
SENATE COMMITTEE ON PUBLIC SAFETY

Senator Nancy Skinner, Chair

2017 - 2018 Regular

Bill No: SB 500 **Hearing Date:** April 4, 2017
Author: Leyva
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Urgency: No **Fiscal:** Yes
Consultant: SC

Subject: *Sexual Extortion*

HISTORY

Source: California District Attorneys Association
Legal Momentum

Prior Legislation: SB 1137 (Hertzberg), Ch. 725, Stats. 2016
SB 1255 (Canella), Ch. 863, Stats. 2014
SB 255 (Canella), Ch. 466, Stats. 2013
AB 919 (Houston), Ch. 583, Stats. 2008
SB 1484 (Ackerman), Ch. 666, Stats. 2004

Support: California State Sheriffs' Association

Opposition: American Civil Liberties Union of California

PURPOSE

The purpose of this bill is to create the new crime of sexual extortion punishable as either a felony or an alternate felony-misdemeanor, depending on the circumstances, and makes the new crime a registerable offense under the Sex Offender Registration Act.

Existing law provides that any person who knowingly accesses and without permission alters, damages, deletes, destroys, or otherwise uses any data, computer, computer system, or computer network to, among other things, wrongfully control or obtain money, property, or data is guilty a felony punishable by imprisonment in county jail for 16 months, or two or three years and a fine not exceeding \$10,000, or a misdemeanor punishable by imprisonment in a county jail not exceeding one year, by a fine not exceeding \$5,000, or by both that fine and imprisonment.. (Pen. Code, § 502, subs. (c)(1) and (d)(1).)

Existing law provides that any person who knowingly accesses and without permission takes, copies, or makes use of any data from a computer, computer system, or computer network is guilty of is guilty a felony punishable by imprisonment in county jail for 16 months, or two or three years and a fine not exceeding \$10,000, or a misdemeanor punishable by imprisonment in a county jail not exceeding one year, by a fine not exceeding \$5,000, or by both that fine and imprisonment. (Pen. Code, § 502, subs. (c)(2) and (d)(1).)

Existing law defines “data” for purposes of the above provisions to mean a representation of information, knowledge, facts, concepts, computer software, or computer programs or instructions. Data may be in any form, in storage media, or as stored in the memory of the computer or in transit or presented on a display device. (Pen. Code, § 502, subd. (b)(8).)

This bill specifies that data includes, but is not limited to, sexually explicit recordings or images.

Existing law states that any person who extorts money or other property from another, under circumstances not amounting to robbery or carjacking, by means of force, or any threat, shall be punished by imprisonment in county jail for two, three or four years. (Pen. Code, § 520.)

Existing law defines fear for purposes of extortion to include a threat of any of the following:

- To do an unlawful injury to the person or property of the individual threatened or of a third person;
- To accuse the individual threatened, or a relative of his or her, or a member of his or her family, of a crime;
- To expose or to impute to him, her, or them a deformity, disgrace or crime.
- To expose a secret affecting him or her, or them;
- To report his, her or their immigration status or suspected immigration status. (Pen. Code, § 519.)

This bill creates the new crime of sexual extortion punishable as follows:

- By imprisonment in a county jail for not more than one year, and by a fine not exceeding \$2,000, or by imprisonment in the state prison for 16 months or two or three years, and by a fine not exceeding \$10,000 if the person:
 - Threatened physical harm to a person, threatened to injure the property or reputation of a person, or threatened to distribute an image or video of the intimate body part or parts of a person or of a person engaged in sexual conduct;
 - With the intent to coerce the person to engage in sexual conduct or to produce, provide, or distribute any image, video, or other recording which depicts the intimate body part or parts of the person or of the person engaged in sexual conduct.
- By imprisonment in the state prison for two, three, or four years, and by a fine not exceeding \$10,000 if the person:
 - Knowingly caused any person to engage in sexual conduct or to produce, provide, or distribute any image, video, or other recording which depicts the intimate body part or parts of the person or of the person engaged in sexual conduct,
 - By threatening physical harm to the person, threatening to injure the property or reputation of the person, or threatening to distribute an image or video of the intimate body part or parts of the person or of the person engaged in sexual conduct.

This bill provides that it is a separate offense for each victim and each incident of sexual extortion.

This bill provides the following definitions for purposes of sexual extortion:

- “Distribute” means to transfer possession of, whether with or without consideration.
- “Intimate body part” means any portion of the genitals, the anus, and, in the case of a female, also includes any portion of the breasts below the top of the areola, that is either uncovered or clearly visible through clothing.
- “Sexual conduct” means any of the following: (1) Sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex or between humans and animals; (2) Penetration of the vagina or rectum by any object; (3) Masturbation for the purpose of sexual stimulation of the viewer; (4) Sadomasochistic abuse for the purpose of sexual stimulation of the viewer; (5) Exhibition of the genitals or the pubic or rectal area of any person for the purpose of sexual stimulation of the viewer; and (6) Defecation or urination for the purpose of sexual stimulation of the viewer.

This bill states that the provisions of this bill do not prohibit an individual from being charged and convicted of separate criminal acts committed while violating or attempting to violate the new section.

Existing law defines rape to include an act of sexual intercourse accomplished against a victim’s will by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the person of another. (Pen. Code, § 261, subd. (a)(2).)

Existing law defines “duress” for purposes of rape to mean a direct or implied threat of force, violence, danger, or retribution sufficient to coerce a reasonable person of ordinary susceptibilities to perform an act which otherwise would not have been performed, or acquiesce in an act to which one otherwise would not have submitted. The total circumstances, including the age of the victim, and his or her relationship to the defendant, are factors to consider in appraising the existence of duress. (Pen. Code, § 261, subd. (b).)

Existing law generally punishes rape by imprisonment in state prison for three, six or eight years. (Pen. Code, § 264, subd. (a).)

Existing law punishes attempts to commit a crime by imprisonment for one-half the term of imprisonment prescribed upon a conviction of the offense attempted. (Pen. Code, § 664, subd. (a).)

Existing law provides that every person who contacts or communicates with a minor, or attempts to contact or communicate with a minor, who knows or reasonably should know that the person is a minor, with intent to commit specified sex offenses involving the minor shall be punished by imprisonment in state prison. (Pen. Code, § 288.3.)

Existing law provides that any person ordered by a court to register as a sex offender for any offense not specifically enumerated in the Sex Offender Registration Act shall so order if the court finds that the person committed the offense as a result of sexual compulsion or for the

purposes of sexual gratification. The court shall state on the record for its findings and the reasons for requiring registration. (Pen. Code, § 290.006.)

This bill specifies that a court may order a person convicted of sexual extortion to register as a sex offender pursuant to the above provision.

COMMENTS

1. Need for This Bill

According to the author of this bill:

Sexual extortion is not a new concept, but it is increasing in the digital age. Today, perpetrators can hack into a stranger's computer by pretending to be a friend or peer and obtain private, often sexually explicit, images of their victims. Perpetrators then use the threat of distribution of these images to demand sex or additional sexually explicit images. Concerned over this threat and worried that these images will be posted online or sent to friends or family, the victims – often teens and young women – comply with the perpetrators' demands. The National Center for Missing and Exploited Children has reported that 78% of reported sexual extortion victims were girls, with an average age of 15, and more than 20% of reported incidents involved multiple victims.

Currently, California has a revenge porn law which criminalized the distribution of sexually explicit images without consent. The problem is that with sexual extortion cases there is no actual distribution, just the threat of distribution. Due to this law enforcement and prosecutors are hampered by the absence of a clear offense that specifically targets sexual extortion offenses. The lack of consistency in the prosecution of sexual extortion cases and the lack of a specific statute that criminalizes sexual extortion leaves prosecutors little choice but to proceed under a hodgepodge of statutes. Since California law does not currently allow for full or uniform prosecution of sexual extortion cases, perpetrators go unpunished or are charged with lesser crimes in many cases. SB 500 will criminalize sexual extortion and give prosecutors an important tool to combat these offenses and protect victims.

2. Reported Incidents of Sexual Extortion

There have been several reported incidents that could constitute sexual extortion in California and most have been prosecuted by the federal government. One of the more publicized incidents involved Miss Teen USA and other women who had been hacked. The defendant, college student Jarred James Abrahams, age 20, took control of victims' email accounts, social media accounts, and their computers – which allowed him to remotely turn on web cameras and take pictures of them naked. Abrahams used the nude photos to extort his victims by threatening to publicly post the compromising photos or videos to the victims' social media accounts – unless they either sent more nude photos or videos, or engaged in a Skype session with him and did what he said for five minutes. Abrahams pleaded guilty to one count of computer hacking and three counts of extortion and was sentenced to 18 months in federal prison. (See <<https://www.justice.gov/usao-cdca/pr/temecula-student-sentenced-federal-prison-sextortion-case>> [as of Mar. 27, 2017].)

In a more recent case, defendant Cesar Estrada-Davila found his victims on social media by posing as a modeling agent and asked them for nude photos. When Estrada-Davila received the images, he threatened to send the photos to their friends and family if he did not receive more nude photos. Prosecutors said there were 21 female victims between the ages of 12 and 17 years old from California, Utah, Texas, Michigan, Washington, Colorado, Nevada, and Florida. Estrada-Davila pleaded no contest to a total of 38 felony counts: one count of lewd act upon a child, 21 counts of distributing or showing child or youth pornography to a minor, and 16 counts of possession of child pornography. He was sentenced to 39 years and 8 months in state prison, and must register as a sex offender. (See <http://losangeles.cbslocal.com/2017/02/17/20-year-old-rosemead-man-gets-nearly-40-years-behind-bars-for-revenge-porn/>> [as of Mar. 27, 2017].)

Another case involved defendant Mark Serrano who stole a sex video that his ex-girlfriend had made with her old boyfriend and threatened that if she did not make a sex video with him he would e-mail copies of the prior video to her employer, her school contacts and to amateur pornography websites. He said he would return the prior video to her if she made a new sex video with him. Serrano was charged and convicted of attempted rape under the theory that he tried to coerce the victim to engage in sexual intercourse by threatening to disseminate a sex video the victim had previously produced with a prior boyfriend. Serrano was also ordered to register as a sex offender. (*Serrano v. Butler*, No. C 06-04433 JW, 2010 U.S. Dist. LEXIS 137617 (N.D. Cal., Dec. 20, 2010).)

California does not have a specific sexual extortion statute so these incidents have been charged under different statutes, such as hacking, possession of child porn, or attempted rape. This bill would create the new crime of sexual extortion.

3. First Amendment Restrictions on Criminalizing Threatening Speech

The First Amendment to the United States Constitution states: "Congress shall make no law . . . abridging the freedom of speech" This fundamental right is applicable to the states through the due process clause of the Fourteenth Amendment. (*Aguilar v. Avis Rent A Car System, Inc.* (1999) 21 Cal. 4th 121, 133-134, citing *Gitlow v. People of New York* (1925) 268 U.S. 652, 666.) Article I, section 2, subdivision (a) of the California Constitution provides that: "Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press."

While these guarantees are stated in broad terms, "the right to free speech is not absolute." (*Aguilar v. Avis Rent A Car System, Inc.*, *supra*, 21 Cal. 4th at p. 134, citing *Near v. Minnesota* (1931) 283 U.S. 697, 708; and *Stromberg v. California* (1931) 283 U.S. 359.) As the United States Supreme Court has acknowledged: "Many crimes can consist solely of spoken words, such as soliciting a bribe (Pen. Code, § 653f), perjury (Pen. Code, § 118), or making a terrorist threat (Pen. Code, § 422)." (*Ibid.*) In *In re M.S.* (1995) 10 Cal. 4th 698, 710, the court held that "the state may penalize threats, even those consisting of pure speech, provided the relevant statute singles out for punishment threats falling outside the scope of First Amendment protection." Nonetheless, statutes criminalizing threats must be narrowly directed against only those threats that truly pose a danger to society. (*People v. Mirmirani* (1981) 30 Cal. 3d 375, 388, fn. 10.)

The First Amendment permits states to ban a true threat. (*Watts v. United States* (1969) 394 U.S. 705, 708.) True threats are "statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group

of individuals." (*Virginia v. Black* (2003) 538 U.S. 343, 359, citing *Watts v. United States*, *supra*, 394 U.S. at 708.) Alleged threats should be considered in light of their entire factual context, including the surrounding events and reactions of the listeners. . . . A threat made such that "a reasonable person would foresee that the listener will believe he will be subjected to physical violence... is unprotected by the First Amendment." (*Planned Parenthood of the Columbia/Willamette v. American Coalition of Life Activists* (2002) 290 F.3d 1058, 1077.) The statute must require "more than the mere utterance of threatening words—some level of intent is required. . . . it is not enough that a reasonable person might have understood the words as a threat—a jury must find that the speaker actually intended to convey a threat." (*Perez v. Florida*, No. 16-6250, 2017 U.S. LEXIS 1570, *4 (U.S., Mar. 6, 2017).)

Also related to true threats are conditional threats such as blackmail and extortion. "[E]xtortionate threats, which are true threats . . . [are] not protected speech." (*United States v. Coss* (6th Cir. 2012) 677 F.3d 278, 289.) "[N]ot all threats to engage in speech that will have the effect of damaging another person's reputation, even if a forbearance from speaking is conditioned on the payment of money, are wrongful. For example, the purchaser of an allegedly defective product may threaten to complain to a consumer protection agency or to bring suit in a public forum if the manufacturer does not make good on its warranty. Or she may threaten to enlist the aid of a television "on-the-side-of-the-consumer" program. Or a private club may threaten to post a list of the club members who have not yet paid their dues." (*United States v. Jackson* (2d Cir. 1999) 180 F.3d 55, 67.) In order to pass constitutional muster, a statute must require both a wrongful threat and an intent to extort. (*United States v. Coss*, *supra*, 677 F.3d at 290.)

One of the provisions in this bill criminalizes speech by making it unlawful to "threaten physical harm to a person, threaten to injure the property or reputation of a person, or threaten to distribute an image or video of the intimate body part or parts of a person or of a person engaged in sexual conduct with an intent to coerce the person to engage in sexual conduct or to produce, provide, or distribute any image, video, or other recording which depicts the intimate body part or parts of the person or of the person engaged in sexual conduct." As such, it implicates a First Amendment analysis of whether the proposed statute criminalizes protected speech.

As discussed above, the right to free speech is not absolute. Examples of speech that are not protected under the First Amendment are true threats and speech that incites imminent violence. Similar to true threats, extortionate threats may be regulated as long as it requires both wrongful threats and the intent to extort. The bill's provision referred to above specifies the type of harm that must be threatened and the intent that is required, so at least on its face, this provision does not appear to be unconstitutional. Whether it is unconstitutional as applied to certain defendants would depend on the facts and circumstances of those individual cases.

4. Governor's Veto Message Regarding "Multiplication" and "Particularization" of Crimes

In 2015, the Governor vetoed a number of criminal justice bills because they created new crimes for conduct that was already prohibited. The bills the Governor vetoed on this basis included: AB 144, AB 849, SB 168, SB 170, SB 271, SB 333, SB 347, SB 716, SB 722.

The Governor vetoed those bills and issued this statement applying to all the bills:

Each of these bills creates a new crime - usually by finding a novel way to characterize and criminalize conduct that is already proscribed. This multiplication and

particularization of criminal behavior creates increasing complexity without commensurate benefit.

Over the last several decades, California's criminal code has grown to more than 5,000 separate provisions, covering almost every conceivable form of human misbehavior. During the same period, our jail and prison populations have exploded.

Before we keep going down this road, I think we should pause and reflect on how our system of criminal justice could be made more human, more just and more cost-effective.

As pointed out above, incidents of sexual extortion have been prosecuted under existing law as hacking or attempted rape. Does creating the new crime of sexual extortion further complicate California's criminal code by particularizing crimes that are already illegal?

5. Ongoing Concerns over Prison Overcrowding

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.

The court also ordered California to implement the following population reduction measures in its prisons:

- Increase prospective credit earnings for non-violent second-strike inmates as well as minimum custody inmates.
- Allow non-violent second-strike inmates who have reached 50 percent of their total sentence to be referred to the Board of Parole Hearings (BPH) for parole consideration.
- Release inmates who have been granted parole by BPH but have future parole dates.
- Expand the CDCR's medical parole program.
- Allow inmates age 60 and over who have served at least 25 years of incarceration to be considered for parole.
- Increase its use of reentry services and alternative custody programs.

(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).) Following the implementation of these measures along with the passage of Proposition 47, approved by California voters in November 2014, California met the federal court's population cap in December 2015. (Defendants' December 2015 Status Report in Response to February 10, 2014 Order, 2:90-cv-00520 KJM DAD PC, 3-Judge Court, *Coleman v. Brown, Plata v. Brown*.) The administration's most recent status report states that as "of December 14, 2016, 114,031 inmates were housed in the State's 34 adult institutions" which amounts to approximately 135.3% of design capacity, and 4,704 inmates were housed in out-of-state facilities. (Defendants' December 2016 Status Report in Response to February 10, 2014 Order, 2:90-cv-00520 KJM DAD PC, 3-Judge Court, *Coleman v. Brown, Plata v. Brown* (fn. omitted).)

While significant gains have been made in reducing the prison population, the state must stabilize these advances and demonstrate to the federal court that California has in place the “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).

This bill creates the new crime of sexual extortion and provides that the offense is punishable by imprisonment in the state prison. Although the state is currently in compliance with the court-ordered population cap, creating new state prison crimes reverses the progress made in reducing the state prison population. This is contrary to the court's order for a durable solution to prison overcrowding.

6. Penalty Assessments on Criminal Fines

This bill specifies fines of up to \$2000 if a person is convicted of misdemeanor sexual extortion and up to \$10,000 if a person is convicted of felony sexual extortion. As described in detail below, when a fine is imposed in a criminal case, that base amount is increased by over 300% because of penalty assessments required for each criminal fine.

Assuming a defendant was fined \$10,000 as the maximum fine, the following penalty assessments would be imposed pursuant to the Penal Code and the Government Code which would substantially increase the total fine:

Base Fine:		\$ 10,000
State Penalty Assessment:	\$10 for every \$10	\$10,000
County Penalty Assessment:	\$7 for every \$10	\$7,000
Court Construction Penalty Assessment:	\$5 for every \$10	\$5,000
Proposition 69 DNA Penalty Assessment:	\$1 for every \$10	\$1000
DNA Identification Fund Penalty Assessment:	\$4 for every \$10	\$4000
EMS Penalty Assessment:	\$2 for every \$10	\$2000
EMAT Penalty Assessment:	\$4 per conviction	\$4
State Surcharge:	20% of base fine	\$2,000
Court Operations Assessment:	\$40 per conviction	\$40
Conviction Assessment Fee:	\$30 per felony or misdemeanor conviction	\$30
Night Court Fee:	\$1 per fine and fee imposed	\$1
Restitution Fine:	\$150 minimum per misdemeanor,\$300 minimum per felony	\$300

Total Fine with Assessments:

\$41,375

7. Intent Required under this Bill

This bill contains two provisions that criminalize threats against another person for the purpose of coercing them to engage in sexual acts or send over nude or sexually explicit images or videos. One of the provisions requires that the person had specific intent to coerce the other person to do one of the enumerated acts, while the other provision only requires that the person knowingly caused the person to do one of these acts. Proving that someone knowingly did something is a lower threshold than proving that they had certain intent when doing it. Considering that the knowingly caused requirement is an element in the provision that provides for the harsher penalty, should that provision also require specific intent?

8. Arguments in Support

Legal Momentum, the sponsor of this bill, writes,

Sexual extortion occurs when a perpetrator obtains sexual images of a victim and then uses the threat of distributing the sexual images to demand additional images or in-person sexual acts. Presented with this threat victims – often teenagers and young women – have no real choice but to comply with the perpetrator’s demands. Victims of sexual extortion experience the same irreparable harm as other sexual assault victims and rape victims

We recently published a report, “A Call to Action: Ending Sexual Extortion in the Digital Age,” together with Orrick, Herrington & Sutcliffe LLP. Our report examines how sexual extortion has proliferated in the digital age. As the report discusses, the FBI has designated sexual extortion as the fastest growing threat to Internet safety for children, teens and women. The National Center for Missing and Exploited Children received more than 800 sextortion-related tips between 2013 and 2015. 78% of reported victims were girls, with an average age of 15, and more than 20% of reported incidents involved multiple victims. These statistics are alarming, particularly because like other sexual assault crimes, sexual extortion is likely underreported.

Given how easily sexual extortion can be proliferated digitally, and the harm it causes, it is critical that California laws address the issue head-on. . . .

9. Arguments in Opposition

According to the American Civil Liberties Union of California,

Much of the conduct at issue in this bill can generally be criminalized under existing law. Under current law, a person can already be convicted of rape if an act of sexual intercourse is “accomplished against a person’s will by...duress...” (Penal Code, § 61, subd. (a)(2).) Under the statute, “duress” is defined as “a direct or implied threat of force, violence, danger, or retribution sufficient to coerce a reasonable person of ordinary susceptibilities to perform an act which otherwise would not have been performed, or acquiesce in an act to which one otherwise

would not have submitted.” (Penal Code, §261, subd. (b).) The statute goes on to provide that, “[t]he total circumstances, including the age of the victim, and his or her relationship to the defendant, are factors to consider in appraising the existence of duress.” (Id.) Likewise, if a person is convicted of a lewd and lascivious act on a child under 14 through “duress,” or convicted of oral copulation accomplished against a person under 14 through “duress,” the person would be guilty of a felony and punished by up to 10 or 14 years, respectively, in prison. (Penal Code, §§288, subd. (b)(1); 288a, subd. (c)(2).)

In addition, any act in which the person, “through force, fear, coercion, deceit, violence duress, menace, or threat of unlawful injury to the victim or to another person, causes a person under 18 years of age to engage in a commercial sex act” could, under certain circumstances, constitute criminal profiteering. (Penal Code, § 186.2, subd. (a)(30).) For purposes of the criminal profiteering statute, “commercial sex act” is defined to mean “any sexual conduct on account of which anything of value is given or received by any person.” (Id.) A person can also be convicted of human trafficking if the person causes a minor to engage in a commercial sex act through “...violence, duress, menace, or threat of unlawful injury...” and can be punished by 15-years-to-life in prison. (Penal Code, §236.1, subd. (c).)

We also fear that the proscriptions in this bill could inadvertently end up criminalizing more youth, who engage in the proscribed behavior. While their conduct may very well be misguided and inappropriate, it frequently should not be penalized as specified in this bill.

Given the state’s historic prison overcrowding problems, now is not the time for California to begin creating new prison-term felonies, particularly when existing penalties appear sufficient. Corrections spending remains high; the Governor’s proposed 2017-18 Budget provides \$11.3 billion. The proposed budget already projects an increase in the daily adult inmate population, and unnecessarily sending more people to prison for longer periods of time will continue the upward trajectory in spending. California needs to use more sensible and cost-effective ways to address criminal justice, as the rest of the world already does.

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