



*Existing law* provides that prosecution for crimes involving fraud, breach of a fiduciary duty, embezzlement of funds from an elder or dependent adult, or misconduct by a public official does not start to run until the discovery of the offense and prosecution must be commenced within four years after discovery of the crime or within four years after completion, whichever is later. (Penal Code § 801.5 & 803, subd. (c).)

*Existing law* states that prosecution for a misdemeanor shall be commenced within one year after the commission of the offense, unless otherwise specified. (Pen. Code, § 802, subd. (a).)

*Existing law* provides that unless provided, as specified, a limitation of time is not tolled or extended for any reason. (Penal Code § 803, subd. (a).)

*Existing law* authorizes the prosecution of specified felonies where a material element of which is fraud or breach of a fiduciary obligation, the commission of the crimes of theft or embezzlement upon an elder or dependent adult, or the basis of which is misconduct in office by a public officer, employee, or appointee, to commence to run upon the discovery of the offense. (Pen. Code, § 803, subd. (c).)

*Existing law* provides that if defendant is out of the state when or after the offense is committed, the prosecution may be commenced within the applicable limitations of time, and no time up to a maximum of three years during which the defendant is not within the state shall be a part of those limitations. (Pen. Code, § 803, subd. (d).)

*Existing law* states that prosecution of specified misdemeanors involving the concealed recording or photographing of another person for the purpose of sexual gratification or for viewing the body or undergarments of the other person without the consent or knowledge of that person under circumstances where the other person has a reasonable expectation of privacy shall commence within one year of the discovery of the offense. (Pen. Code, § 803, subd. (i).)

*Existing law* provides that prosecution of specified crimes involving fleeing the scene of an accident that caused death or permanent, serious injury, which may be punished as either a felony or misdemeanor, shall commence within one year after the person is initially identified by law enforcement as a suspect in the commission of the offense, whichever is later, but in no case later than six years after the commission of the offense. (Pen. Code, § 803, subd. (j).)

*Existing law* requires the prosecution of the active concealment of an accidental death, a misdemeanor, to commence within one year after the person is initially identified by law enforcement as a suspect in the commission of that offense, provided, however, that in any case a complaint may not be filed more than four years after the commission of the offense. (Pen. Code, § 803, subd. (m).)

*Existing law* provides that if more than one statute of limitations period applies to a crime, the time for commencing an action shall be governed by the period that expires later in time. (Penal Code § 803.6, subd. (a).)

*Existing law* states that, except as otherwise provided, prosecution for an offense is commenced when any of the following occurs:

- An indictment or information is filed;

- A complaint is filed charging a misdemeanor or infraction;
- The defendant is arraigned on a complaint that charges the defendant with a felony; or,
- An arrest warrant or bench warrant is issued, provided the warrant names or describes the defendant with the same degree of particularity required for an indictment, information, or complaint. (Pen. Code, § 804.)

*Existing law* states that for purposes of determining the applicable limitation of time the following apply:

- An offense is deemed punishable by the maximum punishment prescribed by statute for the offense, regardless of the punishment actually sought or imposed. Any enhancement of punishment prescribed by statute shall be disregarded in determining the maximum punishment prescribed by statute for an offense;
- The limitation of time applicable to an offense that is necessarily included within a greater offense is the limitation of time applicable to the lesser included offense, regardless of the limitation of time applicable to the greater offense. (Pen. Code, § 805.)

*This bill* authorizes a prosecution for “revenge porn” to commence within one year of discovery of the offense, but no later than 15 years after the commission of the offense.

## COMMENTS

### 1. Need for This Bill

According to the author of this bill:

SB 23 will strengthen protections for victims of revenge porn by extending the statute of limitations to one year from discovery, giving a victim more time to seek justice against those who violate their privacy. California led the nation in 2013 when it created the crime of revenge porn. Data shows that this form of “cyber revenge” is an invasive and increasingly common crime intended to shame and intimidate its victims, and the significant emotional distress it causes them can have severe consequences. A study by the Cyber Civil Rights Initiative found that 93% of victims suffered significant emotional distress as a result of their victimization, 51% had suicidal thoughts, and 49% stated they had been stalked or harassed online by users who saw their material.

Unfortunately, the current statute of limitations for revenge porn in California leaves many victims without the ability to seek justice against those who violate their privacy.

Under existing law, the crime of revenge porn must be prosecuted within one year from the date the photo was first distributed. However, victims often will not discover until years later that an image intended to be kept private has been shared.

SB 23 empowers victims of revenge porn by changing the statute of limitations to be one year from the date that the victim discovers that the image has been distributed, as long as the criminal action is filed within 15 years of the commission of the offense. This approach of starting the clock upon the victim's discovery of the violation already exists in the Penal Code for similar invasive crimes, such as when a person uses a concealed camera to photograph a person without their knowledge or consent.

Recently, in Tulare County, a victim of revenge porn was unable to seek justice because she did not discover a private photo of her was shared in public until long after it was distributed. SB 23 will ensure that the law will never again fail to protect victims like her.

## 2. Background on “Revenge Porn”

In 2013, California enacted a law to criminalize “revenge porn.” The law makes it a misdemeanor for a person to intentionally distribute an image that was intended to remain private of the intimate body parts of another or of the person depicted engaged in a sex act and 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).)

According to the National Conference of State Legislatures (NCSL), 46 states, Washington D.C. and Puerto Rico have laws prohibiting this conduct. “The dissemination of sexually explicit images of others without their permission, sometimes called ‘revenge porn’ or ‘nonconsensual pornography,’ often involves situations where the individual consented to the photos or videos but expected they would be kept private. In other cases, images may have been taken surreptitiously, and then shared. . . . There are few studies about the prevalence of these incidents, but research is beginning to shed light. For example, in a recent study of 3,044 adults (54% women), 1 in 20 reported having experienced nonconsensual pornography.” (*Fighting Revenge Porn and ‘Sextortion’*, NCSL (Aug. 2019).)

## 3. Statutes of Limitations, Generally

Statutes of limitations require commencement of a prosecution within a certain period of time after the commission of a crime. A prosecution is initiated by filing an indictment or information, filing a complaint, certifying a case to superior court, or issuing an arrest or bench warrant. (Penal Code § 804.) The failure of a prosecution to be commenced within the applicable period of limitation is a complete defense to the charge. The statute of limitations is jurisdictional and may be raised as a defense at any time, before or after judgment. (*People v. Morris* (1988) 46 Cal.3d 1, 13.) The defense may only be waived under limited circumstances. (See *Cowan v. Superior Court* (1996) 14 Cal.4th 367.)

The United States Supreme Court has stated that statutes of limitations are the primary guarantee against bringing overly stale criminal charges. (*United States v. Ewell* (1966) 383 U.S. 116, 122.) There is a measure of predictability provided by specifying a limit beyond which there is an irrebuttable presumption that a defendant's right to a fair trial would be prejudiced. Such laws reflect legislative assessments of relative interests of the state and the defendant in administering and receiving justice: “Significantly, a statute of limitations reflects a legislative judgment that, after a certain time, no quantum of evidence is sufficient to convict. And that judgment typically

rests, in large part, upon evidentiary concerns – for example, concern that the passage of time has eroded memories or made witnesses or other evidence unavailable. (*Stogner v. California* (2003) 539 U.S. 607, 615.)

The Legislature enacted the current statutory scheme regarding statutes of limitations for crimes in 1984 based on recommendations from a report of the California Law Revision Commission (“Commission”).

The Commission identified various factors to be considered in drafting a limitations statute. These factors include: (a) *The staleness factor*. A person accused of crime should be protected from having to face charges based on possibly unreliable evidence and from losing access to the evidentiary means to defend. (b) *The repose factor*. This reflects society's lack of a desire to prosecute for crimes committed in the distant past. (c) *The motivation factor*. This aspect of the statute imposes a priority among crimes for investigation and prosecution. (d) *The seriousness factor*. The statute of limitations is a grant of amnesty to a defendant; the more serious the crime, the less willing society is to grant that amnesty. (e) *The concealment factor*. Detection of certain concealed crimes may be quite difficult and may require long investigations to identify and prosecute the perpetrators. (Recommendation: Felony Statute of Limitation (Jan. 1984) 17 Cal. Law Review Com. Rep. (1984) pp. 308-311.)

The Commission concluded that a felony limitations statute generally should be based on the seriousness of the crime. Seriousness is easily determined based on classification of a crime as felony or misdemeanor and the punishment specified, and a scheme based on seriousness generally will accommodate the other factors as well. Also, the simplicity of a limitations period based on seriousness provides predictability and promotes uniformity of treatment. The Commission recommended that the statute of limitation period should generally correspond to the seriousness of the crime would best be effectuated by a one-year period for misdemeanors, a three-year period for most felonies, a six-year period for felonies punishable by eight or more years imprisonment), and no limitation for capital crimes or crimes punishable by life imprisonment. (*Id.* at p. 313-314.)

As to tolling of the statute of limitations until discovery of the offense, the Commission noted that tolling is appropriate for crimes where a material element is fraud or breach of a fiduciary obligation, *however tolling should not be permitted to run indefinitely*. The Commission recommended that a crime to which tolling applies should not be subject to prosecution more than nine years after it is committed and that such a limit would be a reasonable balance of interests. (*Id.* at 314-315.)

Generally, the statute of limitations for misdemeanor offenses requires commencement of prosecution within one year of the commission of the offense (Pen. Code § 802) and for felony offenses, within three years of the commission of the offense (Pen. Code § 801). There are specified exceptions that either provides for a longer statute of limitations (Pen. Code, §§ 801.5, 802), tolls the time that the statute starts to run such as when the crime is discovered (Pen. Code § 803), or provides no statute of limitations at all (Pen. Code § 799).

This bill provides for an extended statute of limitations for the crime of revenge porn, a form of invasion of privacy which is a misdemeanor. Specifically, the bill allows for the prosecution of revenge porn to commence within one year of discovery of the offense, but no later than 15 years after the commission of the offense. The current statute of limitations that applies to this crime is one year after the commission of the offense. One of the justifications for extending the statute of

limitations provided by supporters of the bill is that existing law provides for an extended statute of limitations period for other invasion of privacy crimes, specifically those crimes involving the secret recording of another person either for sexual gratification or to for the purpose of viewing their body or undergarments without consent or knowledge. Pursuant to existing law, those crimes may be prosecuted within one year of discovery of the offense. However, the crime of revenge porn may be distinguished from those other invasion of privacy crimes because the image distributed was not a secretly recorded, rather the image was taken with the victim's knowledge, thus extending the statute of limitations for up to 15 years after the commission of the offense may not strike the right balance between the all of the relevant factors (i.e. staleness, repose, motivation, seriousness, and concealment).

As discussed in the Law Review Commission's report, tolling the statute of limitations for such an extended period of time may not be reasonable when balancing all of the interests that must be considered when determining an appropriate limitation. The Commission recommended that statutes of limitations should not be allowed to toll for more than 9 years for a felony. The Commission did not have a recommendation for tolling misdemeanor statutes of limitations.

#### **4. Discovery of the Offense**

This bill amends the statute of limitations making it longer than the current limit potentially allowing the prosecution of cases many years after the crime was committed depending on when the crime is discovered. However, courts have interpreted the date of discovery provision of statutes of limitations to require due diligence in the investigative efforts of the crime. (*People v. Zamora* (1976) 18 Cal.3d 538, 561; *People v. Lopez* (1997) 52 Cal.App.4th 233, 246.) Thus, "discovery of the offense" is not synonymous with the date that the victim gained actual knowledge of the crime. (*People v. Zamora, supra*, 18 Cal.3d at 571.) "The crucial determination is whether law enforcement authorities or the victim had actual notice *of circumstances sufficient to make them suspicious of fraud thereby leading them to make inquiries which might have revealed the fraud.* (*Id.* at 572, original italics.) The identity of the perpetrator of the crime is not an element of the discovery issue. (*People v. Crossman* (1986) 210 Cal. App. 3d 476, 481.)

So while it is possible that the crimes affected by this bill could be prosecuted many years after their commission, the prosecutor would have the burden to prove by a preponderance of the evidence that the prosecution of the crime began within the required time which includes consideration of when the victim or law enforcement was aware of facts that would have alerted a reasonably diligent person in the same circumstances that a crime may have been committed. (CALCRIM No. 3410.)

#### **5. Ex Post Facto Protections**

The United States Constitution prohibits the ex post application of criminal laws. (U.S. Const., art. 1, § 10.) This prohibition forbids the enactment of laws "which imposes a punishment for an act which was not punishable at the time it was committed; or imposes additional punishment to that then prescribed." (*Weaver v. Graham* (1981), 450 U.S. 24, 28.) The purpose of this prohibition is to assure that legislative acts give fair warning of their effect and to restrict potentially vindictive legislation. (*Id.* at p. 29.)

In *Stogner v. California, supra*, 539 U.S. 607 the Supreme Court ruled that 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. (*Id.* at pp. 610-611, 616.) However,

extension of an existing statute of limitations is not ex post facto as long as the prior limitations period has not expired. (*Id.* at pp. 618-619.) Existing statutory law also provides that any change in the time period for the commencement of prosecution applies to any crime if prosecution for the crime was not barred on the effective date of the change by the statute of limitations in effect immediately prior to the effective date of the change. (Pen. Code § 803.6, subd. (b).)

Under these principles, the amended statute of limitations provided by this bill cannot be applied to cases in which the statute of limitations period has already expired.

## 6. Argument in Support

According to the Conference of California Bar Associations:

SB 23 protects the rights and interests of “revenge porn” victims by changing the applicable statute of limitations for a misdemeanor violation of Penal Code section 647(j)(4), involving the unlawful distribution of another person’s intimate images, to one year from the date of discovery. “Revenge porn” is an increasingly common crime used to shame and traumatize persons who have left a relationship through the posting of their intimate images online.

Existing law requires misdemeanors to be prosecuted within one year of the date of the offense. (See Pen. Code, § 802, subd. (a).) But in “revenge porn” cases, many victims do not learn of the invasion of privacy until well after its occurrence, including after the statute of limitations has passed. Furthermore, crimes involving anonymous online actors require additional time following discovery of the offense to overcome the investigative challenge of identifying a perpetrator.

Instead, SB 23 would require a “revenge porn” prosecution to commence one year from the date of discovery, which can be either actual or constructive. Constructive discovery means having knowledge of facts that would put a reasonably diligent person or officer on notice that a crime has occurred. (See CALCRIM No. 3410.) This is consistent with the applicable statute of limitations for similar invasions of privacy involving hidden recordings. (See Pen. Code, § 803, subd. (i).)

## 7. Argument in Opposition

According to the California Public Defenders Association (CPDA):

Although well intentioned, SB 23 proposes to expand the statute of limitations to resolve the conflict between late discovery of the crime versus the current statute of limitations for a misdemeanor offense. Expanding the statute of limitations for a misdemeanor to fifteen years is too extreme. A more nuanced amendment would protect both the victims of this offense and individuals falsely accused.

CPDA proposes that SB 23 be amended as follows:

Notwithstanding any other limitation of time described in this chapter, a criminal complaint may be filed within one year of the date on which it is

discovered that an image was intentionally distributed in violation of paragraph (4) of subdivision (j) of Section 647, *but in case no later than 10 years after the commission of the offense.*

This amendment to SB 23 would deal with the sometimes complicated relationships between partners who later regret their youthful indiscretions.

CPDA's proposed amendment to SB 23 is a commonsense and balanced approach to the long-standing rationale for statutes of limitations which exist to protect all us.

Over time, memories fade, evidence is lost, and witnesses die. Statutes of limitations protect the innocent from being falsely accused and convicted. In other words, statutes of limitations make sense; they vary by offense and seek to balance the various rights of defendants and victims and the interests and needs of the citizenry for due process of law.

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