

AMENDED IN ASSEMBLY FEBRUARY 25, 2013

AMENDED IN ASSEMBLY FEBRUARY 20, 2013

AMENDED IN ASSEMBLY JANUARY 30, 2013

CALIFORNIA LEGISLATURE—2013–14 REGULAR SESSION

ASSEMBLY BILL

No. 65

**Introduced by Assembly Members Achadjian and Lowenthal
(Principal coauthors: Assembly Members Bradford, Garcia, Gomez,
Mitchell, and Williams)**

(Principal coauthor: Senator Hill)

**(Coauthors: Assembly Members Alejo, Ammiano, Atkins, Bigelow,
Bloom, Blumenfield, Brown, Buchanan, Ian Calderon, Chávez,
Conway, Dahle, Dickinson, Donnelly, Frazier, Gatto, Gordon,
Gorell, Grove, Hagman, Hall, Harkey, Holden, Jones, Levine,
Logue, Maienschein, Mansoor, Melendez, Morrell, Mullin,
Nazarian, Nestande, Olsen, Patterson, Perea, John A. Pérez,
Quirk-Silva, Rendon, Skinner, Stone, Ting, Wagner, Waldron,
Weber, and Wilk)**

(Coauthors: Senators Anderson, Berryhill, Block, Cannella, Emmerson,
Fuller, Gaines, Huff, Jackson, Knight, Lieu, Padilla, Rubio, Walters,
and Wyland)

January 7, 2013

An act to amend ~~Section 261~~ *Sections 261, 286, 288a, and 289* of the Penal Code, relating to crimes.

LEGISLATIVE COUNSEL'S DIGEST

AB 65, as amended, Achadjian. Crimes: ~~rape~~. *sex crimes*.

Existing law provides various circumstances that constitute rape, including an act of sexual intercourse accomplished with a person who

is not the spouse of the perpetrator where the person submits under the belief that the person committing the act is the victim’s spouse, and this belief is induced by artifice, pretense, or concealment practiced by the accused, with the intent to induce the belief. *Existing law provides various circumstances that constitute sodomy against an individual’s will, oral copulation against an individual’s will, and sexual penetration against an individual’s will, including an act accomplished with an individual who is not the spouse of the perpetrator where the individual submits under the belief that the individual committing the act is the victim’s spouse, and this belief is induced by artifice, pretense, or concealment practiced by the accused, with the intent to induce the belief.*

This bill would instead provide that ~~this type~~ *these types of rape occurs rape, sodomy, oral copulation, and sexual penetration occur* where the person submits under the belief that the person committing the act is someone other than the accused.

By expanding the definition of a crime, this bill would impose a state-mandated local program.

The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that no reimbursement is required by this act for a specified reason.

Vote: majority. Appropriation: no. Fiscal committee: yes.
State-mandated local program: yes.

The people of the State of California do enact as follows:

1 SECTION 1. Section 261 of the Penal Code is amended to
2 read:
3 261. (a) Rape is an act of sexual intercourse accomplished
4 with a person not the spouse of the perpetrator, under any of the
5 following circumstances:
6 (1) Where a person is incapable, because of a mental disorder
7 or developmental or physical disability, of giving legal consent,
8 and this is known or reasonably should be known to the person
9 committing the act. Notwithstanding the existence of a
10 conservatorship pursuant to the provisions of the
11 Lanterman-Petris-Short Act (Part 1 (commencing with Section
12 5000) of Division 5 of the Welfare and Institutions Code), the

1 prosecuting attorney shall prove, as an element of the crime, that
2 a mental disorder or developmental or physical disability rendered
3 the alleged victim incapable of giving consent.

4 (2) Where it is accomplished against a person’s will by means
5 of force, violence, duress, menace, or fear of immediate and
6 unlawful bodily injury on the person or another.

7 (3) Where a person is prevented from resisting by any
8 intoxicating or anesthetic substance, or any controlled substance,
9 and this condition was known, or reasonably should have been
10 known by the accused.

11 (4) Where a person is at the time unconscious of the nature of
12 the act, and this is known to the accused. As used in this paragraph,
13 “unconscious of the nature of the act” means incapable of resisting
14 because the victim meets any one of the following conditions:

15 (A) Was unconscious or asleep.

16 (B) Was not aware, knowing, perceiving, or cognizant that the
17 act occurred.

18 (C) Was not aware, knowing, perceiving, or cognizant of the
19 essential characteristics of the act due to the perpetrator’s fraud in
20 fact.

21 (D) Was not aware, knowing, perceiving, or cognizant of the
22 essential characteristics of the act due to the perpetrator’s fraudulent
23 representation that the sexual penetration served a professional
24 purpose when it served no professional purpose.

25 (5) Where a person submits under the belief that the person
26 committing the act is someone other than the accused, and this
27 belief is induced by any artifice, pretense, or concealment practiced
28 by the accused, with intent to induce the belief.

29 (6) Where the act is accomplished against the victim’s will by
30 threatening to retaliate in the future against the victim or any other
31 person, and there is a reasonable possibility that the perpetrator
32 will execute the threat. As used in this paragraph, “threatening to
33 retaliate” means a threat to kidnap or falsely imprison, or to inflict
34 extreme pain, serious bodily injury, or death.

35 (7) Where the act is accomplished against the victim’s will by
36 threatening to use the authority of a public official to incarcerate,
37 arrest, or deport the victim or another, and the victim has a
38 reasonable belief that the perpetrator is a public official. As used
39 in this paragraph, “public official” means a person employed by
40 a governmental agency who has the authority, as part of that

1 position, to incarcerate, arrest, or deport another. The perpetrator
2 does not actually have to be a public official.

3 (b) As used in this section, “duress” means a direct or implied
4 threat of force, violence, danger, or retribution sufficient to coerce
5 a reasonable person of ordinary susceptibilities to perform an act
6 which otherwise would not have been performed, or acquiesce in
7 an act to which one otherwise would not have submitted. The total
8 circumstances, including the age of the victim, and his or her
9 relationship to the defendant, are factors to consider in appraising
10 the existence of duress.

11 (c) As used in this section, “menace” means any threat,
12 declaration, or act which shows an intention to inflict an injury
13 upon another.

14 *SEC. 2. Section 286 of the Penal Code is amended to read:*

15 286. (a) Sodomy is sexual conduct consisting of contact
16 between the penis of one person and the anus of another person.
17 Any sexual penetration, however slight, is sufficient to complete
18 the crime of sodomy.

19 (b) (1) Except as provided in Section 288, any person who
20 participates in an act of sodomy with another person who is under
21 18 years of age shall be punished by imprisonment in the state
22 prison, or in a county jail for not more than one year.

23 (2) Except as provided in Section 288, any person over the age
24 of 21 years who participates in an act of sodomy with another
25 person who is under 16 years of age shall be guilty of a felony.

26 (c) (1) Any person who participates in an act of sodomy with
27 another person who is under 14 years of age and more than 10
28 years younger than he or she shall be punished by imprisonment
29 in the state prison for three, six, or eight years.

30 (2) (A) Any person who commits an act of sodomy when the
31 act is accomplished against the victim’s will by means of force,
32 violence, duress, menace, or fear of immediate and unlawful bodily
33 injury on the victim or another person shall be punished by
34 imprisonment in the state prison for three, six, or eight years.

35 (B) Any person who commits an act of sodomy with another
36 person who is under 14 years of age when the act is accomplished
37 against the victim’s will by means of force, violence, duress,
38 menace, or fear of immediate and unlawful bodily injury on the
39 victim or another person shall be punished by imprisonment in the
40 state prison for 9, 11, or 13 years.

1 (C) Any person who commits an act of sodomy with another
2 person who is a minor 14 years of age or older when the act is
3 accomplished against the victim's will by means of force, violence,
4 duress, menace, or fear of immediate and unlawful bodily injury
5 on the victim or another person shall be punished by imprisonment
6 in the state prison for 7, 9, or 11 years.

7 (D) This paragraph does not preclude prosecution under Section
8 269, Section 288.7, or any other provision of law.

9 (3) Any person who commits an act of sodomy where the act
10 is accomplished against the victim's will by threatening to retaliate
11 in the future against the victim or any other person, and there is a
12 reasonable possibility that the perpetrator will execute the threat,
13 shall be punished by imprisonment in the state prison for three,
14 six, or eight years.

15 (d) (1) Any person who, while voluntarily acting in concert
16 with another person, either personally or aiding and abetting that
17 other person, commits an act of sodomy when the act is
18 accomplished against the victim's will by means of force or fear
19 of immediate and unlawful bodily injury on the victim or another
20 person or where the act is accomplished against the victim's will
21 by threatening to retaliate in the future against the victim or any
22 other person, and there is a reasonable possibility that the
23 perpetrator will execute the threat, shall be punished by
24 imprisonment in the state prison for five, seven, or nine years.

25 (2) Any person who, while voluntarily acting in concert with
26 another person, either personally or aiding and abetting that other
27 person, commits an act of sodomy upon a victim who is under 14
28 years of age, when the act is accomplished against the victim's
29 will by means of force or fear of immediate and unlawful bodily
30 injury on the victim or another person, shall be punished by
31 imprisonment in the state prison for 10, 12, or 14 years.

32 (3) Any person who, while voluntarily acting in concert with
33 another person, either personally or aiding and abetting that other
34 person, commits an act of sodomy upon a victim who is a minor
35 14 years of age or older, when the act is accomplished against the
36 victim's will by means of force or fear of immediate and unlawful
37 bodily injury on the victim or another person, shall be punished
38 by imprisonment in the state prison for 7, 9, or 11 years.

39 (4) This subdivision does not preclude prosecution under Section
40 269, Section 288.7, or any other provision of law.

- 1 (e) Any person who participates in an act of sodomy with any
 2 person of any age while confined in any state prison, as defined
 3 in Section 4504, or in any local detention facility, as defined in
 4 Section 6031.4, shall be punished by imprisonment in the state
 5 prison, or in a county jail for not more than one year.
- 6 (f) Any person who commits an act of sodomy, and the victim
 7 is at the time unconscious of the nature of the act and this is known
 8 to the person committing the act, shall be punished by
 9 imprisonment in the state prison for three, six, or eight years. As
 10 used in this subdivision, “unconscious of the nature of the act”
 11 means incapable of resisting because the victim meets one of the
 12 following conditions:
- 13 (1) Was unconscious or asleep.
 - 14 (2) Was not aware, knowing, perceiving, or cognizant that the
 15 act occurred.
 - 16 (3) Was not aware, knowing, perceiving, or cognizant of the
 17 essential characteristics of the act due to the perpetrator’s fraud in
 18 fact.
 - 19 (4) Was not aware, knowing, perceiving, or cognizant of the
 20 essential characteristics of the act due to the perpetrator’s fraudulent
 21 representation that the sexual penetration served a professional
 22 purpose when it served no professional purpose.
- 23 (g) Except as provided in subdivision (h), a person who commits
 24 an act of sodomy, and the victim is at the time incapable, because
 25 of a mental disorder or developmental or physical disability, of
 26 giving legal consent, and this is known or reasonably should be
 27 known to the person committing the act, shall be punished by
 28 imprisonment in the state prison for three, six, or eight years.
 29 Notwithstanding the existence of a conservatorship pursuant to
 30 the Lanterman-Petris-Short Act (Part 1 (commencing with Section
 31 5000) of Division 5 of the Welfare and Institutions Code), the
 32 prosecuting attorney shall prove, as an element of the crime, that
 33 a mental disorder or developmental or physical disability rendered
 34 the alleged victim incapable of giving consent.
- 35 (h) Any person who commits an act of sodomy, and the victim
 36 is at the time incapable, because of a mental disorder or
 37 developmental or physical disability, of giving legal consent, and
 38 this is known or reasonably should be known to the person
 39 committing the act, and both the defendant and the victim are at
 40 the time confined in a state hospital for the care and treatment of

1 the mentally disordered or in any other public or private facility
2 for the care and treatment of the mentally disordered approved by
3 a county mental health director, shall be punished by imprisonment
4 in the state prison, or in a county jail for not more than one year.
5 Notwithstanding the existence of a conservatorship pursuant to
6 the Lanterman-Petris-Short Act (Part 1 (commencing with Section
7 5000) of Division 5 of the Welfare and Institutions Code), the
8 prosecuting attorney shall prove, as an element of the crime, that
9 a mental disorder or developmental or physical disability rendered
10 the alleged victim incapable of giving legal consent.

11 (i) Any person who commits an act of sodomy, where the victim
12 is prevented from resisting by an intoxicating or anesthetic
13 substance, or any controlled substance, and this condition was
14 known, or reasonably should have been known by the accused,
15 shall be punished by imprisonment in the state prison for three,
16 six, or eight years.

17 (j) Any person who commits an act of sodomy, where the victim
18 submits under the belief that the person committing the act is ~~the~~
19 ~~victim's spouse~~, *someone other than the accused*, and this belief
20 is induced by any artifice, pretense, or concealment practiced by
21 the accused, with intent to induce the belief, shall be punished by
22 imprisonment in the state prison for three, six, or eight years.

23 (k) Any person who commits an act of sodomy, where the act
24 is accomplished against the victim's will by threatening to use the
25 authority of a public official to incarcerate, arrest, or deport the
26 victim or another, and the victim has a reasonable belief that the
27 perpetrator is a public official, shall be punished by imprisonment
28 in the state prison for three, six, or eight years.

29 As used in this subdivision, "public official" means a person
30 employed by a governmental agency who has the authority, as part
31 of that position, to incarcerate, arrest, or deport another. The
32 perpetrator does not actually have to be a public official.

33 (l) As used in subdivisions (c) and (d), "threatening to retaliate"
34 means a threat to kidnap or falsely imprison, or inflict extreme
35 pain, serious bodily injury, or death.

36 (m) In addition to any punishment imposed under this section,
37 the judge may assess a fine not to exceed seventy dollars (\$70)
38 against any person who violates this section, with the proceeds of
39 this fine to be used in accordance with Section 1463.23. The court,
40 however, shall take into consideration the defendant's ability to

1 pay, and no defendant shall be denied probation because of his or
2 her inability to pay the fine permitted under this subdivision.

3 *SEC. 3. Section 288a of the Penal Code is amended to read:*

4 288a. (a) Oral copulation is the act of copulating the mouth
5 of one person with the sexual organ or anus of another person.

6 (b) (1) Except as provided in Section 288, any person who
7 participates in an act of oral copulation with another person who
8 is under 18 years of age shall be punished by imprisonment in the
9 state prison, or in a county jail for a period of not more than one
10 year.

11 (2) Except as provided in Section 288, any person over the age
12 of 21 years who participates in an act of oral copulation with
13 another person who is under 16 years of age is guilty of a felony.

14 (c) (1) Any person who participates in an act of oral copulation
15 with another person who is under 14 years of age and more than
16 10 years younger than he or she shall be punished by imprisonment
17 in the state prison for three, six, or eight years.

18 (2) (A) Any person who commits an act of oral copulation when
19 the act is accomplished against the victim's will by means of force,
20 violence, duress, menace, or fear of immediate and unlawful bodily
21 injury on the victim or another person shall be punished by
22 imprisonment in the state prison for three, six, or eight years.

23 (B) Any person who commits an act of oral copulation upon a
24 person who is under 14 years of age, when the act is accomplished
25 against the victim's will by means of force, violence, duress,
26 menace, or fear of immediate and unlawful bodily injury on the
27 victim or another person, shall be punished by imprisonment in
28 the state prison for 8, 10, or 12 years.

29 (C) Any person who commits an act of oral copulation upon a
30 minor who is 14 years of age or older, when the act is accomplished
31 against the victim's will by means of force, violence, duress,
32 menace, or fear of immediate and unlawful bodily injury on the
33 victim or another person, shall be punished by imprisonment in
34 the state prison for 6, 8, or 10 years.

35 (D) This paragraph does not preclude prosecution under Section
36 269, Section 288.7, or any other provision of law.

37 (3) Any person who commits an act of oral copulation where
38 the act is accomplished against the victim's will by threatening to
39 retaliate in the future against the victim or any other person, and
40 there is a reasonable possibility that the perpetrator will execute

1 the threat, shall be punished by imprisonment in the state prison
2 for three, six, or eight years.

3 (d) (1) Any person who, while voluntarily acting in concert
4 with another person, either personally or by aiding and abetting
5 that other person, commits an act of oral copulation (1) when the
6 act is accomplished against the victim's will by means of force or
7 fear of immediate and unlawful bodily injury on the victim or
8 another person, or (2) where the act is accomplished against the
9 victim's will by threatening to retaliate in the future against the
10 victim or any other person, and there is a reasonable possibility
11 that the perpetrator will execute the threat, or (3) where the victim
12 is at the time incapable, because of a mental disorder or
13 developmental or physical disability, of giving legal consent, and
14 this is known or reasonably should be known to the person
15 committing the act, shall be punished by imprisonment in the state
16 prison for five, seven, or nine years. Notwithstanding the
17 appointment of a conservator with respect to the victim pursuant
18 to the provisions of the Lanterman-Petris-Short Act (Part 1
19 (commencing with Section 5000) of Division 5 of the Welfare and
20 Institutions Code), the prosecuting attorney shall prove, as an
21 element of the crime described under paragraph (3), that a mental
22 disorder or developmental or physical disability rendered the
23 alleged victim incapable of giving legal consent.

24 (2) Any person who, while voluntarily acting in concert with
25 another person, either personally or aiding and abetting that other
26 person, commits an act of oral copulation upon a victim who is
27 under 14 years of age, when the act is accomplished against the
28 victim's will by means of force or fear of immediate and unlawful
29 bodily injury on the victim or another person, shall be punished
30 by imprisonment in the state prison for 10, 12, or 14 years.

31 (3) Any person who, while voluntarily acting in concert with
32 another person, either personally or aiding and abetting that other
33 person, commits an act of oral copulation upon a victim who is a
34 minor 14 years of age or older, when the act is accomplished
35 against the victim's will by means of force or fear of immediate
36 and unlawful bodily injury on the victim or another person, shall
37 be punished by imprisonment in the state prison for 8, 10, or 12
38 years.

39 (4) This paragraph does not preclude prosecution under Section
40 269, Section 288.7, or any other provision of law.

1 (e) Any person who participates in an act of oral copulation
2 while confined in any state prison, as defined in Section 4504 or
3 in any local detention facility as defined in Section 6031.4, shall
4 be punished by imprisonment in the state prison, or in a county
5 jail for a period of not more than one year.

6 (f) Any person who commits an act of oral copulation, and the
7 victim is at the time unconscious of the nature of the act and this
8 is known to the person committing the act, shall be punished by
9 imprisonment in the state prison for a period of three, six, or eight
10 years. As used in this subdivision, “unconscious of the nature of
11 the act” means incapable of resisting because the victim meets one
12 of the following conditions:

13 (1) Was unconscious or asleep.

14 (2) Was not aware, knowing, perceiving, or cognizant that the
15 act occurred.

16 (3) Was not aware, knowing, perceiving, or cognizant of the
17 essential characteristics of the act due to the perpetrator’s fraud in
18 fact.

19 (4) Was not aware, knowing, perceiving, or cognizant of the
20 essential characteristics of the act due to the perpetrator’s fraudulent
21 representation that the oral copulation served a professional purpose
22 when it served no professional purpose.

23 (g) Except as provided in subdivision (h), any person who
24 commits an act of oral copulation, and the victim is at the time
25 incapable, because of a mental disorder or developmental or
26 physical disability, of giving legal consent, and this is known or
27 reasonably should be known to the person committing the act,
28 shall be punished by imprisonment in the state prison, for three,
29 six, or eight years. Notwithstanding the existence of a
30 conservatorship pursuant to the provisions of the
31 Lanterman-Petris-Short Act (Part 1 (commencing with Section
32 5000) of Division 5 of the Welfare and Institutions Code), the
33 prosecuting attorney shall prove, as an element of the crime, that
34 a mental disorder or developmental or physical disability rendered
35 the alleged victim incapable of giving consent.

36 (h) Any person who commits an act of oral copulation, and the
37 victim is at the time incapable, because of a mental disorder or
38 developmental or physical disability, of giving legal consent, and
39 this is known or reasonably should be known to the person
40 committing the act, and both the defendant and the victim are at

1 the time confined in a state hospital for the care and treatment of
2 the mentally disordered or in any other public or private facility
3 for the care and treatment of the mentally disordered approved by
4 a county mental health director, shall be punished by imprisonment
5 in the state prison, or in a county jail for a period of not more than
6 one year. Notwithstanding the existence of a conservatorship
7 pursuant to the provisions of the Lanterman-Petris-Short Act (Part
8 1 (commencing with Section 5000) of Division 5 of the Welfare
9 and Institutions Code), the prosecuting attorney shall prove, as an
10 element of the crime, that a mental disorder or developmental or
11 physical disability rendered the alleged victim incapable of giving
12 legal consent.

13 (i) Any person who commits an act of oral copulation, where
14 the victim is prevented from resisting by any intoxicating or
15 anesthetic substance, or any controlled substance, and this condition
16 was known, or reasonably should have been known by the accused,
17 shall be punished by imprisonment in the state prison for a period
18 of three, six, or eight years.

19 (j) Any person who commits an act of oral copulation, where
20 the victim submits under the belief that the person committing the
21 act is ~~the victim's spouse~~, *someone other than the accused*, and
22 this belief is induced by any artifice, pretense, or concealment
23 practiced by the accused, with intent to induce the belief, shall be
24 punished by imprisonment in the state prison for a period of three,
25 six, or eight years.

26 (k) Any person who commits an act of oral copulation, where
27 the act is accomplished against the victim's will by threatening to
28 use the authority of a public official to incarcerate, arrest, or deport
29 the victim or another, and the victim has a reasonable belief that
30 the perpetrator is a public official, shall be punished by
31 imprisonment in the state prison for a period of three, six, or eight
32 years.

33 As used in this subdivision, "public official" means a person
34 employed by a governmental agency who has the authority, as part
35 of that position, to incarcerate, arrest, or deport another. The
36 perpetrator does not actually have to be a public official.

37 (l) As used in subdivisions (c) and (d), "threatening to retaliate"
38 means a threat to kidnap or falsely imprison, or to inflict extreme
39 pain, serious bodily injury, or death.

1 (m) In addition to any punishment imposed under this section,
2 the judge may assess a fine not to exceed seventy dollars (\$70)
3 against any person who violates this section, with the proceeds of
4 this fine to be used in accordance with Section 1463.23. The court
5 shall, however, take into consideration the defendant's ability to
6 pay, and no defendant shall be denied probation because of his or
7 her inability to pay the fine permitted under this subdivision.

8 *SEC. 4. Section 289 of the Penal Code is amended to read:*

9 289. (a) (1) (A) Any person who commits an act of sexual
10 penetration when the act is accomplished against the victim's will
11 by means of force, violence, duress, menace, or fear of immediate
12 and unlawful bodily injury on the victim or another person shall
13 be punished by imprisonment in the state prison for three, six, or
14 eight years.

15 (B) Any person who commits an act of sexual penetration upon
16 a child who is under 14 years of age, when the act is accomplished
17 against the victim's will by means of force, violence, duress,
18 menace, or fear of immediate and unlawful bodily injury on the
19 victim or another person, shall be punished by imprisonment in
20 the state prison for 8, 10, or 12 years.

21 (C) Any person who commits an act of sexual penetration upon
22 a minor who is 14 years of age or older, when the act is
23 accomplished against the victim's will by means of force, violence,
24 duress, menace, or fear of immediate and unlawful bodily injury
25 on the victim or another person, shall be punished by imprisonment
26 in the state prison for 6, 8, or 10 years.

27 (D) This paragraph does not preclude prosecution under Section
28 269, Section 288.7, or any other provision of law.

29 (2) Any person who commits an act of sexual penetration when
30 the act is accomplished against the victim's will by threatening to
31 retaliate in the future against the victim or any other person, and
32 there is a reasonable possibility that the perpetrator will execute
33 the threat, shall be punished by imprisonment in the state prison
34 for three, six, or eight years.

35 (b) Except as provided in subdivision (c), any person who
36 commits an act of sexual penetration, and the victim is at the time
37 incapable, because of a mental disorder or developmental or
38 physical disability, of giving legal consent, and this is known or
39 reasonably should be known to the person committing the act or
40 causing the act to be committed, shall be punished by imprisonment

1 in the state prison for three, six, or eight years. Notwithstanding
2 the appointment of a conservator with respect to the victim pursuant
3 to the provisions of the Lanterman-Petris-Short Act (Part 1
4 (commencing with Section 5000) of Division 5 of the Welfare and
5 Institutions Code), the prosecuting attorney shall prove, as an
6 element of the crime, that a mental disorder or developmental or
7 physical disability rendered the alleged victim incapable of giving
8 legal consent.

9 (c) Any person who commits an act of sexual penetration, and
10 the victim is at the time incapable, because of a mental disorder
11 or developmental or physical disability, of giving legal consent,
12 and this is known or reasonably should be known to the person
13 committing the act or causing the act to be committed and both
14 the defendant and the victim are at the time confined in a state
15 hospital for the care and treatment of the mentally disordered or
16 in any other public or private facility for the care and treatment of
17 the mentally disordered approved by a county mental health
18 director, shall be punished by imprisonment in the state prison, or
19 in a county jail for a period of not more than one year.
20 Notwithstanding the existence of a conservatorship pursuant to
21 the provisions of the Lanterman-Petris-Short Act (Part 1
22 (commencing with Section 5000) of Division 5 of the Welfare and
23 Institutions Code), the prosecuting attorney shall prove, as an
24 element of the crime, that a mental disorder or developmental or
25 physical disability rendered the alleged victim incapable of giving
26 legal consent.

27 (d) Any person who commits an act of sexual penetration, and
28 the victim is at the time unconscious of the nature of the act and
29 this is known to the person committing the act or causing the act
30 to be committed, shall be punished by imprisonment in the state
31 prison for three, six, or eight years. As used in this subdivision,
32 “unconscious of the nature of the act” means incapable of resisting
33 because the victim meets one of the following conditions:

- 34 (1) Was unconscious or asleep.
- 35 (2) Was not aware, knowing, perceiving, or cognizant that the
36 act occurred.
- 37 (3) Was not aware, knowing, perceiving, or cognizant of the
38 essential characteristics of the act due to the perpetrator’s fraud in
39 fact.

1 (4) Was not aware, knowing, perceiving, or cognizant of the
2 essential characteristics of the act due to the perpetrator's fraudulent
3 representation that the sexual penetration served a professional
4 purpose when it served no professional purpose.

5 (e) Any person who commits an act of sexual penetration when
6 the victim is prevented from resisting by any intoxicating or
7 anesthetic substance, or any controlled substance, and this condition
8 was known, or reasonably should have been known by the accused,
9 shall be punished by imprisonment in the state prison for a period
10 of three, six, or eight years.

11 (f) Any person who commits an act of sexual penetration when
12 the victim submits under the belief that the person committing the
13 act or causing the act to be committed is ~~the victim's spouse,~~
14 *someone other than the accused*, and this belief is induced by any
15 artifice, pretense, or concealment practiced by the accused, with
16 intent to induce the belief, shall be punished by imprisonment in
17 the state prison for a period of three, six, or eight years.

18 (g) Any person who commits an act of sexual penetration when
19 the act is accomplished against the victim's will by threatening to
20 use the authority of a public official to incarcerate, arrest, or deport
21 the victim or another, and the victim has a reasonable belief that
22 the perpetrator is a public official, shall be punished by
23 imprisonment in the state prison for a period of three, six, or eight
24 years.

25 As used in this subdivision, "public official" means a person
26 employed by a governmental agency who has the authority, as part
27 of that position, to incarcerate, arrest, or deport another. The
28 perpetrator does not actually have to be a public official.

29 (h) Except as provided in Section 288, any person who
30 participates in an act of sexual penetration with another person
31 who is under 18 years of age shall be punished by imprisonment
32 in the state prison or in the county jail for a period of not more
33 than one year.

34 (i) Except as provided in Section 288, any person over the age
35 of 21 years who participates in an act of sexual penetration with
36 another person who is under 16 years of age shall be guilty of a
37 felony.

38 (j) Any person who participates in an act of sexual penetration
39 with another person who is under 14 years of age and who is more

1 than 10 years younger than he or she shall be punished by
2 imprisonment in the state prison for three, six, or eight years.

3 (k) As used in this section:

4 (1) “Sexual penetration” is the act of causing the penetration,
5 however slight, of the genital or anal opening of any person or
6 causing another person to so penetrate the defendant’s or another
7 person’s genital or anal opening for the purpose of sexual arousal,
8 gratification, or abuse by any foreign object, substance, instrument,
9 or device, or by any unknown object.

10 (2) “Foreign object, substance, instrument, or device” shall
11 include any part of the body, except a sexual organ.

12 (3) “Unknown object” shall include any foreign object,
13 substance, instrument, or device, or any part of the body, including
14 a penis, when it is not known whether penetration was by a penis
15 or by a foreign object, substance, instrument, or device, or by any
16 other part of the body.

17 (l) As used in subdivision (a), “threatening to retaliate” means
18 a threat to kidnap or falsely imprison, or inflict extreme pain,
19 serious bodily injury or death.

20 (m) As used in this section, “victim” includes any person who
21 the defendant causes to penetrate the genital or anal opening of
22 the defendant or another person or whose genital or anal opening
23 is caused to be penetrated by the defendant or another person and
24 who otherwise qualifies as a victim under the requirements of this
25 section.

26 ~~SEC. 2.~~

27 *SEC. 5.* No reimbursement is required by this act pursuant to
28 Section 6 of Article XIII B of the California Constitution because
29 the only costs that may be incurred by a local agency or school
30 district will be incurred because this act creates a new crime or
31 infraction, eliminates a crime or infraction, or changes the penalty
32 for a crime or infraction, within the meaning of Section 17556 of
33 the Government Code, or changes the definition of a crime within
34 the meaning of Section 6 of Article XIII B of the California
35 Constitution.

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