SENATE COMMITTEE ON PUBLIC SAFETY

Senator Steven Bradford, Chair
2021 - 2022 Regular

Bill No:	SB 522	**Hearing Date:**	March 23, 2021
Author:	Borgeas		
Version:	February 17, 2021		
Urgency:	No	**Fiscal:**	Yes
Consultant:	SC		

Subject: ***Criminal law: schools: malicious communication***

HISTORY

Source: Author

Prior Legislation: SB 1391 (Borgeas), 2020, never heard by Sen. Pub. Safety
AB 907 (Grayson), held in Sen. Approps. Suspense File, 2019
AB 2768 (Melendez), held in Assembly Approps. suspense file, 2018
SB 110 (Fuller), vetoed, 2015
SB 456 (Block), vetoed, 2015

Support: California State Sheriffs' Association

Opposition: California Attorneys for Criminal Justice; California Public Defenders Association; Ella Baker Center for Human Rights; Pacific Juvenile Defender Center; San Francisco Public Defender's Office

PURPOSE

The purpose of this bill is to create a new crime for maliciously communicating that deadly harm will occur at the campus of a school, or at the location of a school-sponsored event, even if there is no intent of carrying it out, punishable as an alternate felony-misdemeanor.

Existing law states that any person who willfully threatens to commit a crime which will result in death or great bodily injury to another person, with the specific intent that the statement made (either verbally, in writing, or by means of an electronic device) is to be taken as a threat, even if there is no intent of carrying it out, which, on its face and under the circumstances in which it is made, is so unequivocal, unconditional, immediate, and specific as to convey to the person threatened a gravity of purpose and an immediate prospect of execution, and which thereby causes the person reasonably to be in sustained fear for their own safety or that of their family, is guilty of a crime punishable either as a misdemeanor or felony, as specified. (Pen. Code, § 422.)

Existing law states that any person who with intent to cause, attempts to cause, or causes, any officer or employee of any public or private educational institution to do, or refrain from doing, any act in the performance of his or her duties, by means of a directly-communicated threat to the person, to inflict unlawful injury upon any person or property, and it reasonably appears to

the recipient that such threat could be carried out, is guilty of a crime, punishable as an alternate felony-misdemeanor on a first offense, and a felony on a second or subsequent offense. (Pen. Code, § 71, subd, (a).)

Existing law states that any person who with intent to annoy, telephones another or contacts him or her by means of an electronic device, and threatens to inflict injury on the person or the person's family, or to the person's property is guilty of a misdemeanor. (Pen. Code, § 653m, subd. (a).)

This bill states that it is a crime for a person to maliciously communicate to any other person, with the specific intent that a statement made orally, in writing, by means of an electronic communication device, including, but not limited to, a telephone, cellular telephone, computer, video recorder, fax machine, text message, social media, or by any other means, that deadly harm will occur on the campus of a school, or at a location of a school-sponsored event, and that the communication is to be taken as a threat, even if there is no intent of carrying it out.

This bill provides that the new crime is punishable as a misdemeanor with a term of imprisonment of up to one year in county jail, or as a felony with a term of imprisonment in the county jail for 16 months, or 2 or 3 years.

This bill states that a minor who is adjudicated and found to have violated this section shall, in lieu of any other punishment, be placed on probation.

This bill states that the defendant shall be ordered to perform community service and participate in a mental health counseling program for the number of hours specified by the court.

This bill provides that the defendant, or the defendant's parent or guardian, shall be responsible for paying the expense of participation in the counseling program, however, the court shall take into consideration the ability of the defendant to pay and the defendant shall not be denied probation because of their inability to pay.

Existing law provides that any act of willful misconduct that results in injury or death to another person or injury to the property of another shall be imputed to the parent or guardian having custody and control of the minor for all purposes of civil damages, and the parent or guardian having custody and control shall be jointly and severally liable with the minor for any damages resulting from the willful misconduct. (Civ. Code, § 1714.1, subd. (a).)

Existing law generally limits the joint and several liability of the parent or guardian having custody and control of a minor to $25,000 for each tort, subject to adjustments made by Judicial Council every two years to reflect increases in cost of living in California as indicated by the annual average of the California Consumer Price Index. (Civ. Code, § 1714.1, subd. (a) & (c).)

This bill states that any civil liability arising from a violation of this new crime by a minor may be imposed on the parent or guardian of the minor.

COMMENTS

1. Need for this Bill

According to the author of this bill:

> In our current culture, the vast majority of these "threats" are electronic social media postings directed at the entire school and not individuals. Sometimes the perpetrator does not even attend the school they threatened. When these threats occur, the upheaval to the school administration and the student body is enormous as parents will keep their children home out of fear, schools will go into lock down and lesson plans are ignored. This disruption to the school day has an unknown social and economical impact on our schools and the mental wellbeing of our students.
>
> There is a deficiency in the current criminal code as nothing adequately captures this type of threat on a school. The closest current statute is Penal Code 422, however it is limited. The first limitation is having a named victim. If the perpetrator targets a school with a shooting without naming any individuals in the threat, prosecution will fail. Under existing law, an individual must be the target of the offense and the threatened individual must be in sustained fear. In addition, the perpetrator must have "intended that (his/her) statement be understood as a threat [and intended that it be communicated to *<insert name of complaining* witness" and his threat must also be "so clear, immediate, unconditional, and specific that it communicated to *<insert name of complaining witness>* a serious intention and the immediate prospect that the threat would be carried out." *See CALCRIM 1300.* Often it is difficult to obtain sufficient evidence to support the above quoted elements. Without proving *all* the required elements beyond a reasonable doubt, the prosecution fails.
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> The proposed legislation would address these limitations and, more importantly, limits the punishment of a juvenile perpetrator. This is important as most are juvenile offenders who engage in this activity and without a true finding of violation of a criminal statute then that minor receives no social services or mental health assistance. What is especially worrisome is that these threats may be just a cry for help and, without the new legislation, this cry will slip through the cracks of our current system.

2. First Amendment Considerations

A law that restricts speech has First Amendment implications. The First Amendment to the United States Constitution states: "Congress shall make no law . . . abridging the freedom of speech . . . ." This fundamental right is applicable to the states through the due process clause of the Fourteenth Amendment. (*Aguilar v. Avis Rent A Car System, Inc.* (1999) 21 Cal. 4th 121, 133-134, citing *Gitlow v. People of New York* (1925) 268 U.S. 652, 666.) Article I, section 2, subdivision (a) of the California Constitution provides that: "Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press."

While these guarantees are stated in broad terms, "the right to free speech is not absolute." (*Aguilar v. Avis Rent A Car System, Inc.*, supra, 21 Cal. 4th at p. 134, citing *Near v. Minnesota* (1931) 283 U.S. 697, 708; and *Stromberg v. California* (1931) 283 U.S. 359.) As the United States Supreme Court has acknowledged: "Many crimes can consist solely of spoken words, such as soliciting a bribe (Pen. Code, § 653f), perjury (Pen. Code, § 118), or making a terrorist threat (Pen. Code, § 422)." In *In re M.S.* (1995) 10 Cal.4th 698, 710, the court held that "the state may penalize threats, even those consisting of pure speech, provided the relevant statute singles out for punishment threats falling outside the scope of First Amendment protection." Nonetheless, statutes criminalizing threats must be narrowly directed against only those threats that truly pose a danger to society. (*People v. Mirmirani* (1981) 30 Cal.3d 375, 388, fn. 10.)

True threats are "statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." (*Virginia v. Black* (2003) 538 U.S. 343, 359, citing *Watts v. United States* (1969) 394 U.S. 705, 708.) The speaker must have the specific intent that the statement be understood as a threat. (*Elonis v. United States* (2015) 135 S. Ct. 2001, 2011, "Having liability turn on whether a 'reasonable person' regards the communication as a threat—regardless of what the defendant thinks— 'reduces culpability on the all-important element of the crime to negligence,' and we 'have long been reluctant to infer that a negligence standard was intended in criminal statutes.'")

The language in the current criminal threats statute was carefully crafted to avoid constitutional issues. In *People v. Mirmirani, supra,* 30 Cal. 3d 375, the California Supreme Court held that the former criminal threats statute (Penal Code section 422) was void for vagueness in violation of the due process clause of the California constitution. The Court's opinion noted that the federal circuit court decision in *United States v. Kelner* (2nd Cir. 1976) 534 F.2d 1020, held that a "threat can be penalized only if, 'the threat ' 'on its face and in the circumstances in which it is made . . . is so unequivocal, unconditional, immediate and specific as to the person threatened, as to convey a gravity of purpose and imminent prospect of execution . . . .'" (*People v. Mirmirani*, *supra*, 30 Cal. 3d at p. 388, fn. 10, quoting *United States v. Kelner*, *supra*, 534 F.2d at p. 1027; see also *People v. Toledo* (2001) 26 Cal. 4th 221.) Following the Court's decision in *People v. Mirmirani*, the California Legislature repealed Penal Code section 422 and replaced it with a new criminal threats statute adopting the specific language referenced in case law. (SB 1555, Ch. 1256, Stats. 1988.)

Penal Code section 422 applies to criminal threats which will result in death or great bodily injury regardless of location or the exact type of violence that is threatened. This bill creates a new statute prohibiting "malicious communication . . . that deadly harm will occur on the campus of a school, or at a location of a school-sponsored event, with the specific intent that the statement be taken as a threat, even if there is no intent of carrying it out." Someone acts maliciously when "he or she intentionally does a wrongful act or when he or she acts with the unlawful intent to disturb, annoy, or injure someone else." (CALCRIM 1301.)

The new crime created by this bill contains some of the same elements found in the existing criminal threats statute: (1) threat (2) of deadly harm (3) with specific intent that the statement be taken as a threat; however it is lacking in the requirements that (1) the threat is "unequivocal, unconditional, and immediate," (2) that the threat causes sustained fear which means for a period of time that is more than momentary or fleeting, and (3) that any fear experienced due to the threat was reasonable under the circumstances. These additional elements found in Penal Code

section 422 are present to ensure that the statute appropriately criminalizes a true threat without violating First Amendment protections. Without these elements, the bill's provisions may not be crafted narrowly enough to criminalize speech that truly pose a threat.

3. Parental Liability

Existing law provides that a parent or guardian of a minor may be jointly and severally liable for fines, penalty assessments and restitution to victims. (Welf. & Inst. Code,§ 730.7, subd. (a).) This liability is rebuttably presumed on a parent or guardian, up to statutorily provided limits, and subject to a parent or guardian's inability to pay. (*Ibid*.) The limits provided in existing statute is found in Civil Code section 1714.1 which provide that a parent or guardian may be liable for up to $25,000 for any act of willful misconduct that results in injury or death or injury to the property of another.

This bill provides that any civil liability arising from a violation of the bill's provision by a minor may be imposed on the parent or guardian of the minor. It is unclear whether this provision is intended to be applied in conjunction with existing Civil Code section 1714.1 to set the same monetary limits.

4. Similar Prior Legislation

Threats of violence at schools has been the subject of several bills in the past few years. SB 1169, of the 2019-2020 Legislative Session, would have create a new crime for willfully threatening unlawful violence to occur on the grounds of a school, as provided, and that threat creates a disruption in the school, punishable as an alternate felony-misdemeanor. AB 907, of the same Legislative session, would have created a new particularized criminal threat statute for threatening to commit a violent crime on the grounds of a school or place of worship. That bill was amended in this committee to specify that minor who commits the new offense is guilty of a misdemeanor rather than facing a potential felony. AB 907 was held in the Senate Appropriations' suspense file.

Two bills introduced in the 2015-2016 Legislative session would have specifically addressed criminal threats at schools. SB 456 (Block) would have provided that any person who threatens to discharge a firearm on a school campus or at a location where a school-sponsored event is or will to take place, is guilty of an alternate felony-misdemeanor. SB 110 (Fuller) would have enacted a new crime prohibiting anyone willfully threatening unlawful violence to another person by any means, including through an electronic act, to occur upon school grounds, with the specific intent that the statement be taken as a threat, and where the threat, on its face and under the circumstances in which it is made, was so unequivocal, unconditional, immediate, and specific as to convey a gravity of purpose and an immediate prospect of execution of the threat.

Governor Brown had the following veto message as to both SB 456 and SB 110:

> No one could be anything but intolerant of threats to cause great bodily injury, especially on school grounds. Certainly not legislators, who voted nearly unanimously for this bill.

> While I'm sympathetic and utterly committed to ensuring maximum safety for California's school children, the offensive conduct covered by this bill is already illegal.
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> In recent decades, California has created an unprecedented number of new and detailed criminal laws. Before we keep enacting more, I think we should pause and reflect on the fact that our bulging criminal code now contains in excess of 5,000 separate provisions, covering almost every conceivable form of human misbehavior.

This bill seeks to create the specific crime of threats of deadly harm at a school or school-sponsored event. The author of the bill argues that the current criminal threats statute does fit well into instances of threats of violence at schools because often times these threats do not specify who the target is. Rather, the threat typically applies to anyone present at those locations.

An example illustrating the existing law's application to threats of violence made to a group of people rather than naming a specific person as the target can be found in case law. In *In re L.F.* (June 3, 2015, A142296) [nonpub. opn.], the adjudged minor was a Fairfield High School student who posted on her Twitter account that she planned to bring a gun to school and shoot people. While she did note specified areas of the school and one of the campus monitors by name in some of her posts, her Tweets were generally targeted at all of the students and staff at the school. The petition filed against the minor alleged that the minor had made criminal threats against "Fairfield High School students and staff" instead of listing specific persons. (*Id*. at p. 4.) The appellate court affirmed the juvenile court's ruling that the minor had violated the existing criminal threats statute. (*In re L.F.*, *supra*, A142296. at p. 8.)

Last year, the Committee on the Revision of the Penal Code was established with the goals of, among others, simplifying and rationalizing the substance of criminal law and criminal procedures. (SB 94, Ch. 25, Stats. 2019; Gov. Code, § 8280.) Creating new crimes to punish acts that may already be punished by existing law further complicates the Penal Code.

5. Argument in Support

According to the California State Sheriffs' Association:

> SB 522 adds an additional protection against persons who would threaten schools or school-sponsored events. Ensuring that this behavior is clearly unlawful will protect schools and attempt to keep such threats from impacting educational pursuits.

6. Argument in Opposition

According to Pacific Juvenile Defender Center:

> The dispositional provisions for juveniles, as written in S.B. 522, would deprive young people of the opportunity to have a judge decide what to do with their case. Under current law, in cases involving an inappropriate text or social media posting, it is entirely possible that the court would opt for placing the young

person on informal supervision (Welf. & Inst. Code § 654.2) or non-wardship probation (Welf & Inst. Code § 725), as a means of ensuring accountability, while protecting the young person from the collateral consequences of formal wardship. This bill would do away with such dispositions and would force the court to impose formal probation, with all of the short and long-term consequences that holds. Also, in prescribing the conditions of probation, the measure deprives the court of the ability to fashion an individualized set of probation conditions as called for in *In re Ricardo P*. (2019) 7 Cal.7th 1113. Further, in requiring mental health services, the bill wrongly assumes that every malicious communication reflects a mental health problem, and that the juvenile court may order involuntary treatment.

Finally, we do not need another threat crime. The Penal Code already contains numerous threat statutes, including several addressing electronic threats. The basic criminal threat statute, Penal Code section 422 is quite broad – including any threat to commit a crime that will result in death or great bodily injury to another, including by means of an electronic communications device. Penal Code section 653m specifically addresses the use of telephones or electronic communications devices with obscene language, or threat to inflict injury, or intent to annoy. There are also special threat statutes, such as Penal Code section 71, which protect public officials, including school personnel.

To the extent this would be used to address school related speech, California has a well-developed school threat assessment system. Every school in the state has a school safety plan, and in it are procedures for assessing risk, addressing problems within the school setting, and collaborating with law enforcement when needed. (The California Governor's Office of Emergency Services web page on School Facilities Vulnerability Assessment provides links to a range of resources for threat assessment, https://www.caloes.ca.gov/cal-oes-divisions/planning-preparedness/school-emergency-planning-safety/school-facilities-vulnerability-assessment.) In our view, the proper starting place for dealing with malicious speech is in that setting.

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