

AMENDED IN ASSEMBLY MARCH 25, 2015

CALIFORNIA LEGISLATURE—2015–16 REGULAR SESSION

## ASSEMBLY BILL

**No. 860**

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**Introduced by Assembly Member Daly**

February 26, 2015

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An act to amend ~~Section 422.55 of the Penal Code, relating to hate crimes;~~ Sections 243.4, 261, 286, 288a, and 289 of the Penal Code, relating to sex crimes.

### LEGISLATIVE COUNSEL'S DIGEST

AB 860, as amended, Daly. ~~Hate crimes: political affiliation. Sex crimes: professional services.~~

*Under existing law, a person is guilty of sexual battery, punishable by imprisonment in a county jail or in the state prison for 2, 3, or 4 years, if he or she touches an intimate part of another person for the purpose of sexual arousal, sexual gratification, or sexual abuse, while the victim is unconscious of the nature of the act because the perpetrator fraudulently represented that the touching served a professional purpose.*

*This bill would expand the crime of sexual battery to apply to a person who performs professional services that entail having access to another person's body, who touches an intimate part of the that person's body while performing those services and the touching was against the person's will and for the purpose of sexual arousal, sexual gratification, or sexual abuse. The bill would make the crime punishable by imprisonment in the state prison for 2, 3, or 4 years, and by a fine not exceeding \$10,000. By expanding the scope of a crime and increasing the punishment for a crime, this bill would impose a state-mandated local program.*

*Existing law defines rape as an act of sexual intercourse accomplished with a person not the spouse of the perpetrator under any of several circumstances. Existing law also defines the crimes of sodomy, oral copulation, and sexual penetration.*

*This bill would expand the definitions of each of those crimes to include when any of those acts are performed against a victim's will by a professional whose services entail having access to the victim's body, if the conduct is performed by the professional while performing those services. By expanding the scope of crimes, the 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.*

~~Existing law defines "hate crime" as a criminal act committed, in whole or in part, because of actual or perceived characteristics of the victim, including, among other things, race, religion, disability, and sexual orientation. Under existing law, that definition applies unless an explicit provision of law or the context clearly requires a different meaning. Existing law provides punishments for hate crimes that range from misdemeanors with specified penalties to felonies with additional terms of one to 3 years in state prison, depending on the underlying criminal act and other circumstances. Existing law requires, with conditions, the Attorney General to direct local law enforcement agencies to report specified information relative to hate crimes to the Department of Justice. Existing law requires the department to annually submit a report to the Legislature that analyzes the results of information obtained from local law enforcement pursuant to these provisions. Local law enforcement entities are required by existing law to provide a brochure on hate crimes to victims of these crimes and to the public, and the Department of Fair Employment and Housing is required by existing law to revise those brochures as needed and to provide those brochures to local law enforcement agencies upon request.~~

~~This bill would add political affiliation to the list of actual or perceived characteristics necessary to determine whether a criminal act qualifies as a hate crime. By expanding the scope of an existing crime, this bill would impose a state-mandated local program. By expanding the information that local law enforcement agencies are required to report~~

to the Department of Justice, 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 with regard to certain mandates no reimbursement is required by this act for a specified reason.~~

~~With regard to any other mandates, this bill would provide that, if the Commission on State Mandates determines that the bill contains costs so mandated by the state, reimbursement for those costs shall be made pursuant to the statutory provisions noted above.~~

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 243.4 of the Penal Code is amended to  
2     read:

3     243.4. (a) Any person who touches an intimate part of another  
4     person while that person is unlawfully restrained by the accused  
5     or an accomplice, and if the touching is against the will of the  
6     person touched and is for the purpose of sexual arousal, sexual  
7     gratification, or sexual abuse, is guilty of sexual battery. A violation  
8     of this subdivision is punishable by imprisonment in a county jail  
9     for not more than one year, and by a fine not exceeding two  
10    thousand dollars (\$2,000); or by imprisonment in the state prison  
11    for two, three, or four years, and by a fine not exceeding ten  
12    thousand dollars (\$10,000).

13    (b) Any person who touches an intimate part of another person  
14    who is institutionalized for medical treatment and who is seriously  
15    disabled or medically incapacitated, if the touching is against the  
16    will of the person touched, and if the touching is for the purpose  
17    of sexual arousal, sexual gratification, or sexual abuse, is guilty  
18    of sexual battery. A violation of this subdivision is punishable by  
19    imprisonment in a county jail for not more than one year, and by  
20    a fine not exceeding two thousand dollars (\$2,000); or by  
21    imprisonment in the state prison for two, three, or four years, and  
22    by a fine not exceeding ten thousand dollars (\$10,000).

23    (c) Any person who touches an intimate part of another person  
24    for the purpose of sexual arousal, sexual gratification, or sexual

1 abuse, and the victim is at the time unconscious of the nature of  
2 the act because the perpetrator fraudulently represented that the  
3 touching served a professional purpose, is guilty of sexual battery.  
4 A violation of this subdivision is punishable by imprisonment in  
5 a county jail for not more than one year, and by a fine not  
6 exceeding two thousand dollars (\$2,000); or by imprisonment in  
7 the state prison for two, three, or four years, and by a fine not  
8 exceeding ten thousand dollars (\$10,000).

9 (d) Any person who, for the purpose of sexual arousal, sexual  
10 gratification, or sexual abuse, causes another, against that person's  
11 will while that person is unlawfully restrained either by the accused  
12 or an accomplice, or is institutionalized for medical treatment and  
13 is seriously disabled or medically incapacitated, to masturbate or  
14 touch an intimate part of either of those persons or a third person,  
15 is guilty of sexual battery. A violation of this subdivision is  
16 punishable by imprisonment in a county jail for not more than one  
17 year, and by a fine not exceeding two thousand dollars (\$2,000);  
18 or by imprisonment in the state prison for two, three, or four years,  
19 and by a fine not exceeding ten thousand dollars (\$10,000).

20 (e) *Any person who performs professional services that entail*  
21 *having access to another person's body, who touches an intimate*  
22 *part of that person while performing those services, and the*  
23 *touching is against the will of the person touched and for the*  
24 *specific purpose of sexual arousal, sexual gratification, or sexual*  
25 *abuse, is guilty of sexual battery. A violation of this subdivision is*  
26 *punishable by imprisonment in the state prison for two, three, or*  
27 *four years, and by a fine not exceeding ten thousand dollars*  
28 *(\$10,000).*

29 (e)

30 (f) (1) Any person who touches an intimate part of another  
31 person, if the touching is against the will of the person touched,  
32 and is for the specific purpose of sexual arousal, sexual  
33 gratification, or sexual abuse, is guilty of misdemeanor sexual  
34 battery, punishable by a fine not exceeding two thousand dollars  
35 (\$2,000), or by imprisonment in a county jail not exceeding six  
36 months, or by both that fine and imprisonment. However, if the  
37 defendant was an employer and the victim was an employee of  
38 the defendant, the misdemeanor sexual battery shall be punishable  
39 by a fine not exceeding three thousand dollars (\$3,000), by  
40 imprisonment in a county jail not exceeding six months, or by both

1 that fine and imprisonment. Notwithstanding any other provision  
2 of law, any amount of a fine above two thousand dollars (\$2,000)  
3 which is collected from a defendant for a violation of this  
4 subdivision shall be transmitted to the State Treasury and, upon  
5 appropriation by the Legislature, distributed to the Department of  
6 Fair Employment and Housing for the purpose of enforcement of  
7 the California Fair Employment and Housing Act (Part 2.8  
8 (commencing with Section 12900) of Division 3 of Title 2 of the  
9 Government Code), including, but not limited to, laws that  
10 proscribe sexual harassment in places of employment. However,  
11 in no event shall an amount over two thousand dollars (\$2,000)  
12 be transmitted to the State Treasury until all fines, including any  
13 restitution fines that may have been imposed upon the defendant,  
14 have been paid in full.

15 (2) As used in this subdivision, “touches” means physical contact  
16 with another person, whether accomplished directly, through the  
17 clothing of the person committing the offense, or through the  
18 clothing of the victim.

19 ~~(f)~~

20 (g) As used in subdivisions (a), (b), (c), ~~and (d)~~, (d), and (e),  
21 “touches” means physical contact with the skin of another person  
22 whether accomplished directly or through the clothing of the person  
23 committing the offense.

24 ~~(g)~~

25 (h) As used in this section, the following terms have the  
26 following meanings:

27 (1) “Intimate part” means the sexual organ, anus, groin, or  
28 buttocks of any person, and the breast of a female.

29 (2) “Sexual battery” does not include the crimes defined in  
30 Section 261 or 289.

31 (3) “Seriously disabled” means a person with severe physical  
32 or sensory disabilities.

33 (4) “Medically incapacitated” means a person who is  
34 incapacitated as a result of prescribed sedatives, anesthesia, or  
35 other medication.

36 (5) “Institutionalized” means a person who is located voluntarily  
37 or involuntarily in a hospital, medical treatment facility, nursing  
38 home, acute care facility, or mental hospital.

39 (6) “Minor” means a person under 18 years of age.

40 ~~(h)~~

1     (i) This section ~~shall not be construed to~~ *does not* limit or prevent  
2 prosecution under any other law which also proscribes a course  
3 of conduct that also is proscribed by this section.

4     ~~(i)~~

5     (j) In the case of a felony conviction for a violation of this  
6 section, the fact that the defendant was an employer and the victim  
7 was an employee of the defendant shall be a factor in aggravation  
8 in sentencing.

9     ~~(j)~~

10    (k) A person who commits a violation of subdivision (a), (b),  
11 (c), or (d) against a minor when the person has a prior felony  
12 conviction for a violation of this section shall be guilty of a felony,  
13 punishable by imprisonment in the state prison for two, three, or  
14 four years and a fine not exceeding ten thousand dollars (\$10,000).

15    *SEC. 2. Section 261 of the Penal Code is amended to read:*

16    261. (a) Rape is an act of sexual intercourse accomplished  
17 with a person not the spouse of the perpetrator, under any of the  
18 following circumstances:

19    (1) Where a person is incapable, because of a mental disorder  
20 or developmental or physical disability, of giving legal consent,  
21 and this is known or reasonably should be known to the person  
22 committing the act. Notwithstanding the existence of a  
23 conservatorship pursuant to the provisions of the  
24 Lanterman-Petris-Short Act (Part 1 (commencing with Section  
25 5000) of Division 5 of the Welfare and Institutions Code), the  
26 prosecuting attorney shall prove, as an element of the crime, that  
27 a mental disorder or developmental or physical disability rendered  
28 the alleged victim incapable of giving consent.

29    (2) Where it is accomplished against a person's will by means  
30 of force, violence, duress, menace, or fear of immediate and  
31 unlawful bodily injury on the person or another.

32    (3) Where a person is prevented from resisting by any  
33 intoxicating or anesthetic substance, or any controlled substance,  
34 and this condition was known, or reasonably should have been  
35 known by the accused.

36    (4) Where a person is at the time unconscious of the nature of  
37 the act, and this is known to the accused. As used in this paragraph,  
38 "unconscious of the nature of the act" means incapable of resisting  
39 because the victim meets any one of the following conditions:

40    (A) Was unconscious or asleep.

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

3 (C) Was not aware, knowing, perceiving, or cognizant of the  
4 essential characteristics of the act due to the perpetrator's fraud in  
5 fact.

6 (D) Was not aware, knowing, perceiving, or cognizant of the  
7 essential characteristics of the act due to the perpetrator's fraudulent  
8 representation that the sexual penetration served a professional  
9 purpose when it served no professional purpose.

10 (5) Where a person submits under the belief that the person  
11 committing the act is someone known to the victim other than the  
12 accused, and this belief is induced by any artifice, pretense, or  
13 concealment practiced by the accused, with intent to induce the  
14 belief.

15 (6) Where the act is accomplished against the victim's will by  
16 threatening to retaliate in the future against the victim or any other  
17 person, and there is a reasonable possibility that the perpetrator  
18 will execute the threat. As used in this paragraph, "threatening to  
19 retaliate" means a threat to kidnap or falsely imprison, or to inflict  
20 extreme pain, serious bodily injury, or death.

21 (7) Where the act is accomplished against the victim's will by  
22 threatening to use the authority of a public official to incarcerate,  
23 arrest, or deport the victim or another, and the victim has a  
24 reasonable belief that the perpetrator is a public official. As used  
25 in this paragraph, "public official" means a person employed by  
26 a governmental agency who has the authority, as part of that  
27 position, to incarcerate, arrest, or deport another. The perpetrator  
28 does not actually have to be a public official.

29 (8) *Where the act is accomplished against the victim's will by*  
30 *a person while that person is performing professional services*  
31 *that entail having access to the victim's body.*

32 (b) As used in this section, "duress" means a direct or implied  
33 threat of force, violence, danger, or retribution sufficient to coerce  
34 a reasonable person of ordinary susceptibilities to perform an act  
35 which otherwise would not have been performed, or acquiesce in  
36 an act to which one otherwise would not have submitted. The total  
37 circumstances, including the age of the victim, and his or her  
38 relationship to the defendant, are factors to consider in appraising  
39 the existence of duress.

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

4 *SEC. 3. Section 286 of the Penal Code is amended to read:*

5 286. (a) Sodomy is sexual conduct consisting of contact  
6 between the penis of one person and the anus of another person.  
7 Any sexual penetration, however slight, is sufficient to complete  
8 the crime of sodomy.

9 (b) (1) Except as provided in Section 288, any person who  
10 participates in an act of sodomy with another person who is under  
11 18 years of age shall be punished by imprisonment in the state  
12 prison, or in a county jail for not more than one year.

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

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

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

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

31 (C) Any person who commits an act of sodomy with another  
32 person who is a minor 14 years of age or older when the act is  
33 accomplished against the victim’s will by means of force, violence,  
34 duress, menace, or fear of immediate and unlawful bodily injury  
35 on the victim or another person shall be punished by imprisonment  
36 in the state prison for 7, 9, or 11 years.

37 (D) This paragraph does not preclude prosecution under Section  
38 269, Section 288.7, or any other provision of law.

39 (3) Any person who commits an act of sodomy where the act  
40 is accomplished against the victim’s will by threatening to retaliate



1 in the future against the victim or any other person, and there is a  
2 reasonable possibility that the perpetrator will execute the threat,  
3 shall be punished by imprisonment in the state prison for three,  
4 six, or eight years.

5 (d) (1) Any person who, while voluntarily acting in concert  
6 with another person, either personally or aiding and abetting that  
7 other person, commits an act of sodomy when the act is  
8 accomplished against the victim's will by means of force or fear  
9 of immediate and unlawful bodily injury on the victim or another  
10 person or where the act is accomplished against the victim's will  
11 by threatening to retaliate in the future against the victim or any  
12 other person, and there is a reasonable possibility that the  
13 perpetrator will execute the threat, shall be punished by  
14 imprisonment in the state prison for five, seven, or nine years.

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

22 (3) Any person who, while voluntarily acting in concert with  
23 another person, either personally or aiding and abetting that other  
24 person, commits an act of sodomy upon a victim who is a minor  
25 14 years of age or older, when the act is accomplished against the  
26 victim's will by means of force or fear of immediate and unlawful  
27 bodily injury on the victim or another person, shall be punished  
28 by imprisonment in the state prison for 7, 9, or 11 years.

29 (4) This subdivision does not preclude prosecution under Section  
30 269, Section 288.7, or any other provision of law.

31 (e) Any person who participates in an act of sodomy with any  
32 person of any age while confined in any state prison, as defined  
33 in Section 4504, or in any local detention facility, as defined in  
34 Section 6031.4, shall be punished by imprisonment in the state  
35 prison, or in a county jail for not more than one year.

36 (f) (1) Any person who commits an act of sodomy, and the  
37 victim is at the time unconscious of the nature of the act and this  
38 is known to the person committing the act, shall be punished by  
39 imprisonment in the state prison for three, six, or eight years. As  
40 used in this subdivision, "unconscious of the nature of the act"

1 means incapable of resisting because the victim meets one of the  
2 following conditions:

3 ~~(1)~~

4 (A) Was unconscious or asleep.

5 ~~(2)~~

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

8 ~~(3)~~

9 (C) Was not aware, knowing, perceiving, or cognizant of the  
10 essential characteristics of the act due to the perpetrator's fraud in  
11 fact.

12 ~~(4)~~

13 (D) Was not aware, knowing, perceiving, or cognizant of the  
14 essential characteristics of the act due to the perpetrator's fraudulent  
15 representation that the sexual penetration served a professional  
16 purpose when it served no professional purpose.

17 (2) *A person who performs professional services that entail*  
18 *having access to the victim's body, who commits an act of sodomy*  
19 *upon the victim while performing those services, and the act is*  
20 *against the victim's will, shall be punished by imprisonment in the*  
21 *state prison for three, six, or eight years.*

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

34 (h) Any person who commits an act of sodomy, and the victim  
35 is at the time incapable, because of a mental disorder or  
36 developmental or physical disability, of giving legal consent, and  
37 this is known or reasonably should be known to the person  
38 committing the act, and both the defendant and the victim are at  
39 the time confined in a state hospital for the care and treatment of  
40 the mentally disordered or in any other public or private facility

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

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

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

22 (k) (1) Any person who commits an act of sodomy, where the  
23 act is accomplished against the victim's will by threatening to use  
24 the authority of a public official to incarcerate, arrest, or deport  
25 the victim or another, and the victim has a reasonable belief that  
26 the perpetrator is a public official, shall be punished by  
27 imprisonment in the state prison for three, six, or eight years.

28 ~~As~~

29 (2) *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. 4. 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 21 years  
12 of age who participates in an act of oral copulation with another  
13 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 (A) 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 (B) 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 (C) 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.

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

(f) (1) Any person who commits an act of oral copulation, and the victim is at the time unconscious of the nature of the act and this is known to the person committing the act, shall be punished by imprisonment in the state prison for a period of three, six, or eight years. As used in this subdivision, “unconscious of the nature of the act” means incapable of resisting because the victim meets one of the following conditions:

~~(1)~~

(A) Was unconscious or asleep.

~~(2)~~

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

~~(3)~~

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

~~(4)~~

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

(2) *A person who performs professional services that entail having access to the victim’s body, who commits an act of oral copulation upon the victim while performing those services, and the act is against the victim’s will, shall be punished by imprisonment in the state prison for three, six, or eight years.*

(g) Except as provided in subdivision (h), any person who commits an act of oral copulation, and the victim is at the time incapable, because of a mental disorder or developmental or physical disability, of giving legal consent, and this is known or reasonably should be known to the person committing the act, shall be punished by imprisonment in the state prison, for three, six, or eight years. Notwithstanding the existence of a conservatorship pursuant to the provisions of the Lanterman-Petris-Short Act (Part 1 (commencing with Section

5000) of Division 5 of the Welfare and Institutions Code), the prosecuting attorney shall prove, as an element of the crime, that a mental disorder or developmental or physical disability rendered the alleged victim incapable of giving consent.

(h) Any person who commits an act of oral copulation, and the victim is at the time incapable, because of a mental disorder or developmental or physical disability, of giving legal consent, and this is known or reasonably should be known to the person committing the act, and both the defendant and the victim are at the time confined in a state hospital for the care and treatment of the mentally disordered or in any other public or private facility for the care and treatment of the mentally disordered approved by a county mental health director, shall be punished by imprisonment in the state prison, or in a county jail for a period of not more than one year. Notwithstanding the existence of a conservatorship pursuant to the provisions of the Lanterman-Petris-Short Act (Part 1 (commencing with Section 5000) of Division 5 of the Welfare and Institutions Code), the prosecuting attorney shall prove, as an element of the crime, that a mental disorder or developmental or physical disability rendered the alleged victim incapable of giving legal consent.

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

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

(k) (1) Any person who commits an act of oral copulation, where the act is accomplished against the victim's will by threatening to use the authority of a public official to incarcerate, arrest, or deport the victim or another, and the victim has a reasonable belief that the perpetrator is a public official, shall be

1 punished by imprisonment in the state prison for a period of three,  
2 six, or eight years.

3 ~~As~~

4 (2) As used in this subdivision, “public official” means a person  
5 employed by a governmental agency who has the authority, as part  
6 of that position, to incarcerate, arrest, or deport another. The  
7 perpetrator does not actually have to be a public official.

8 (l) As used in subdivisions (c) and (d), “threatening to retaliate”  
9 means a threat to kidnap or falsely imprison, or to inflict extreme  
10 pain, serious bodily injury, or death.

11 (m) In addition to any punishment imposed under this section,  
12 the judge may assess a fine not to exceed seventy dollars (\$70)  
13 against any person who violates this section, with the proceeds of  
14 this fine to be used in accordance with Section 1463.23. The court  
15 shall, however, take into consideration the defendant’s ability to  
16 pay, and no defendant shall be denied probation because of his or  
17 her inability to pay the fine permitted under this subdivision.

18 *SEC. 5. Section 289 of the Penal Code is amended to read:*

19 289. (a) (1) (A) Any person who commits an act of sexual  
20 penetration when the act is accomplished against the victim’s will  
21 by means of force, violence, duress, menace, or fear of immediate  
22 and unlawful bodily injury on the victim or another person shall  
23 be punished by imprisonment in the state prison for three, six, or  
24 eight years.

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

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

37 (D) This paragraph does not preclude prosecution under Section  
38 269, Section 288.7, or any other provision of law.

39 (2) Any person who commits an act of sexual penetration when  
40 the act is accomplished against the victim’s will by threatening to



1 retaliate in the future against the victim or any other person, and  
2 there is a reasonable possibility that the perpetrator will execute  
3 the threat, shall be punished by imprisonment in the state prison  
4 for three, six, or eight years.

5 (b) Except as provided in subdivision (c), any person who  
6 commits an act of sexual penetration, and the victim is at the time  
7 incapable, because of a mental disorder or developmental or  
8 physical disability, of giving legal consent, and this is known or  
9 reasonably should be known to the person committing the act or  
10 causing the act to be committed, shall be punished by imprisonment  
11 in the state prison for three, six, or eight years. Notwithstanding  
12 the appointment of a conservator with respect to the victim pursuant  
13 to the provisions of the Lanterman-Petris-Short Act (Part 1  
14 (commencing with Section 5000) of Division 5 of the Welfare and  
15 Institutions Code), the prosecuting attorney shall prove, as an  
16 element of the crime, that a mental disorder or developmental or  
17 physical disability rendered the alleged victim incapable of giving  
18 legal consent.

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

37 (d) (1) Any person who commits an act of sexual penetration,  
38 and the victim is at the time unconscious of the nature of the act  
39 and this is known to the person committing the act or causing the  
40 act to be committed, shall be punished by imprisonment in the

1 state prison for three, six, or eight years. As used in this  
2 subdivision, “unconscious of the nature of the act” means incapable  
3 of resisting because the victim meets one of the following  
4 conditions:

5 (1)

6 (A) Was unconscious or asleep.

7 (2)

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

10 (3)

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

14 (4)

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

19 (2) *A person who performs professional services that entail*  
20 *having access to the victim’s body, who commits an act of sexual*  
21 *penetration upon the victim while performing those services, and*  
22 *the act is against the victim’s will, shall be punished by*  
23 *imprisonment in the state prison for three, six, or eight years.*

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

30 (f) Any person who commits an act of sexual penetration when  
31 the victim submits under the belief that the person committing the  
32 act or causing the act to be committed is someone known to the  
33 victim other than the accused, and this belief is induced by any  
34 artifice, pretense, or concealment practiced by the accused, with  
35 intent to induce the belief, shall be punished by imprisonment in  
36 the state prison for a period of three, six, or eight years.

37 (g) (1) Any person who commits an act of sexual penetration  
38 when the act is accomplished against the victim’s will by  
39 threatening to use the authority of a public official to incarcerate,  
40 arrest, or deport the victim or another, and the victim has a

1 reasonable belief that the perpetrator is a public official, shall be  
2 punished by imprisonment in the state prison for a period of three,  
3 six, or eight years.

4 ~~As~~

5 (2) As used in this subdivision, “public official” means a person  
6 employed by a governmental agency who has the authority, as part  
7 of that position, to incarcerate, arrest, or deport another. The  
8 perpetrator does not actually have to be a public official.

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

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

17 (j) Any person who participates in an act of sexual penetration  
18 with another person who is under 14 years of age and who is more  
19 than 10 years younger than he or she shall be punished by  
20 imprisonment in the state prison for three, six, or eight years.

21 (k) As used in this section:

22 (1) “Sexual penetration” is the act of causing the penetration,  
23 however slight, of the genital or anal opening of any person or  
24 causing another person to so penetrate the defendant’s or another  
25 person’s genital or anal opening for the purpose of sexual arousal,  
26 gratification, or abuse by any foreign object, substance, instrument,  
27 or device, or by any unknown object.

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

30 (3) “Unknown object” shall include any foreign object,  
31 substance, instrument, or device, or any part of the body, including  
32 a penis, when it is not known whether penetration was by a penis  
33 or by a foreign object, substance, instrument, or device, or by any  
34 other part of the body.

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

38 (m) As used in this section, “victim” includes any person who  
39 the defendant causes to penetrate the genital or anal opening of  
40 the defendant or another person or whose genital or anal opening

1 is caused to be penetrated by the defendant or another person and  
2 who otherwise qualifies as a victim under the requirements of this  
3 section.

4 *SEC. 6. No reimbursement is required by this act pursuant to*  
5 *Section 6 of Article XIII B of the California Constitution because*  
6 *the only costs that may be incurred by a local agency or school*  
7 *district will be incurred because this act creates a new crime or*  
8 *infraction, eliminates a crime or infraction, or changes the penalty*  
9 *for a crime or infraction, within the meaning of Section 17556 of*  
10 *the Government Code, or changes the definition of a crime within*  
11 *the meaning of Section 6 of Article XIII B of the California*  
12 *Constitution.*

13 ~~SECTION 1. Section 422.55 of the Penal Code is amended to~~  
14 ~~read:~~

15 ~~422.55. For purposes of this title, and for purposes of all other~~  
16 ~~state law unless an explicit provision of law or the context clearly~~  
17 ~~requires a different meaning, the following shall apply:~~

18 ~~(a) "Hate crime" means a criminal act committed, in whole or~~  
19 ~~in part, because of one or more of the following actual or perceived~~  
20 ~~characteristics of the victim:~~

21 ~~(1) Disability.~~

22 ~~(2) Gender.~~

23 ~~(3) Nationality.~~

24 ~~(4) Political affiliation.~~

25 ~~(5) Race or ethnicity.~~

26 ~~(6) Religion.~~

27 ~~(7) Sexual orientation.~~

28 ~~(8) Association with a person or group with one or more of these~~  
29 ~~actual or perceived characteristics.~~

30 ~~(b) "Hate crime" includes, but is not limited to, a violation of~~  
31 ~~Section 422.6.~~

32 ~~SEC. 2. No reimbursement is required by this act pursuant to~~  
33 ~~Section 6 of Article XIII B of the California Constitution for certain~~  
34 ~~costs that may be incurred by a local agency or school district~~  
35 ~~because, in that regard, this act creates a new crime or infraction,~~  
36 ~~eliminates a crime or infraction, or changes the penalty for a crime~~  
37 ~~or infraction, within the meaning of Section 17556 of the~~  
38 ~~Government Code, or changes the definition of a crime within the~~  
39 ~~meaning of Section 6 of Article XIII B of the California~~  
40 ~~Constitution.~~

1     However, if the Commission on State Mandates determines that  
2     this act contains other costs mandated by the state, reimbursement  
3     to local agencies and school districts for those costs shall be made  
4     pursuant to Part 7 (commencing with Section 17500) of Division  
5     4 of Title 2 of the Government Code.

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