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# SENATE COMMITTEE ON PUBLIC SAFETY

Senator Nancy Skinner, Chair

2017 - 2018 Regular

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**Bill No:** AB 324                      **Hearing Date:** June 26, 2018  
**Author:** Kiley  
**Version:** June 18, 2018  
**Urgency:** No                                      **Fiscal:** Yes  
**Consultant:** SC

**Subject:** *Crimes: Disorderly Conduct*

## HISTORY

**Source:** Conference of California Bar Associations

**Prior Legislation:** AB 1310 (Gatto), Ch. 643, Stats. 2015  
AB 1528 (Donnelly), 2012, failed passage in Assembly Public Safety  
AB 1484 (Ackerman), Ch. 666, Stats. 2004  
AB 182 (Ackerman), Ch. 231, Stats. 1999

**Support:** Association of Orange County Deputy Sheriffs; California District Attorneys Association; California Police Chiefs Association; California State Sheriffs' Association; California Statewide Law Enforcement Association; Crime Victims United; Fraternal Order of Police; Long Beach Police Officers Association; Los Angeles County District Attorney's Office; Riverside Sheriffs Association; Sacramento County Deputy Sheriffs' Association; San Diego County District Attorney's Office

**Opposition:** California Attorneys for Criminal Justice; California Public Defenders Association

**Assembly Floor Vote:** 73 - 0

## PURPOSE

*The purpose of this bill is to define the term "identifiable" for purposes of the crimes of secretly recording or photographing under or through the clothing worn by another identifiable person, or while the other person is in a state of full or partial undress, for the purpose of sexual gratification, as specified.*

*Existing law* makes it a misdemeanor for any person to use a concealed device to secretly videotape or record by electronic means another identifiable person under or through his or her clothing, for the purpose of viewing that person's body or undergarments without consent and under circumstances in which that person has a reasonable expectation of privacy, if the perpetrator commits the act with a prurient intent. (Pen. Code § 647, subd. (j)(2).)

*Existing law* makes it a misdemeanor for any person who uses a concealed camcorder, motion picture camera, or photographic camera of any type, to secretly videotape, film, photograph, or record by electronic means, another, identifiable person who may be in a state of full or partial undress, for the purpose of viewing the body of, or the undergarments worn by, that other person, without the consent or knowledge of that other person, in the interior of a bedroom, bathroom, changing room, fitting room, dressing room, or tanning booth, or the interior of any other area in which that other person has a reasonable expectation of privacy, with the intent to invade the privacy of that other person inside. (Pen. Code, § 647, subd. (j)(3).)

*Existing law* generally provides that a violation of disorderly conduct is punishable by up to six months imprisonment in county jail or up to a fine of \$1000, or both the fine and imprisonment. A second violation of subdivision (j) of Penal Code section 647 is punishable by up to one year in county jail, a fine not exceeding \$2000, or both the fine and imprisonment. (Pen. Code § 647, subd. (l).)

*Existing law* provides that “identifiable” means capable of identification, or capable of being recognized, meaning that someone could identify or recognize the victim, including the victim herself or himself. It does not require that the victim's identity to actually be established. (*People v. Johnson* (2015) 234 Cal.App.4th 1432, 1441.)

*This bill* would codify the definition of “identifiable” from *People v. Johnson, supra*, for purposes of the crimes of secretly recording or photographing under or through the clothing worn by another identifiable person, or while the other person is in a state of full or partial undress, for the purpose of sexual gratification.

## COMMENTS

### 1. Need for This Bill

According to the author:

Under current law, an individual can only be charged with disorderly conduct for recording a person in a state of partial or full undress for sexual gratification if the person being recorded is “identifiable”. The term identifiable is not defined in this section, and thus has been narrowly interpreted by the courts to require the identification of the specific victim by a third party. Because these images and videos are frequently of women from the upskirt angle, the victim is most often not identifiable from this narrow definition. This stringent definition has led to the lack of ability for these crimes to be prosecuted, and thus women are not getting the justice they deserve. AB 324 seeks to define identifiable based on the definition provided in *People v. Johnson*, so that women can receive the justice they deserve.

### 2. Relevant Case Law

In *People v. Johnson, supra*, 234 Cal.App.4th 1432, the defendant was convicted of 12 counts of secretly videotaping, filming, photographing, or recording by electronic means, another, identifiable person under or through the clothing being worn by that other person, for the purpose of viewing the body of, or the undergarments worn by, that other person, without the consent or

knowledge of that other person, with the intent to arouse, appeal to, or gratify the lust, passions, or sexual desires of that person and invade the privacy of that other person, under circumstances in which the other person has a reasonable expectation of privacy, in violation of subdivision (j)(2) of Penal Code section 647. Only three victims had been named, and the others were named Jane Does because law enforcement had not determined who their identities.

During the trial, the jury was shown video footage defendant had recorded in which he followed women and filmed under their skirts, without their knowledge. In some cases, the resulting footage did not capture the women's faces, or their profiles. (*Id.* at 1436.) In some cases only shoes, legs, skirts or dresses, purses, or the woman's back and the back of her head, appeared on screen. (*Id.* at 1437.) The court was called on to determine whether there was sufficient evidence to support findings that the defendant had violated the criminal statute when the evidence did not include the women's faces.

The court noted that the elements of criminal statute require that the defendant must film an "identifiable person" to face criminal liability. The court held that "identifiable" means capable of identification, or capable of being recognized. The court stated that in order to be "identifiable" it does not require that the victim's identity must ultimately be established. The court held the prosecution does not have to prove up the victim's identity, does not have to prove the victim has actually been identified, located, or named, and does not have to offer evidence showing anyone has actually recognized the victim. (*Id.* at 1441.)

In reaching its decision the court stated that, "identifiable" means that when all of the available evidence is considered, it is reasonably probable that someone could identify or recognize the victim. This includes the victim herself or himself." (*Ibid.*) The court reasoned that "[t]his is consistent with a legislative goal of criminalizing the invasive act when it poses the most significant risk of harm to specific individuals—when it is reasonably probable the victim could be recognized or recognize himself or herself, potentially leading to the victim's humiliation and embarrassment." (*Id.* at 1451.)

On appeal, the court found that based on the totality of the evidence presented, there was sufficient evidence to meet find the victims "identifiable" even where their faces were not depicted in the secret recordings.

This bill codifies the definition of "identifiable" provided by the *Johnson* case.

### 3. Legislative History

One of the invasion of privacy crimes that this bill seeks to amend was enacted in 1999 by AB 182 (Ackerman), Chapter 231, Statutes of 1999, specifically the crime of taking photos through or under the clothing of another person pursuant to Penal Code section 647, subdivision (j)(2). When the bill was heard by the Senate Public Safety Committee, the analysis noted that:

The language of the bill may not clearly state whether or not the victim must be identifiable from the prohibited image to allow conviction under the new crime. However, it appears from the background information that the intent of the author of the bill is that the law could be applied in cases where there is no identifiable victim. Background information provided by the author included examples of 'up-skirt' photographs (or electronic scans of some sort of visual recording) found on the Internet. These images depicted only the underclothing of a woman, as seen from behind, under

the woman's skirt. It does not appear possible to determine the identity of the person whose underclothing is depicted in the photograph. Thus, the bill raises the issue of whether a defendant can be found guilty of criminal violation of privacy where it cannot be determined whose privacy was invaded.

(*People v. Johnson, supra*, 234 Cal.App.4th at 1444, citing Sen. Com. on Public Safety, Analysis of Assem. Bill No. 182 (1999–2000 Reg. Sess.) as amended Apr. 26, 1999, p. 5.)

AB 182 was subsequently amended to include the “identifiable” element and included that language when it signed into law. When AB 1484 (Ackerman), Chapter 666, Statutes of 2004 enacted Penal Code section 647, subdivision (j)(3), which is the other invasion of privacy crime this bill seeks to amend, it was drafted to include the “identifiable” element for the new crime as well.

A prior version of this bill would have eliminated the “identifiable” requirement in both of these subdivisions. The amended version of this bill will instead define the term “identifiable,” consistent with the *Johnson* case.

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