
SENATE COMMITTEE ON PUBLIC SAFETY

Senator Nancy Skinner, Chair

2017 - 2018 Regular

Bill No: AB 324 **Hearing Date:** July 11, 2017
Author: Kiley
Version: March 22, 2017
Urgency: No **Fiscal:** Yes
Consultant: SC

Subject: *Crimes: Disorderly Conduct*

HISTORY

Source: Conference of California Bar Associations

Prior Legislation: AB 1310 (Gatto), Ch. 643, Stats. 2015
AB 1528 (Donnelly), 2012, failed passage in Assembly Public Safety
AB 1484 (Ackerman), Ch. 666, Stats. 2004
AB 182 (Ackerman), Ch. 231, Stats. 1999

Support: Association of Orange County Deputy Sheriffs; California District Attorneys Association; California Police Chiefs Association; California State Sheriffs' Association; California Statewide Law Enforcement Association; Crime Victims United; Fraternal Order of Police; Long Beach Police Officers Association; Los Angeles County District Attorney's Office; Riverside Sheriffs Association; Sacramento County Deputy Sheriffs' Association; San Diego County District Attorney's Office

Opposition: American Civil Liberties Union of California; California Attorneys for Criminal Justice; California Public Defenders Association

Assembly Floor Vote: 73 - 0

PURPOSE

The purpose of this bill is to eliminate the requirement that a victim be "identifiable" from the crimes of secretly recording or photographing under or through the clothing worn by another identifiable person, or while the other person is in a state of full or partial undress, for the purpose of sexual gratification, as specified.

Existing law makes it a misdemeanor for any person to use a concealed device to secretly videotape or record by electronic means another identifiable person under or through his or her clothing, for the purpose of viewing that person's body or undergarments without consent and under circumstances in which that person has a reasonable expectation of privacy, if the perpetrator commits the act with a prurient intent. (Pen. Code § 647, subd. (j)(2).)

Existing law makes it a misdemeanor for any person who uses a concealed camcorder, motion picture camera, or photographic camera of any type, to secretly videotape, film, photograph, or record by electronic means, another, identifiable person who may be in a state of full or partial

undress, for the purpose of viewing the body of, or the undergarments worn by, that other person, without the consent or knowledge of that other person, in the interior of a bedroom, bathroom, changing room, fitting room, dressing room, or tanning booth, or the interior of any other area in which that other person has a reasonable expectation of privacy, with the intent to invade the privacy of that other person inside. (Pen. Code, § 647, subd. (j)(3).)

Existing law generally provides that a violation of disorderly conduct is punishable by up to six months imprisonment in county jail or up to a fine of \$1000, or both the fine and imprisonment. A second violation of subdivision (j) of Penal Code section 647 is punishable by up to one year in county jail, a fine not exceeding \$2000, or both the fine and imprisonment. (Pen. Code § 647, subd. (l).)

Existing law provides that “identifiable” means capable of identification, or capable of being recognized, meaning that someone could identify or recognize the victim, including the victim herself or himself. It does not require that the victim's identity to actually be established. (*People v. Johnson* (2015) 234 Cal.App.4th 1432, 1441.)

This bill would eliminate the requirement in the above provisions that the videotape or recording must be of an identifiable person.

COMMENTS

1. Need for This Bill

According to the author:

Existing law, California Penal Code 647, states that an individual can only be charged with disorderly conduct for recording a person(s) in a state of partial or full undress for sexual gratification if the person being recorded is identifiable. AB 324 will eliminate the requirement of identifying the person(s) being recorded without their consent.

2. Relevant Case Law

In *People v. Johnson, supra*, 234 Cal.App.4th 1432, the defendant was convicted of 12 counts of secretly videotaping, filming, photographing, or recording by electronic means, another, identifiable person under or through the clothing being worn by that other person, for the purpose of viewing the body of, or the undergarments worn by, that other person, without the consent or knowledge of that other person, with the intent to arouse, appeal to, or gratify the lust, passions, or sexual desires of that person and invade the privacy of that other person, under circumstances in which the other person has a reasonable expectation of privacy, in violation of subdivision (j)(2) of Penal Code section 647. Only three victims had been named, and the others were named Jane Does because law enforcement had not determined who their identities.

During the trial, the jury was shown video footage defendant had recorded in which he followed women and filmed under their skirts, without their knowledge. In some cases, the resulting footage did not capture the women's faces, or their profiles. (*Id.* at 1436.) In some cases only shoes, legs, skirts or dresses, purses, or the woman's back and the back of her head, appeared on

screen. (*Id.* at 1437.) The court was called on to determine whether there was sufficient evidence to support findings that the defendant had violated the criminal statute when the evidence did not include the women’s faces.

The court noted that the elements of criminal statute require that the defendant must film an “identifiable person” to face criminal liability. The court held that “identifiable” means capable of identification, or capable of being recognized. The court stated that in order to be “identifiable” it does not require that the victim’s identity must ultimately be established. The court held the prosecution does not have to prove up the victim’s identity, does not have to prove the victim has actually been identified, located, or named, and does not have to offer evidence showing anyone has actually recognized the victim. (*Id.* at 1441.)

In reaching its decision the court stated that, “identifiable” means that when all of the available evidence is considered, it is reasonably probable that someone could identify or recognize the victim. This includes the victim herself or himself.” (*Ibid.*) The court reasoned that “[t]his is consistent with a legislative goal of criminalizing the invasive act when it poses the most significant risk of harm to specific individuals—when it is reasonably probable the victim could be recognized or recognize himself or herself, potentially leading to the victim’s humiliation and embarrassment.” (*Id.* at 1451.)

On appeal, the court found that based on the totality of the evidence presented, there was sufficient evidence to meet find the victims “identifiable” even where their faces were not depicted in the secret recordings.

The proponents of this bill argue that the “identifiable” element is too burdensome to prove and thus proposes to delete this element altogether. However, as illustrated by the *Johnson* case where the court found there was sufficient evidence to meet the identifiable element even though the majority of the victims were never actually identified, the definition in current law does not appear to be overly restrictive.

Perhaps a better solution would be to codify the definition of “identifiable” provided by the *Johnson* case in order to clarify that a victim does not have to be determined to meet the requirement.

3. Legislative History

One of the invasion of privacy crimes that this bill seeks to amend was enacted in 1999 by AB 182 (Ackerman), Chapter 231, Statutes of 1999, specifically the crime of taking photos through or under the clothing of another person pursuant to Penal Code section 647, subdivision (j)(2). When the bill was heard by the Senate Public Safety Committee, the analysis noted that:

The language of the bill may not clearly state whether or not the victim must be identifiable from the prohibited image to allow conviction under the new crime. However, it appears from the background information that the intent of the author of the bill is that the law could be applied in cases where there is no identifiable victim. Background information provided by the author included examples of ‘up-skirt’ photographs (or electronic scans of some sort of visual recording) found on the Internet. These images depicted only the underclothing of a woman, as seen from behind, under the woman’s skirt. It does not appear possible to determine the identity of the person

whose underclothing is depicted in the photograph. Thus, the bill raises the issue of whether a defendant can be found guilty of criminal violation of privacy where it cannot be determined whose privacy was invaded.

(*People v. Johnson, supra*, 234 Cal.App.4th at 1444, citing Sen. Com. on Public Safety, Analysis of Assem. Bill No. 182 (1999–2000 Reg. Sess.) as amended Apr. 26, 1999, p. 5.)

The bill was subsequently amended to include the “identifiable” element and included that language when it signed into law. When AB 1484 (Ackerman), Chapter 666, Statutes of 2004 enacted Penal Code section 647, subdivision (j)(3), which is the other invasion of privacy crime this bill seeks to amend, it was drafted to include the “identifiable” element for the new crime as well. This bill would eliminate the “identifiable” requirement in both of these subdivisions.

4. Argument in Support

According to the Conference of California Bar Associations, the sponsor of this bill:

In California, [], a voyeur can surreptitiously record and distribute images and videos of the intimate body parts or sexual activities of another person without their knowledge or consent, if the person is not identifiable. This means that in California, it is not enough that a person is discovered taking or posting “up-skirt” or “down-blouse” pictures or videos, but the prosecution “must establish, beyond a reasonable doubt, that when all of the evidence is considered, it is reasonably probable someone could identify or recognize the victim.” (*See People v. Johnson* (2015) 234 Cal.App.4th 1432.) Absent images of victims’ faces or uniquely identifiable characteristics, this is an extremely difficult burden to overcome.

If the “identifiable” requirement is removed, prosecution for invasion of privacy would still require proof that the recording was made or distributed without the subject’s knowledge or consent. But such evidence could be based on the recorded content, the manner in which it was shot, and/or the defendant’s confession, without needing to show an ‘identifiable’ victim. Until then, careful voyeurs who avoid detection can capture and distribute “up-skirt” images and videos without fear of subsequent prosecution, as intimate body parts are typically not features from which persons can be identified.

5. Argument in Opposition

The American Civil Liberties Union of California, in opposition of the bill, argues:

These sections of Penal Code section 647 were enacted by AB 182, passed by the California Legislature in 1999. The requirement that the victim of the crime be “identifiable” was added to the bill when it was heard in the Senate Public Safety Committee. The Committee analysis states:

“[t]he language of the bill may not clearly state whether or not the victim must be identifiable from the prohibited image to allow conviction under the new crime. . . . [T]he bill raises the issue of whether a defendant can be found guilty of criminal violation of privacy where it cannot be determined whose privacy was invaded.”

Subsequently, the word “identifiable” was added, so that the statute now prohibits using electronic equipment to record the intimate body parts of “another, identifiable person,” with the requisite intent and without the person’s consent or knowledge.

. . . .

We understand the view that the use of the word “identifiable” in Penal Code section 647(j)(2) and (3) does not add clarity and has created unnecessary confusion. We do, however, think the point raised by the Senate Public Safety Committee analysis is valid and should be addressed. The crux of the crime is invasion of privacy. It requires evidence that the specific person who was recorded did not consent or have knowledge of the recording. We are concerned that simply deleting the term “identifiable,” without further clarifying that the lack of consent or knowledge must be proven for the specific victim alleged, will add greater confusion and lead to excessive prosecutions.

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