
SENATE COMMITTEE ON PUBLIC SAFETY
SENATOR NANCY SKINNER, CHAIR
2019 - 2020 REGULAR

Bill No: AB 907 **Hearing Date:** July 2, 2019
Author: Grayson
Version: April 2, 2019
Urgency: No **Fiscal:** Yes
Consultant: SC

Subject: *Threats: Schools and Places of Worship*

HISTORY

Source: Contra Costa District Attorney's Office
California District Attorneys Association

Prior Legislation: AB 2768 (Melendez), 2018, held in Assembly Approps.
SB 110 (Fuller), 2015, vetoed
SB 456 (Block), 2015, vetoed

Support: Anti-Defamation League; California Police Chiefs Association; California State Sheriffs' Association; Hindu American Foundation; Jewish Public Affairs Committee of California; San Diego County District Attorney's Office

Opposition: American Civil Liberties Union of California; California Public Defenders Association

Assembly Floor Vote: 74 - 0

PURPOSE

The purpose of this bill is to create a new crime of threatening a school or place of worship, punishable as a misdemeanor or felony punishable by imprisonment in a county jail as specified.

Existing law states that any person who willfully threatens to commit a crime which will result in death or great bodily injury to another person, with the specific intent that the statement made (either verbally, in writing, or by means of an electronic device) is to be taken as a threat, even if there is no intent of carrying it out, which, on its face and under the circumstances in which it is made, is so unequivocal, unconditional, immediate, and specific as to convey to the person threatened a gravity of purpose and an immediate prospect of execution, and which thereby causes the person reasonably to be in sustained fear for their own safety or that of their family, is guilty of a crime punishable either as a misdemeanor or felony, as specified. (Pen. Code, § 422.)

Existing law states that any person who with intent to cause, attempts to cause, or causes, any officer or employee of any public or private educational institution to do, or refrain from doing, any act in the performance of his or her duties, by means of a directly-communicated threat to the person, to inflict unlawful injury upon any person or property, and it reasonably appears to

the recipient that such threat could be carried out, is guilty of a crime, punishable as an alternate felony-misdemeanor on a first offense, and a felony on a second or subsequent offense. (Pen. Code, § 71, subd. (a).)

Existing law states that any person who with intent to annoy, telephones another or contacts him or her by means of an electronic device, and threatens to inflict injury on the person or the person's family, or to the person's property is guilty of a misdemeanor. (Pen. Code, § 653m, subd. (a).)

Existing law provides that any person who with intent to cause, attempts to cause or causes, another to refrain from exercising his or her religion or from engaging in a religious service by means of a threat directly communicated to such a person to inflict an injury upon the person or property, and it reasonably appears to the recipient that such a threat could be carried out, is guilty of a felony. (Pen. Code, § 11412.)

Existing law provides that any person who knowingly threatens to use a weapon of mass destruction with the specific intent that the statement, as defined, or a statement made by means of an electronic device, is to be taken as a threat, even if there is no intent of carrying it out, which on its face and under the circumstances in which it is made, is so unequivocal, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution, and thereby causes the person reasonably to be in sustained fear of for personal safety or that of their family is guilty of a crime, punishable as an alternate felony-misdemeanor. (Pen. Code, § 11418.5, subd. (a).)

Existing law defines a "hate crime" as a criminal act committed, in whole or in part, because of one or more of the following actual or perceived characteristics of the victim:

- 1) Disability;
- 2) Gender;
- 3) Nationality;
- 4) Race or ethnicity;
- 5) Religion;
- 6) Sexual orientation;
- 7) Association with a person or group with one or more of these actual or perceived characteristics. (Pen. Code, § 422.55, subd. (a).)

Existing law provides that no person, whether or not acting under color of law, shall by force or threat of force, willfully injure, intimidate, interfere with, oppress, or threaten any other person in the free exercise or enjoyment of any right or privilege secured to him or her by the Constitution or laws of this state or by the Constitution or laws of the United States in whole or in part because of one or more of the actual or perceived characteristics of the victim defined as a "hate crime." (Pen. Code, § 422.6, subd. (a).)

Existing law states that a person convicted of violating Penal Code section 422.6 is guilty of a misdemeanor punishable by up to one year in county jail, a fine not to exceed \$5,000 and community service, but specifies that no person shall be convicted of violating Penal Code section 422.6, subdivision (a) based upon speech alone, except upon a showing that the speech itself threatened violence against a specific person or group of persons and that the defendant had the apparent ability to carry out the threat. (Pen. Code, § 422.6, subd. (c).)

Existing law provides that a person who commits a hate crime that is a felony shall receive an additional term of one, two, or three years in state prison, or an additional term of two, three, or four years if the act was committed in concert with another person. (Pen. Code, § 422.75.)

Existing law provides, except where the court imposes an enhancement for a hate crime, or imposes the upper sentencing term for committing robbery or assault with a deadly weapon or by means of any force likely to cause great bodily injury, the fact that a person committed or attempted to commit a felony that is a hate crime shall be considered a circumstance in aggravation. (Pen. Code, § 422.76.)

This bill provides that any person who, by any means including via an electronic act, willfully threatens to commit a crime which is reasonably likely to result in death or great bodily injury to any person who may be on the grounds of a school or place of worship, with the specific intent that the statement be taken as a threat, even if there is no intent to carry it out, and where the statement on its face and under the circumstances in which it is made is so unequivocal, unconditional, and specific as to convey a gravity of purpose and immediate prospect of execution of the threat, and which causes a person or persons reasonably to be in sustained fear for their own safety or that of another, is guilty of a crime.

This bill punishes the crime of threatening a school or place of worship as a misdemeanor by imprisonment in the county jail for up to one year, or as a felony by imprisonment in the county jail for 16 months, or two or three years.

This bill states that this section does not preclude punishment under any other law, but prohibits dual conviction for this crime and the general criminal threats statute based on the same threat.

This bill defines the following terms for purposes of this crime:

- 1) “Electronic act” means the creation or transmission originated on or off the schoolsite, by means of an electronic device, including, but not limited to, a telephone, wireless telephone, or other wireless communication device, computer, or pager, of a communication, including, but not limited to, a message, text, sound, video, or image; a post on a social network Internet website; or an act of cyber sexual bullying;
- 2) “Place of worship” means “any church, synagogue, temple, mosque, or other building where religious services are regularly conducted;” and,
- 3) “School” means “a state preschool, a private or public elementary, middle, vocational, junior high, or high school, a community college, a public or private university, or a location where a school-sponsored event is or will be taking place and the threat is related to both the school-sponsored event and to the time period during which the school-sponsored event will occur.”

COMMENTS

1. Need for This Bill

According to the author of this bill:

In 2018 there was a record high of 97 school gun violence incidents, and with those incidents, a heightened fear for students that a tragedy could occur in their own school. In 81% of school shooting incidents, at least one other person was aware of the shooter's plans, and in the digital age, threats are often made or shared through social media platforms.

The Anti-Defamation League concluded that hate groups were emboldened in the last year as incidents of white supremacist propaganda in the United States increased 182% from 2017. In 2017, the last year data is available, anti-Semitic incidents increased by 57%, the largest single-year increase on record. Violence against places of worship reached national headlines in cases such as the Pennsylvania synagogue shooting wherein 11 Jewish worshipers were killed, a Georgian mosque that received multiple threats of being "blown up", and a predominantly black church in Kentucky that a gunman tried to enter before ultimately taking the lives of two people.

When a school or place of worship is threatened, it can directly cause reasonable and immediate fear for anyone on that institution's property. However, because the threat is not directed against one or many specifically named individuals, pursuing a criminal threat prosecution is impractical and largely unsuccessful resulting in a lack of consequences for those purposefully causing fear in communities.

AB 907 would hold those who threaten schools and places of worship accountable for the fear they create by making it a crime for anyone to willfully threaten to commit a crime that is reasonably likely to result in death or great bodily injury to any person who may be on the grounds of that property.

2. First Amendment Considerations

A law that restricts speech has First Amendment implications. 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).” 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.)

Recently, the Supreme Court again reviewed criminal threats and the mental state required. (*Elonis v. United States* (2015) 135 S.Ct. 2001.) Elonis was convicted of making criminal threats against his soon-to-be ex-wife and others after he posted several rap lyrics that included graphically violent language and imagery on his Facebook page. There were added disclaimers that the lyrics were “fictitious” and his writings were “therapeutic” and helped him “deal with the pain.” (*Id.* at 2004-2005.) At trial, the court instructed the jury that Elonis could be found guilty if a reasonable person would foresee that his statements would be interpreted as a threat. (*Id.* at 2007.) The prosecution’s closing argument also emphasized that it was irrelevant whether Elonis intended the Facebook postings to be threats. (*Ibid.*) The appellate court held that the prosecution only had to show that Elonis intentionally made the communication, not that he intended to make a threat. (*Ibid.*) The Supreme Court reversed that decision and overturned Elonis’ conviction finding that the prosecution failed to make a showing of Elonis’ subjective intent.

Elonis’ conviction was based on how his Facebook posts would be understood by a reasonable person, rather than his subjective intent. The Court rejected the use of this standard, asserting that “[h]aving liability turn on whether a ‘reasonable person’ regards the communication as a threat—regardless of what the defendant thinks—‘reduces culpability on the all-important element of the crime to negligence,’ and we ‘have long been reluctant to infer that a negligence standard was intended in criminal statutes.’ Under these principles, ‘what [Elonis] thinks’ does matter.” (*Elonis v. United States*, supra, 135 S.Ct. at p. 2011.)

This bill would require a showing of specific intent on the part of the person communicating the threat, rather than negligence or even recklessness. This is the highest level of culpability required for a crime, which satisfies the Supreme Court’s ruling in both *Elonis v. United States*, supra, and *Virginia v. Black*, supra. Additionally, this bill would require that the threat on its face and under the circumstances in which it is made, is so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat. This language is contained in current statutes punishing true threats and has been accepted by the California Supreme Court. (*People v. Mirmirani*, supra, 30 Cal.3d at p. 388, fn. 10, quoting *United States v. Kelner*, (2nd Cir. 1976) 534 F.2d 1020.) Thus, it appears that the provisions in this bill would likely pass constitutional muster.

3. Criminal Threat Prosecutions

In order to convict a person under the current criminal threat statute, Penal Code section 422, the prosecutor must prove the following:

- a) That the defendant willfully threatened to commit a crime which will result in death or great bodily injury to another person;
- b) That the defendant made the threat;
- c) That the defendant intended that the statement is to be taken as a threat, even if there is no intent of actually carrying it out;
- d) That the threat was so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat;
- e) That the threat actually caused the person threatened to be in sustained fear for his or her own safety or for his or her immediate family's safety; and,
- f) That the threatened person's fear was reasonable under the circumstances. (Pen. Code, §422; CALCRIM No. 1300; see also *People v. Toledo* (2001) 26 Cal.4th 221, 227-228.)

Penal Code section 422 applies to all criminal threats which will result in death or great bodily injury regardless of location or the exact type of violence that is threatened.

This bill seeks to create the specific crime of criminal threats when the threat is to take place on a school campus or place of worship. Some prosecutors argue that the current criminal threats statute does fit well into instances of threats of shootings at schools or at a place of worship because often times these threats do not specify who the target is. Rather, the threat typically applies to anyone present at those locations.

A recent example illustrating the existing law's application to threats of violence on school grounds made by means of an electronic act, such as social media, can be found in an appellate court's recent ruling. (*In re L.F.* (June 3, 2015, A142296) [nonpub. opn.]; Egelko, *Smiling Emojis Aside, Student's Threats Were Serious, Court Says*, San Francisco Chronicle, (June 4, 2015) <<http://www.sfgate.com/crime/article/Smiling-emojis-aside-student-s-threats-were-6307626.php>> [as of June 8, 2015].) The adjudged minor was a Fairfield High School student who posted on her Twitter account that she planned to bring a gun to school and shoot people. While she did note specified areas of the school and one of the campus monitors by name in some of her posts, her Tweets were generally targeted at all of the students and staff at the school. The petition filed against the minor alleged that the minor had made criminal threats against "Fairfield High School students and staff" instead of listing specific persons. (*Id.* at p. 4.) The appellate court affirmed the juvenile court's ruling that the minor had violated the existing criminal threats statute, and found that the minor intended her comments to be taken as threats, even though she contended that she was only joking. (*In re L.F.*, supra, A142296. at p. 8.)

Another recent example of the existing law's application to threats of violence at a place of worship involved a man who was arrested in Contra Costa County for allegedly threatening to

commit a mass shooting at a synagogue. The man never specified any locations that would be targeted. His comments were made on an online chatroom and the FBI was able to trace them back to this individual. The man was arrested and charged with making criminal threats under existing Penal Code section 422, as well as a possession of an illegal assault rifle and manufacturing an assault rifle. (*Police: California man posted synagogue shooting threats*, SF Gate (June 16, 2019) <<https://www.sfgate.com/news/crime/article/California-man-threatens-synagogue-shooting-in-14001400.php>> [as of June 24, 2019].)

So, while the current statute appears sufficient to prosecute threats that are not aimed at particular individuals, this bill would specify that it is sufficient for the person, or persons, who become aware of the threat to reasonably be in sustained fear for their own safety or that of any other person who may be on the grounds of a school or place of worship.

4. Punishment for Criminal Threats

The existing crime of criminal threats is punishable as either a misdemeanor or a felony. (Pen. Code, § 422.) When a criminal threats conviction is punished as a felony, it is also becomes a serious felony for purposes of enhanced punishment under the Three Strikes Law (Pen. Code, 1192.7. subd. (c)(38)) and the five-year prison enhancement for prior serious felony convictions (Pen. Code, § 667). Additionally it triggers credits limitations. (Pen. Code, § 1170.12.) (See also *People v. Moore* (2004) 118 Cal.App.4th 74.)

This bill does not add the newly-created crime of criminal threats directed at a school or place of worship to the serious-felony list. Therefore, credits limitations and future enhanced penalty provisions for prior convictions would not apply.

This bill specifies that a perpetrator can be prosecuted for a threat under the general criminal threats statute, Penal Code section 422, or any other law; but that the person cannot be convicted for both the general statute and this more particularized one.

5. Governor Veto Messages of Prior Similar Legislation

Two bills introduced in the 2015-2016 Legislative session would have specifically addressed criminal threats at schools. SB 456 (Block) would have provided that any person who threatens to discharge a firearm on a school campus or at a location where a school-sponsored event is or will to take place, is guilty of an alternate felony-misdemeanor. SB 110 (Fuller) would have enacted a new crime prohibiting anyone willfully threatening unlawful violence to another person by any means, including through an electronic act, to occur upon school grounds, with the specific intent that the statement be taken as a threat, and where the threat, on its face and under the circumstances in which it is made, was so unequivocal, unconditional, immediate, and specific as to convey a gravity of purpose and an immediate prospect of execution of the threat.

Governor Brown had the following veto message as to both bills:

No one could be anything but intolerant of threats to cause great bodily injury, especially on school grounds. Certainly not legislators, who voted nearly unanimously for this bill.

While I'm sympathetic and utterly committed to ensuring maximum safety for California's school children, the offensive conduct covered by this bill is already illegal.

In recent decades, California has created an unprecedented number of new and detailed criminal laws. Before we keep enacting more, I think we should pause and reflect on the fact that our bulging criminal code now contains in excess of 5,000 separate provisions, covering almost every conceivable form of human misbehavior.

6. Argument in Support

According to the San Diego District Attorney's Office:

Most recently, a shooting occurred at Chabad of Poway Synagogue in San Diego County, killing a 60-year old woman and wounding three others, including an 8-year old girl. Our office has seen an increase in hate crimes prosecutions the last couple of years. A recent report from California's Attorney General shows that San Diego County saw 95 hate crime incidents in 2017. We filed 14 cases in 2016, 13 cases in 2017, and 30 cases in 2018 and are, unfortunately, on track to file more in 2019. Additionally, hate crimes between 2015 and 2017 rose 27 percent in San Diego County alone according to a report published in Law Enforcement Quarterly, and the Anti-Defamation League (ADL) reported that anti-Semitic incidents were nearly 60% higher in 2017 than 2016. These particular statistics beg the question as to why we couldn't file more cases – prosecutors need to have the ability and resources to pursue criminal action against all hate crimes.

Unfortunately, school threats have also increased significantly in San Diego County in the recent years. Since 2015, our office has reviewed 111 school threats. We have prosecuted 66 of those cases. In 2018 there was a record high of 97 school gun violence incidents, and with those incidents, a heightened fear for students that a tragedy could occur in their own school.

AB 907 provides law enforcement and prosecutors one more tool to deal with these offenders and their crimes. In order to promote safety, security and wellbeing for all residents, we must take such threats seriously and allow for these acts to be criminally prosecutable.

7. Argument in Opposition

According to the American Civil Liberties Union of California:

AB 907 is unnecessary, covering behavior that can already be prosecuted under existing law. The threats covered by this bill . . . are already punishable under existing law. Penal Code section 422 has been interpreted to apply in a situation where a threat is made to a third party and conveyed to a person who then reasonably becomes fearful. *In Re David L.* (1991) 234 CalApp.3d 1655, 1657. If a school administrator receives a threat from someone saying they will blow up the school, and then takes action in response to that threat, for example closing the

school for some period, and as a result the students and staff learn of the threat and become fearful, the person making the threat could be prosecuted under section 422. In recent years, the law has been applied to young people making social media threats against their schools.

Moreover, we caution against expanding the existing law when enforcement of that law is often problematic. Penal Code section 422, like AB 907, does not require that the person making the threat have either the intent or the ability to carry it out, or that the person take any action to carry out the threat. Defendants – often young people, or individuals with mental health issues – can face punishment, and even felony penalties, for something they said with no intent to do anything about it.

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