
SENATE COMMITTEE ON PUBLIC SAFETY

Senator Aisha Wahab, Chair

2023 - 2024 Regular

Bill No: AB 1874 **Hearing Date:** June 18, 2024
Author: Sanchez
Version: March 19, 2024
Urgency: No **Fiscal:** Yes
Consultant: SC

Subject: *Crimes: disorderly conduct*

HISTORY

Source: Orange County Sheriff's Department

Prior Legislation: AB 1310 (Gatto), Ch. 643, Stats. 2015
AB 1528 (Donnelly), failed Assem. Public Safety Comm., 2012
AB 665 (Torres), Chapter 658, Statutes of 2011
SB 1484 (Ackerman), Chapter 666, Statutes of 2004
AB 2640 (Cox), failed Assem. Public Safety Comm., 2004
AB 2553 (Garcia), failed Assem. Public Safety Comm., 2004
AB 182 (Ackerman), Ch. 231, Stats. 1999

Support: California Association of Highway Patrolmen; California District Attorneys Association; Peace Officers' Research Association of California (PORAC)

Opposition: None known

Assembly Floor Vote: 68 - 0

PURPOSE

The purpose of this bill is to increase the punishment for a second or subsequent offense of secretly recording or photographing a minor in full or partial undress without their consent in a place where the minor has a reasonable expectation of privacy, from a misdemeanor to an alternate felony-misdemeanor if the defendant was 18 years of age or older at the time of the offense.

Existing law provides that a person who records or photographs 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 is guilty of disorderly conduct. (Pen. Code, § 647, subd. (j)(3).)

Existing law punishes disorderly conduct as a misdemeanor punishable by up to 6 months imprisonment, or a fine not exceeding \$1,000, or both, unless otherwise specified. (Pen. Code, § 647.)

Existing law provides that a second or subsequent conviction for secretly recording or photographing a minor in full or partial undress without their consent in a place where the person has a reasonable expectation of privacy is a misdemeanor punishable by imprisonment in county jail not exceeding one year, a fine not exceeding \$2,000, or both. (Pen. Code, § 647, subd. (k)(1).)

Existing law provides that, if the victim was a minor at the time of the offense, a conviction recording or photographing a minor in full or partial undress without their consent in a place where the minor has a reasonable expectation of privacy is a misdemeanor punishable by imprisonment in county jail not exceeding one year, a fine not exceeding \$2,000, or both. (Pen. Code, § 647, subd. (k)(2).)

This bill increases the punishment for a second or subsequent offense of secretly recording or photographing a minor in full or partial undress without their consent in a place where the minor has a reasonable expectation of privacy, by making the crime punishable by a fine not exceeding two \$2,000, or by imprisonment in county jail not exceeding one year, or by imprisonment for 16 months, or 2 or 3 years in county jail, or by both a fine and imprisonment.

This bill specifies that the increased punishment does not apply to a person who was under 18 years of age at the time they committed the offense.

COMMENTS

1. Need for This Bill

According to the author of this bill:

I introduced AB 1874 to ensure that criminals who repeatedly record children in intimate settings face serious consequences. Our children deserve every protection possible, and when existing law does too little to discourage these pedophiles from continuing this illicit behavior, we must increase the penalties.

2. Disorderly Conduct: Invasion of Privacy Crimes

Penal Code Section 647 includes numerous misdemeanors under the general term “disorderly conduct.” Generally, disorderly conduct refers to activity or behavior that is offensive or disruptive and prevents others from enjoying a public space. These crimes include prostitution, public intoxication, loitering around a public toilet for soliciting a lewd act, loitering for purposes of committing a crime and various forms of invading another person’s privacy.

Relevant to this bill, there are four invasion of privacy crimes listed in subdivision (j) of Penal Code section 647. The most recently added crime is commonly referred to as nonconsensual pornography or revenge porn, where the defendant distributes a sexually explicit image of a person without their consent under circumstances where the persons understood the images would remain private. (Pen. Code, § 647, subd. (j)(4).) Two of the crimes involve observing or recording the conduct of a victim in an intimate or private setting which include bedrooms, bathrooms, changing rooms or similar places. One of the crimes is committed by immediate observation through a peephole or through the use of an instrument. (Pen. Code, § 647, subd.

(j)(1.) The other crime occurs where the perpetrator secretly records the victim. (Pen. Code, § 647, subd. (j)(3).)

The third offense would typically be committed where the perpetrator secretly films or records the victim in a public place, but in an invasive and sexually motivated manner. (Pen. Code, § 647, subd. (j)(2).) The most common example of this crime is filming under the skirt of a woman while she stands at a store counter or rides an escalator. This crime occurs in a public place where the victim would have little or no general expectation of privacy. Generally, a person has a right to be in a public place and a right to use a recording device where someone does not have a reasonable expectation of privacy. Whether a person has a “reasonable expectation of privacy” in a place is an inquiry that takes into account the specific circumstances surrounding the intrusion, societal understanding about the place where the intrusion occurred, and the severity of the intrusion. (See e.g., *Trujillo v. City of Ontario* (9th Cir. 2006) 428 F.Supp.2d 1094, 1103; *Hill v. Nat’l Collegiate Athletic Assn.* (1994) 7 Cal.4th 1, 36-37.) In order to avoid constitutional vagueness and First Amendment problems, the crime includes an element of sexual intent.

Existing law punishes disorderly conduct, including the invasion of privacy crimes as a misdemeanor with a maximum term of imprisonment of 6 months and/or a maximum fine of \$1,000, unless otherwise specified. Existing law specifies that a second or subsequent offense of one of the invasion of privacy crimes is punishable by a maximum term of imprisonment of one year, and/or a maximum fine of \$2,000. (Pen. Code, § 647, subd. (k)(1).) Additionally, the statute specifies that if the victim of one of the invasion of privacy crimes was a minor at the time of the offense, the crime is punishable by a maximum term of imprisonment of one year and/or a maximum fine of \$2,000. (Pen. Code, § 647, subd. (k)(2).)

This bill increases the punishment for a second or subsequent offense of secretly recording or photographing a minor in full or partial undress without their consent 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 from a one-year misdemeanor to an alternate felony-misdemeanor if the defendant was 18 years of age or older at the time of the offense.

As discussed above, all of the crimes in Penal Code section 647 are punishable as misdemeanors with the more serious offenses being punishable with a maximum of imprisonment of one year. Allowing felony penalties for crimes in this section would be a departure from the current penalty scheme.

3. Increasing Penalties Has Minimal Deterrent Effect

A comprehensive report published in 2014, entitled *The Growth of Incarceration in the United States*, discusses the effects on crime reduction through incapacitation and deterrence, and describes general deterrence compared to specific deterrence:

A large body of research has studied the effects of incarceration and other criminal penalties on crime. Much of this research is guided by the hypothesis that incarceration reduces crime through incapacitation and deterrence. Incapacitation refers to the crimes averted by the physical isolation of convicted offenders during the period of their incarceration. Theories of deterrence distinguish between general and specific behavioral responses. General deterrence refers to the crime

prevention effects of the threat of punishment, while specific deterrence concerns the aftermath of the failure of general deterrence—that is, the effect on reoffending that might result from the experience of actually being punished.

(National Research Council (2014) *The Growth of Incarceration in the United States: Exploring Causes and Consequences Committee on Causes and Consequences of High Rates of Incarceration*, J. Travis, B. Western, and S. Redburn, Editors. Committee on Law and Justice, Division of Behavioral and Social Sciences and Education. Washington, DC: The National Academies Press. (http://johnjay.jjay.cuny.edu/nrc/NAS_report_on_incarceration.pdf.)

In regard to deterrence, the authors note that in “the classical theory of deterrence, crime is averted when the expected costs of punishment exceed the benefits of offending. Much of the empirical research on the deterrent power of criminal penalties has studied sentence enhancements and other shifts in penal policy.” (National Research Council, *supra*, *The Growth of Incarceration in the United States*, p. 132.)

Deterrence theory is underpinned by a rationalistic view of crime. In this view, an individual considering commission of a crime weighs the benefits of offending against the costs of punishment. Much offending, however, departs from the strict decision calculus of the rationalistic model. Robinson and Darley (2004) review the limits of deterrence through harsh punishment. They report that offenders must have some knowledge of criminal penalties to be deterred from committing a crime, but in practice often do not.

(*Id.* at p. 133.) The report concludes: The incremental deterrent effect of increases in lengthy prison sentences is modest at best. “Because recidivism rates decline markedly with age, lengthy prison sentences, unless they specifically target very high-rate or extremely dangerous offenders, are an inefficient approach to preventing crime by incapacitation.” (*Id.* at p. 5.)

This bill increases the punishment for a second or subsequent offense of secretly recording or photographing a minor in full or partial undress without their consent from a misdemeanor to an alternate felony-misdemeanor if the defendant was 18 years of age or older at the time of the offense. Generally, a person convicted this crime faces an aggravated misdemeanor which provides for a maximum term of imprisonment of one year. This bill would authorize felony punishment which would increase the maximum term of imprisonment to 3 years. As discussed above, studies show that increasing penalties does little to deter crimes.

4. Argument in Support

According to Peace Officers’ Research Association of California:

AB 1874 would increase the punishment for a 2nd or subsequent offense of that prohibition, if the victim was a minor at the time of the offense, to also be punishable as a felony. The bill would specify that this punishment does not apply to a person who was under 18 years of age at the time they committed the offense.

Disorderly conduct can cause intense emotional and physical distress and often are a gateway to more serious crimes. By enhancing the punishment for these

crimes, criminals will be held accountable for their actions and be removed from the streets.

5. Argument in Opposition

According to Debt-Free Justice California (DJFC):

DFJC is a coalition of over seventy organizations that works to reduce the harm caused by our criminal legal system by eliminating excessive and extractive financial barriers to individuals across the state. AB 1874 will increase financial penalties for specified disorderly conduct offenses outlined in Penal Code § 647(j), and we therefore oppose on the grounds that fines are not an appropriate penalty for this type of offense.

Our coalition and relevant research has found that increasing fines and other monetary sanctions on Californians does not deter crime, and can even increase recidivism. While it is important to protect minors in California, as is the assumed intent of this bill, criminalizing individuals with increased jail time and fines is an ineffective way to protect crime survivors. Instead, we recommend nonmonetary rehabilitative alternatives, such as counseling and other mental health services.

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