

AMENDED IN SENATE JUNE 2, 2015
AMENDED IN ASSEMBLY MARCH 25, 2015
CALIFORNIA LEGISLATURE—2015–16 REGULAR SESSION

ASSEMBLY BILL

No. 860

Introduced by Assembly Member Daly

February 26, 2015

An act to amend 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. 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. *Existing law makes the crime punishable by 2, 3, or 4 years in the state prison if committed against a minor by a person with a prior conviction for sexual battery.*

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~~ *an existing 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 *these* 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.

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

1 imprisonment in a county jail for not more than one year, and by
2 a fine not exceeding two thousand dollars (\$2,000); or by
3 imprisonment in the state prison for two, three, or four years, and
4 by a fine not exceeding ten thousand dollars (\$10,000).

5 (c) (1) Any person who touches an intimate part of another
6 person for the purpose of sexual arousal, sexual gratification, or
7 sexual abuse, and the victim is at the time unconscious of the nature
8 of the act because the perpetrator fraudulently represented that the
9 touching served a professional purpose, is guilty of sexual battery.
10 ~~A violation of this subdivision is punishable by imprisonment in~~
11 ~~a county jail for not more than one year, and by a fine not~~
12 ~~exceeding two thousand dollars (\$2,000); or by imprisonment in~~
13 ~~the state prison for two, three, or four years, and by a fine not~~
14 ~~exceeding ten thousand dollars (\$10,000).~~

15 (2) *Any person who performs professional services that entail*
16 *having access to another person's body, who touches an intimate*
17 *part of that person while performing those services, and the*
18 *touching is against the will of the person touched and for the*
19 *specific purpose of sexual arousal, sexual gratification, or sexual*
20 *abuse, is guilty of sexual battery.*

21 (3) *A violation of this subdivision is punishable by imprisonment*
22 *in a county jail for not more than one year, and by a fine not*
23 *exceeding two thousand dollars (\$2,000); or by imprisonment in*
24 *the state prison for two, three, or four years, and by a fine not*
25 *exceeding ten thousand dollars (\$10,000).*

26 (d) Any person who, for the purpose of sexual arousal, sexual
27 gratification, or sexual abuse, causes another, against that person's
28 will while that person is unlawfully restrained either by the accused
29 or an accomplice, or is institutionalized for medical treatment and
30 is seriously disabled or medically incapacitated, to masturbate or
31 touch an intimate part of either of those persons or a third person,
32 is guilty of sexual battery. A violation of this subdivision is
33 punishable by imprisonment in a county jail for not more than one
34 year, and by a fine not exceeding two thousand dollars (\$2,000);
35 or by imprisonment in the state prison for two, three, or four years,
36 and by a fine not exceeding ten thousand dollars (\$10,000).

37 ~~(e) Any person who performs professional services that entail~~
38 ~~having access to another person's body, who touches an intimate~~
39 ~~part of that person while performing those services, and the~~
40 ~~touching is against the will of the person touched and for the~~

1 ~~specific purpose of sexual arousal, sexual gratification, or sexual~~
2 ~~abuse, is guilty of sexual battery. A violation of this subdivision~~
3 ~~is punishable by imprisonment in the state prison for two, three,~~
4 ~~or four years, and by a fine not exceeding ten thousand dollars~~
5 ~~(\$10,000).~~

6 ~~(f)~~

7 (e) (1) Any person who touches an intimate part of another
8 person, if the touching is against the will of the person touched,
9 and is for the specific purpose of sexual arousal, sexual
10 gratification, or sexual abuse, is guilty of misdemeanor sexual
11 battery, punishable by a fine not exceeding two thousand dollars
12 (\$2,000), or by imprisonment in a county jail not exceeding six
13 months, or by both that fine and imprisonment. However, if the
14 defendant was an employer and the victim was an employee of
15 the defendant, the misdemeanor sexual battery shall be punishable
16 by a fine not exceeding three thousand dollars (\$3,000), by
17 imprisonment in a county jail not exceeding six months, or by both
18 that fine and imprisonment. Notwithstanding any other provision
19 of law, any amount of a fine above two thousand dollars (\$2,000)
20 which is collected from a defendant for a violation of this
21 subdivision shall be transmitted to the State Treasury and, upon
22 appropriation by the Legislature, distributed to the Department of
23 Fair Employment and Housing for the purpose of enforcement of
24 the California Fair Employment and Housing Act (Part 2.8
25 (commencing with Section 12900) of Division 3 of Title 2 of the
26 Government Code), including, but not limited to, laws that
27 proscribe sexual harassment in places of employment. However,
28 in no event shall an amount over two thousand dollars (\$2,000)
29 be transmitted to the State Treasury until all fines, including any
30 restitution fines that may have been imposed upon the defendant,
31 have been paid in full.

32 (2) As used in this subdivision, “touches” means physical contact
33 with another person, whether accomplished directly, through the
34 clothing of the person committing the offense, or through the
35 clothing of the victim.

36 ~~(g)~~

37 (f) As used in subdivisions (a), (b), (c), ~~(d), and (e)~~, and (d),
38 “touches” means physical contact with the skin of another person
39 whether accomplished directly or through the clothing of the person
40 committing the offense.

~~(h)~~

(g) As used in this section, the following terms have the following meanings:

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

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

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

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

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

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

~~(i)~~

(h) This section does not limit or prevent prosecution under any other law which also proscribes a course of conduct that also is proscribed by this section.

~~(j)~~

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

~~(k)~~

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

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

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

(1) Where a person is 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. Notwithstanding the existence of a conservatorship pursuant to the provisions of the

1 Lanterman-Petris-Short Act (Part 1 (commencing with Section
2 5000) of Division 5 of the Welfare and Institutions Code), the
3 prosecuting attorney shall prove, as an element of the crime, that
4 a mental disorder or developmental or physical disability rendered
5 the alleged victim incapable of giving consent.

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

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

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

17 (A) Was unconscious or asleep.

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

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

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

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

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

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

6 (8) Where the act is accomplished against the victim’s will by
7 a person while that person is performing professional services that
8 entail having access to the victim’s body.

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

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

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

21 286. (a) Sodomy is sexual conduct consisting of contact
22 between the penis of one person and the anus of another person.
23 Any sexual penetration, however slight, is sufficient to complete
24 the crime of sodomy.

25 (b) (1) Except as provided in Section 288, any person who
26 participates in an act of sodomy with another person who is under
27 18 years of age shall be punished by imprisonment in the state
28 prison, or in a county jail for not more than one year.

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

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

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

1 (B) Any person who commits an act of sodomy with another
2 person who is under 14 years of age when the act is accomplished
3 against the victim's will by means of force, violence, duress,
4 menace, or fear of immediate and unlawful bodily injury on the
5 victim or another person shall be punished by imprisonment in the
6 state prison for 9, 11, or 13 years.

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

13 (D) This paragraph does not preclude prosecution under Section
14 269, Section 288.7, or any other provision of law.

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

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

31 (2) 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 sodomy upon a victim who is under 14
34 years of age, when the act is accomplished against the victim's
35 will by means of force or fear of immediate and unlawful bodily
36 injury on the victim or another person, shall be punished by
37 imprisonment in the state prison for 10, 12, or 14 years.

38 (3) Any person who, while voluntarily acting in concert with
39 another person, either personally or aiding and abetting that other
40 person, commits an act of sodomy upon a victim who is a minor

1 14 years of age or older, when the act is accomplished against the
2 victim's will by means of force or fear of immediate and unlawful
3 bodily injury on the victim or another person, shall be punished
4 by imprisonment in the state prison for 7, 9, or 11 years.

5 (4) This subdivision does not preclude prosecution under Section
6 269, Section 288.7, or any other provision of law.

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

12 (f) (1) Any person who commits an act of sodomy, and the
13 victim is at the time unconscious of the nature of the act and this
14 is known to the person committing the act, shall be punished by
15 imprisonment in the state prison for three, six, or eight years. As
16 used in this subdivision, "unconscious of the nature of the act"
17 means incapable of resisting because the victim meets one of the
18 following conditions:

19 (A) Was unconscious or asleep.

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

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

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

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

34 (g) Except as provided in subdivision (h), a person who commits
35 an act of sodomy, and the victim is at the time incapable, because
36 of a mental disorder or developmental or physical disability, of
37 giving legal consent, and this is known or reasonably should be
38 known to the person committing the act, shall be punished by
39 imprisonment in the state prison for three, six, or eight years.
40 Notwithstanding the existence of a conservatorship pursuant to

1 the Lanterman-Petris-Short Act (Part 1 (commencing with Section
2 5000) of Division 5 of the Welfare and Institutions Code), the
3 prosecuting attorney shall prove, as an element of the crime, that
4 a mental disorder or developmental or physical disability rendered
5 the alleged victim incapable of giving consent.

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

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

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

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

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

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

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

15 SEC. 4. Section 288a of the Penal Code is amended to read:

16 288a. (a) Oral copulation is the act of copulating the mouth
17 of one person with the sexual organ or anus of another person.

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

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

26 (c) (1) Any person who participates in an act of oral copulation
27 with another person who is under 14 years of age and more than
28 10 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 oral copulation when
31 the 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 oral copulation upon a
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
40 the state prison for 8, 10, or 12 years.

1 (C) Any person who commits an act of oral copulation upon a
2 minor who is 14 years of age or older, when the act is accomplished
3 against the victim's will by means of force, violence, duress,
4 menace, or fear of immediate and unlawful bodily injury on the
5 victim or another person, shall be punished by imprisonment in
6 the state prison for 6, 8, or 10 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 oral copulation where
10 the act is accomplished against the victim's will by threatening to
11 retaliate in the future against the victim or any other person, and
12 there is a reasonable possibility that the perpetrator will execute
13 the threat, shall be punished by imprisonment in the state prison
14 for three, six, or eight years.

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

36 (2) Any person who, while voluntarily acting in concert with
37 another person, either personally or aiding and abetting that other
38 person, commits an act of oral copulation upon a victim who is
39 under 14 years of age, when the act is accomplished against the
40 victim's will by means of force or fear of immediate and unlawful

1 bodily injury on the victim or another person, shall be punished
2 by imprisonment in the state prison for 10, 12, or 14 years.

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

11 (4) This paragraph does not preclude prosecution under Section
12 269, Section 288.7, or any other provision of law.

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

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

25 (A) Was unconscious or asleep.

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

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

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

35 (2) A person who performs professional services that entail
36 having access to the victim's body, who commits an act of oral
37 copulation upon the victim while performing those services, and
38 the act is against the victim's will, shall be punished by
39 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

1 practiced by the accused, with intent to induce the belief, shall be
2 punished by imprisonment in the state prison for a period of three,
3 six, or eight years.

4 (k) (1) Any person who commits an act of oral copulation,
5 where the act is accomplished against the victim's will by
6 threatening to use the authority of a public official to incarcerate,
7 arrest, or deport the victim or another, and the victim has a
8 reasonable belief that the perpetrator is a public official, shall be
9 punished by imprisonment in the state prison for a period of three,
10 six, or eight years.

11 (2) As used in this subdivision, "public official" means a person
12 employed by a governmental agency who has the authority, as part
13 of that position, to incarcerate, arrest, or deport another. The
14 perpetrator does not actually have to be a public official.

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

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

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

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

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

38 (C) Any person who commits an act of sexual penetration upon
39 a minor who is 14 years of age or older, when the act is
40 accomplished against the victim's will by means of force, violence,

1 duress, menace, or fear of immediate and unlawful bodily injury
2 on the victim or another person, shall be punished by imprisonment
3 in the state prison for 6, 8, or 10 years.

4 (D) This paragraph does not preclude prosecution under Section
5 269, Section 288.7, or any other provision of law.

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

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

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

1 element of the crime, that a mental disorder or developmental or
2 physical disability rendered the alleged victim incapable of giving
3 legal consent.

4 (d) (1) Any person who commits an act of sexual penetration,
5 and the victim is at the time unconscious of the nature of the act
6 and this is known to the person committing the act or causing the
7 act to be committed, shall be punished by imprisonment in the
8 state prison for three, six, or eight years. As used in this
9 subdivision, “unconscious of the nature of the act” means incapable
10 of resisting because the victim meets one of the following
11 conditions:

12 (A) Was unconscious or asleep.

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

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

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

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

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

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

(g) (1) Any person who commits an act of sexual penetration when 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 punished by imprisonment in the state prison for a period of three, six, or eight years.

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

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

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

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

(k) As used in this section:

(1) "Sexual penetration" is the act of causing the penetration, however slight, of the genital or anal opening of any person or causing another person to so penetrate the defendant's or another person's genital or anal opening for the purpose of sexual arousal, gratification, or abuse by any foreign object, substance, instrument, or device, or by any unknown object.

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

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

(l) As used in subdivision (a), "threatening to retaliate" means a threat to kidnap or falsely imprison, or inflict extreme pain, serious bodily ~~injury~~ *injury*, or death.

1 (m) As used in this section, “victim” includes any person who
2 the defendant causes to penetrate the genital or anal opening of
3 the defendant or another person or whose genital or anal opening
4 is caused to be penetrated by the defendant or another person and
5 who otherwise qualifies as a victim under the requirements of this
6 section.

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

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