probation and if the person has not failed to substantially comply with the reasonable orders of supervision or probation that are within their capacity to perform. The period of supervision or probation shall not be extended solely for the purpose of deferring or delaying eligibility for dismissal of the petition and sealing of the records under this section.

(2) An unfulfilled order or condition of restitution, including a restitution fine that can be converted to a civil judgment under Section 730.6 or an unpaid restitution fee shall not be deemed to constitute unsatisfactory completion of supervision or probation under this section.

(d) A court shall not seal a record or dismiss a petition pursuant to this section if the petition was sustained based on the commission of an offense listed in subdivision (b) of Section 707 that was committed when the individual was 14 years of age or older unless the finding on that offense was dismissed or was reduced to a misdemeanor or to a lesser offense that is not listed in subdivision (b) of Section 707.

(e) If a person who has been alleged to be a ward of the juvenile court has their petition dismissed by the court, whether on the motion of the prosecution or on the court’s own motion, or if the petition is not sustained by the court after an adjudication hearing, the court shall order sealed all records pertaining to the dismissed petition in the custody of the juvenile court, and in the custody of law enforcement agencies, the probation department, or the Department of Justice. The court shall send a copy of the order to each agency and official named in the order, direct the agency or official to seal its records, and specify a date by which the sealed records shall be destroyed. Each agency and official named in the order shall seal the records in its custody as directed by the order, shall advise the court of its compliance, and, after advising the court, shall seal the copy of the court’s order that was received. The court shall also provide notice to the person and the person’s counsel that it has ordered the petition dismissed and the records sealed in the case. The notice
shall include an advisement of the person’s right to nondisclosure of the arrest and proceedings, as specified in subdivision (b).

(f) (1) The court may, in making its order to seal the record and dismiss the instant petition pursuant to this section, include an order to seal a record relating to, or to dismiss, any prior petition or petitions that have been filed or sustained against the individual and that appear to the satisfaction of the court to meet the sealing and dismissal criteria otherwise described in this section.

(2) An individual who has a record that is eligible to be sealed under this section may ask the court to order the sealing of a record pertaining to the case that is in the custody of a public agency other than a law enforcement agency, the probation department, or the Department of Justice, and the court may grant the request and order that the public agency record be sealed if the court determines that sealing the additional record will promote the successful reentry and rehabilitation of the individual.

(g) (1) A record that has been ordered sealed by the court under this section may be accessed, inspected, or utilized only under any of the following circumstances:

(A) By the prosecuting attorney, the probation department, or the court for the limited purpose of determining whether the minor is eligible and suitable for deferred entry of judgment pursuant to Section 790 or is ineligible for a program of supervision as defined in Section 654.3.

(B) By the court for the limited purpose of verifying the prior jurisdictional status of a ward who is petitioning the court to resume its jurisdiction pursuant to subdivision (c) of Section 388.

(C) If a new petition has been filed against the minor for a felony offense, by the probation department for the limited purpose of identifying the minor’s previous court-ordered programs or placements, and in that event solely to determine the individual’s eligibility or suitability for remedial programs or services. The information obtained pursuant to this subparagraph shall not be disseminated to other agencies or individuals, except as necessary to implement a referral to a remedial program or service, and shall not be used to support the imposition of penalties, detention, or other sanctions upon the minor.

(D) Upon a subsequent adjudication of a minor whose record has been sealed under this section and a finding that the minor is a person described by Section 602 based on the commission of a felony offense, by the probation department, the prosecuting attorney, counsel for the minor, or the court for the limited purpose of determining an appropriate juvenile court disposition. Access, inspection, or use of a sealed record as provided under this subparagraph shall not be construed as a reversal or modification of the court’s order dismissing the petition and sealing the record in the prior case.

(E) Upon the prosecuting attorney’s motion, made in accordance with Section 707, to initiate court proceedings to determine whether the case should be transferred to a court of criminal jurisdiction, by the probation department, the prosecuting attorney, counsel for the minor, or the court for the

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limited purpose of evaluating and determining if such a transfer is appropriate. Access, inspection, or use of a sealed record as provided under this subparagraph shall not be construed as a reversal or modification of the court’s order dismissing the petition and sealing the record in the prior case.

(F) By the person whose record has been sealed, upon their request and petition to the court to permit inspection of the records.

(G) By the probation department of any county to access the records for the limited purpose of meeting federal Title IV-B and Title IV-E compliance.

(H) The child welfare agency of a county responsible for the supervision and placement of a minor or nonminor dependent may access a record that has been ordered sealed by the court under this section for the limited purpose of determining an appropriate placement or service that has been ordered for the minor or nonminor dependent by the court. The information contained in the sealed record and accessed by the child welfare worker or agency under this subparagraph may be shared with the court but shall in all other respects remain confidential and shall not be disseminated to any other person or agency. Access to the sealed record under this subparagraph shall not be construed as a modification of the court’s order dismissing the petition and sealing the record in the case.

(I) By the prosecuting attorney for the evaluation of charges and prosecution of offenses pursuant to Section 29820 of the Penal Code.

(J) By the Department of Justice for the purpose of determining if the person is suitable to purchase, own, or possess a firearm, consistent with Section 29820 of the Penal Code.

(K) (i) A record that has been sealed pursuant to this section may be accessed, inspected, or utilized by the prosecuting attorney in order to meet a statutory or constitutional obligation to disclose favorable or exculpatory evidence to a defendant in a criminal case in which the prosecuting attorney has reason to believe that access to the record may be necessary to meet the disclosure obligation. A request to access information in the sealed record for this purpose, including the prosecutor’s rationale for believing that access to the information in the record is necessary to meet the disclosure obligation and the date by which the records are needed, shall be submitted by the prosecuting attorney to the juvenile court. If the juvenile court is unable to rule before the date by which the records are needed, the juvenile court may designate the court hearing the criminal case for which the records are requested to hear and rule on the request. The juvenile court or designated criminal court shall notify the person having the sealed record, including the person’s attorney of record, that the court is considering the prosecutor’s request to access the record, and the court shall provide that person with the opportunity to respond, in writing or by appearance, to the request prior to making its determination. The juvenile court or designated criminal court may require the prosecuting attorney to provide notice to the juvenile and juvenile’s attorney of record if the court provides the address of the juvenile and the juvenile’s attorney of record. The juvenile court or designated criminal court shall review the case file and records that have been referenced by the prosecutor as necessary to meet the disclosure obligation and any response submitted by the person having the sealed record. The court shall approve the

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prosecutor’s request to the extent that the court has, upon review of the relevant records, determined that access to a specific sealed record or portion of a sealed record is necessary to enable the prosecuting attorney to comply with the disclosure obligation. If the juvenile court approves the prosecuting attorney’s request, the court shall state on the record appropriate limits on the access, inspection, and utilization of the sealed record information in order to protect the confidentiality of the person whose sealed record is accessed pursuant to this subparagraph. A ruling allowing disclosure of information pursuant to this subdivision does not affect whether the information is admissible in a criminal or juvenile proceeding. This subparagraph does not impose any discovery obligations on a prosecuting attorney that do not already exist.

(ii) This subparagraph shall not apply to juvenile case files pertaining to matters within the jurisdiction of the juvenile court pursuant to Section 300.

(2) When a record has been sealed by the court based on a dismissed petition pursuant to subdivision (e), the prosecutor, within six months of the date of dismissal, may petition the court to access, inspect, or utilize the sealed record for the limited purpose of refiling the dismissed petition based on new circumstances, including, but not limited to, new evidence or witness availability. The court shall determine whether the new circumstances alleged by the prosecutor provide sufficient justification for accessing, inspecting, or utilizing the sealed record in order to refile the dismissed petition.

(3) Access to, or inspection of, a sealed record authorized by paragraphs (1) and (2) shall not be deemed an unsealing of the record and shall not require notice to any other agency.

(h) (1) This section does not prohibit a court from enforcing a civil judgment for an unfulfilled order of restitution ordered pursuant to Section 730.6. A minor is not relieved from the obligation to pay victim restitution, restitution fines, and court-ordered fines and fees because the minor’s records are sealed.

(2) A victim or a local collection program may continue to enforce victim restitution orders, restitution fines, and court-ordered fines and fees after a record is sealed. The juvenile court shall have access to records sealed pursuant to this section for the limited purpose of enforcing a civil judgment or restitution order.

(i) This section does not prohibit the State Department of Social Services from meeting its obligations to monitor and conduct periodic evaluations of, and provide reports on, the programs carried under federal Title IV-B and Title IV-E as required by Sections 622, 629 et seq., and 671(a)(7) and (22) of Title 42 of the United States Code, as implemented by federal regulation and state statute.

(j) The Judicial Council shall adopt rules of court, and shall make available appropriate forms, providing for the standardized implementation of this section by the juvenile courts.

SEC. 4. Section 793 of the Welfare and Institutions Code is amended to read:

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793. (a) If it appears to the prosecuting attorney, the court, or the probation department that the minor is not performing satisfactorily in the assigned program or is not complying with the terms of the minor's probation, or that the minor is not benefiting from education, treatment, or rehabilitation, the court shall lift the deferred entry of judgment and schedule a dispositional hearing. If after accepting deferred entry of judgment and during the period in which deferred entry of judgment was granted, the minor is convicted of, or declared to be a person described in Section 602 for the commission of, any felony offense or of any two misdemeanor offenses committed on separate occasions, the judge shall enter judgment and schedule a dispositional hearing. If the minor is convicted of, or found to be a person described in Section 602, because of the commission of one misdemeanor offense, or multiple misdemeanor offenses committed during a single occasion, the court may enter judgment and schedule a dispositional hearing.

(b) If the judgment previously deferred is imposed and a dispositional hearing scheduled pursuant to subdivision (a), the juvenile court shall report the complete criminal history of the minor to the Department of Justice, pursuant to Section 602.5.

(c) If the minor has performed satisfactorily during the period in which deferred entry of judgment was granted, at the end of that period the charge or charges in the wardship petition shall be dismissed and the arrest upon which the judgment was deferred shall be deemed never to have occurred and any records in the possession of the juvenile court shall be sealed, except that the prosecuting attorney and the probation department of any county shall have access to these records after they are sealed for the limited purpose of determining whether a minor is eligible for deferred entry of judgment pursuant to Section 790 and as described in subdivision (d).

(d) (1) A record that has been sealed pursuant to this section may be accessed, inspected, or utilized by the prosecuting attorney in order to meet a statutory or constitutional obligation to disclose favorable or exculpatory evidence to a defendant in a criminal case in which the prosecuting attorney has reason to believe that access to the record is necessary to meet the disclosure obligation. A request to access information in the sealed record for this purpose, including the prosecutor's rationale for believing that access to the information in the record may be necessary to meet the disclosure obligation and the date by which the records are needed, shall be submitted by the prosecuting attorney to the juvenile court. If the juvenile court is unable to rule before the date by which the records are needed, the juvenile court may designate the court hearing the criminal case for which the records are requested to hear and rule on the request. The juvenile court or designated criminal court shall notify the person having the sealed record, including the person's attorney of record, that the court is considering the prosecutor's request to access the record, and the court shall provide that person with the opportunity to respond, in writing or by appearance, to the request prior to making its determination. The juvenile court or designated criminal court may require the prosecuting attorney to provide notice to the juvenile and juvenile's attorney of record if the court provides the address of the juvenile and the juvenile's attorney of record. The juvenile court or designated criminal court shall review the case file and records that have been referenced by the prosecutor as necessary to meet the disclosure obligation and any response submitted by the person having the sealed record. The court shall approve the prosecutor's request to the extent that the court has, upon review of the relevant records, determined that access to a specific sealed record or portion of a sealed record is necessary to

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enable the prosecuting attorney to comply with the disclosure obligation. If the juvenile court or designated criminal court approves the prosecuting attorney’s request, the court shall state on the record appropriate limits on the access, inspection, and utilization of the sealed record information in order to protect the confidentiality of the person whose sealed record is accessed pursuant to this subdivision. A ruling allowing disclosure of information pursuant to this subdivision does not affect whether the information is admissible in a criminal or juvenile proceeding. This subdivision does not impose any discovery obligations on a prosecuting attorney that do not already exist.

(2) This subdivision shall not apply to juvenile case files pertaining to matters within the jurisdiction of the juvenile court pursuant to Section 300.
SUMMARY: Creates a new sexual battery crime for the specific situation in which a person causes another person to touch an intimate part of either of those persons, or a third person, for the purpose of sexual arousal, sexual gratification, or sexual abuse, by threatening to use the authority to incarcerate, arrest, or deport the victim or another person, if the touching is against the will of the victim and the victim has a reasonable belief that the perpetrator is a public official, as defined. Specifically, this bill:

1) Makes it a sexual battery for any person to cause another person to touch an intimate part of either of those persons or a third person for the specific purpose of sexual arousal, sexual gratification, or sexual abuse, by threatening to use their authority to incarcerate, arrest, or deport the victim or another person, if the touching is against the will of the victim and the victim has a reasonable belief that the perpetrator is a public official.

2) Punishes a sexual battery of this nature as either a misdemeanor with a maximum one year in jail and a two thousand dollar ($2,000) fine, or as a felony carrying a two, three, or four year state prison term, and a fine not exceeding ten thousand dollars ($10,000).

EXISTING LAW:

1) States sexual battery occurs when any person who touches an intimate part of another person while that person is unlawfully restrained by the accused or an accomplice, if the touching is against the will of the person touched and is for the purpose of sexual arousal, sexual gratification, or sexual abuse. (Pen. Code § 243.4, subd. (a).)

2) States sexual battery occurs any person who touches an intimate part of another person who is institutionalized for medical treatment and who is seriously disabled or medically incapacitated, if the touching is against the will of the person touched, if the touching is for the purpose of sexual arousal, sexual gratification, or sexual abuse. (Pen. Code § 243.4, subd. (b).)

3) States sexual battery occurs when any person touches an intimate part of another person for the purpose of sexual arousal, sexual gratification, or sexual abuse, and the victim is at the time unconscious of the nature of the act because the perpetrator fraudulently represented that the touching served a professional purpose. (Pen. Code § 243.4, subd. (c).)

4) States sexual battery occurs when any person, for the purpose of sexual arousal, sexual gratification, or sexual abuse, causes another, against that person's will while that person is unlawfully restrained either by the accused or an accomplice, or is institutionalized for medical treatment and is seriously disabled or medically incapacitated, to masturbate or
touch an intimate part of either of those persons or a third person. (Pen. Code § 243.4, subd. (d).)

5) Punishes the above forms of sexual battery as either a misdemeanor with imprisonment in a county jail for not more than one year, and by a fine not exceeding two thousand dollars ($2,000); or as a felony with imprisonment in the state prison for two, three, or four years, and by a fine not exceeding ten thousand dollars ($10,000). (Pen. Code § 243.4, subds. (a) - (d).)

6) States misdemeanor sexual battery occurs when any person touches an intimate part of another person, if the touching is against the will of the person touched, and is for the specific purpose of sexual arousal, sexual gratification, or sexual abuse; punishes misdemeanor sexual battery by imprisonment in county jail not exceeding six months, or by a fine of either two thousand dollars ($2,000) or three thousand dollars ($3,000), as specified. (Pen. Code § 243.4, subd. (e)(1)).

7) Requires a person who is convicted of sexual battery to register as a sex offender. (Pen. Code § 290, subd. (c).)

8) Defines “extortion” as “the obtaining of property from another, with his or her consent, or the obtaining of an official act of a public officer, induced by a wrongful use of force or fear, or under color of official right.” (Pen. Code, § 518, subd. (a).)

9) Specifies that for the purposes of the extortion statute, “consideration” means anything of value, including sexual conduct, as specified, or an image of an intimate body part, as specified. (Pen. Code § 518, subd. (b).

10) Punishes extortion by imprisonment in the county jail for two, three or four years. (Pen. Code § 520.)

11) Criminalizes the act of soliciting another person to commit extortion and punishes such solicitation as either a misdemeanor or felony, as specified. (Pen. Code, § 653f.)

FISCAL EFFECT: Unknown

COMMENTS:

1) Author's Statement: According to the author, “California’s Penal Code currently protects against most instances when someone is sexually assaulted. There is no current law that prohibits Peace Officers from inducing victims to commit sex acts by threatening to arrest, incarcerate or deport them. Peace Officers are trusted and valued members of our society and communities. Unfortunately, there are instances where some officers abuse their power and authority and target victims. We must make sure ‘bad apples’ are caught and not on our streets anymore. Closing this loophole will keep California and our communities safer.”

2) This Bill would Prohibit Conduct that is Already Covered by Existing Law: This bill would state that is a sexual battery for a perpetrator to cause the victim to do some kind of sexual touching by making a threat to arrest, incarcerate, or deport the victim, if the victim believes that the perpetrator is public official. The bill would state that the sexual touching
of either the perpetrator or the victim's self, or a third person, would all constitute sexual battery if done pursuant to one of the specified threats.

The provisions proposed by this bill appear to be entirely covered by existing law. Penal Code Section 243.4, the sexual battery statute, already covers any sexual touching of either the perpetrator or the victim if the victim is "unlawfully restrained." The term "unlawfully restrained" constitutes any kind of threat or even simple directions from a person holding him or herself out to be an authority figure. (See People v. Grant (1992) 8 Cal. App. 4th 1105, 1112-13.) In the words of the California courts, "a person is unlawfully restrained when his or her liberty is being controlled by words, acts or authority of the perpetrator aimed at depriving the person's liberty." (Ibid., quoting People v. Arnold (1992) 6 Cal. App. 4th 18.)

In Grant, the defendant approached a couple who were kissing in their car in a parking lot at night. (Id. at 1108.) The defendant presented himself as an authority figure who was working with the police on vandalism problems in the area. (Ibid.) After some discussion, the defendant took the young female from the car and ordered the male to stay in the car. He then groped the female in a variety of locations and forced her to put her hand down his pants. (Ibid.) All the while, the defendant was telling the young couple that if they did not cooperate they might be in trouble and he might have to call the police to take them away. (Id. at 1113.) The court concluded that this behavior by the defendant constituted sexual battery, stating that the young woman's liberty was clearly being controlled by the defendant's words and acts of authority. (Ibid.) The Grant case is one of many that demonstrate that the current sexual battery statute is sufficient to cover the threats enumerated in this bill. (See e.g. People v. Rosen (2007) 148 Cal. App. 4th 1311 (police officer "exerted psychological coercion by virtue of his position as a police officer and her situation as a prostitute subject to arrest" to get her to touch his penis); People v. Hughey, (2018) Cal. App. Unpub. LEXIS 259 (the perpetrator's act of putting his finger to his lips and "shushing" the victim was sufficient to constitute unlawful restraint for sexual battery.)

The conduct that this bill would prohibit would also likely be covered under California's extortion statute. Penal Code section 518 prohibits a person from obtaining anything of value, including sexual conduct, as a result of a threat made against the person. A companion section, Penal Code Section 519 specifies that threats to accuse a person of a crime and threats to expose someone's unlawful immigration status constitute extortionate threats. It is also irrelevant that the person who makes the threat has the legal authority to carry out the threat. (Flatley v. Mauro (2006) 39 Cal. 4th 299, 326 (extortion "criminalizes the making of threats that, in and of themselves, may not be illegal.").)

The sexual battery statute currently contains ten subdivisions. The unlawful restraint element of the current sexual battery covers all of the threats listed in this bill and extends to even more benign verbal and non-verbal instructions. In addition, the threats proposed by this bill are likely punishable as extortion. Should the Legislature add an eleventh subdivision to the sexual battery statute in order to cover conduct that is already punishable by existing law?

3) The Need for this Bill: Included in the background information was a link to a news article which is apparently the impetus for this measure. (Fountain, Paso Case Shows Sex Misconduct by Police Isn't Just Unprofessional — It Should Be Criminal, Jan. 12, 2019, available at: https://www.sanluisobispo.com/opinion/editorials/article223838225.html, [as of Apr. 18, 2019].) The article deals with the decision of the local district attorney in Paso
Robles not to prosecute a police officer for a number of allegations of rape, sexual assault, and misconduct while he was on the job. (Id.) In one incident, a woman accused the officer of lingering behind the scene of a call after other officers had left and sexually assaulting her. According to the same woman, the officer later returned to the scene and raped her. To dissuade the woman from reporting him, the officer threatened to call Child Protective Services and have her children taken away. (Id.) The article indicates that the district attorney explained his decision not to charge on inconsistencies in the woman’s statement and problems of proof. (Id.) In another incident, the same officer was accused of forcing a woman to expose her breasts by threatening to arrest her. As to that allegation, the district attorney stated that the woman “was unsure what year the incident occurred, [ ] and since there is a three-year statute of limitations on that crime, it was necessary to pin down a date.” (Id.) It therefore appears that the district attorney chose not to prosecute the officer because there was there were evidentiary problems with the charges, not because there was a loophole in California’s Penal Code that allowed the officer to walk free. It is unclear how this bill would address either of the evidentiary problems that the district attorney cited as the reason for not pressing charges against the officer in Paso Robles.

4) Argument in Support: According to the California State Sheriffs’ Association: “On behalf of the California State Sheriffs’ Association (CSSA), we are pleased to support your measure, Assembly Bill 1599, which would make it a crime for a person to cause another person to touch an intimate part of either of those persons or a third person for the specific purpose of sexual arousal, sexual gratification, or sexual abuse, by threatening to use their authority to incarcerate, arrest, or deport the victim or another person, if the touching is against the will of the victim and the victim has a reasonable belief that the perpetrator is a public official.

“Penal Code Section 243 prohibits various forms of sexual battery, and defines sexual battery as intimate touching against a victim’s will. However, it is not considered sexual battery when a victim is coerced or threatened into touching themself or another person.”

5) Argument in Opposition: According to the American Civil Liberties Union of California: “Despite your worthy intentions, the conduct addressed by AB 1599 can already be prosecuted as a wobbler under existing law. Penal Code section 243.3(a) makes sexual battery a wobbler when the victim is “unlawfully restrained.” Physical restraint is not required; the battery can be accomplished by threats to exercise actual or pretended authority. People v. Grant (1992) 8 Cal.App. 4th 1105. Courts have interpreted this subdivision to apply to situations where a law enforcement officer abuses his authority to commit sexual battery. See, e.g. People v. King (2010) 183 Cal.App. 4th 1281, 1321-1322. Penal Code section 518, regarding extortion, would also apply where threats of accusing someone of a crime or of taking action based on their immigration status are used to coerce someone into engaging in “sexual conduct as defined in subdivision (b) of Section 311.3.” Extortion is a felony. (Penal Code §520.)

“Needlessly adding a new paragraph to Penal Code section 643.4 to address the specific situation of sexual battery by means of a threat to use one’s authority as a public official will unfortunately only create confusion regarding the applicability of the existing law to this situation. We believe that the aims of the bill would be better served by adding language in Penal Code section 518 to clarify that the existing crime of extortion includes extortion to
coerce the victim into submitting to an act of sexual battery.

6) **Prior Legislation:**

a) AB 2078 (Daly), of the 2017-2018 Legislative Session would have expanded the crimes of sexual battery, rape, sodomy, oral copulation, and sexual penetration to include non-consensual, sexual touching by a person who has been engaged by the victim for a professional purpose. AB 2078 was held in the Senate Appropriations Committee.

b) AB 1033 (C. Garcia), of the 2017-2018 Legislative Session, would have created a new sexual battery crime when there was an agreement to use a condom during consensual sexual intercourse and one person intentionally tampered with or removed the condom. AB 1033 was held in the Senate Appropriations Committee.

c) SB 500 (Leyva), Chapter 518, Statutes of 2017, created the crime of “sextortion” which prohibits a threat to distribute an image of a person’s intimate body parts of a person engaged in sexual conduct with the intent to coerce the person to engage in sexual conduct or to produce additional images.

a) SB 1255 (Canella), Chapter 863, Statutes of 2014, expanded the elements of “revenge porn.”

b) SB 255 (Canella), Chapter 466, Statutes of 2013, created the crime of “revenge porn” which prohibits the distribution of an image of an identifiable person’s intimate body parts which had been taken with an understanding that the image would remain private.

c) AB 2078 (Nielsen), Chapter 123, Statutes of 2012, added peace officers to the list of individuals who are prohibited from engaging in consenting sexual activity with a confined person.

**REGISTERED SUPPORT / OPPOSITION:**

**Support**

California District Attorneys Association  
California State Sheriffs' Association  
End Violence Against Women International  
Peace Officers Research Association Of California

**Oppose**

American Civil Liberties Union of California

**Analysis Prepared by:** Matthew Fleming / PUB. S. / (916) 319-3744