

**RESOLUTION 01-07-2016 (As Amended)**

**DIGEST**

Criminal Law: Unauthorized Video of Unidentified Victim

Amends Penal Code section 647 to prohibit the taking or disclosure of video of unidentified, non-consenting individuals.

**TEXT OF RESOLUTION**

**RESOLVED** that the Conference of California Bar Associations recommends that legislation be sponsored to amend California Penal Code section 647 to read as follows:

§647

- 1        Except as provided in subdivision (l), every person who commits any of the following  
2 acts is guilty of disorderly conduct, a misdemeanor:
- 3        (a) Who solicits anyone to engage in or who engages in lewd or dissolute conduct in any  
4 public place or in any place open to the public or exposed to public view.
- 5        (b) Who solicits or who agrees to engage in or who engages in any act of prostitution. A  
6 person agrees to engage in an act of prostitution when, with specific intent to so engage, he or  
7 she manifests an acceptance of an offer or solicitation to so engage, regardless of whether the  
8 offer or solicitation was made by a person who also possessed the specific intent to engage in  
9 prostitution. No agreement to engage in an act of prostitution shall constitute a violation of this  
10 subdivision unless some act, in addition to the agreement, is done within this state in furtherance  
11 of the commission of an act of prostitution by the person agreeing to engage in that act. As used  
12 in this subdivision, "prostitution" includes any lewd act between persons for money or other  
13 consideration.
- 14        (c) Who accosts other persons in any public place or in any place open to the public for  
15 the purpose of begging or soliciting alms.
- 16        (d) Who loiters in or about any toilet open to the public for the purpose of engaging in or  
17 soliciting any lewd or lascivious or any unlawful act.
- 18        (e) Who lodges in any building, structure, vehicle, or place, whether public or private,  
19 without the permission of the owner or person entitled to the possession or in control of it.
- 20        (f) Who is found in any public place under the influence of intoxicating liquor, any drug,  
21 controlled substance, toluene, or any combination of any intoxicating liquor, drug, controlled  
22 substance, or toluene, in a condition that he or she is unable to exercise care for his or her own  
23 safety or the safety of others, or by reason of his or her being under the influence of intoxicating  
24 liquor, any drug, controlled substance, toluene, or any combination of any intoxicating liquor,  
25 drug, or toluene, interferes with or obstructs or prevents the free use of any street, sidewalk, or  
26 other public way.
- 27        (g) When a person has violated subdivision (f), a peace officer, if he or she is reasonably  
28 able to do so, shall place the person, or cause him or her to be placed, in civil protective custody.  
29 The person shall be taken to a facility, designated pursuant to Section 5170 of the Welfare and  
30 Institutions Code, for the 72-hour treatment and evaluation of inebriates. A peace officer may  
31 place a person in civil protective custody with that kind and degree of force which would be  
32 lawful were he or she effecting an arrest for a misdemeanor without a warrant. A person who has  
33 been placed in civil protective custody shall not thereafter be subject to any criminal prosecution

34 or juvenile court proceeding based on the facts giving rise to this placement. This subdivision  
35 shall not apply to the following persons:

36 (1) Any person who is under the influence of any drug, or under the combined influence  
37 of intoxicating liquor and any drug.

38 (2) Any person who a peace officer has probable cause to believe has committed any  
39 felony, or who has committed any misdemeanor in addition to subdivision (f).

40 (3) Any person who a peace officer in good faith believes will attempt escape or will be  
41 unreasonably difficult for medical personnel to control.

42 (h) Who loiters, prowls, or wanders upon the private property of another, at any time,  
43 without visible or lawful business with the owner or occupant. As used in this subdivision,  
44 "loiter" means to delay or linger without a lawful purpose for being on the property and for the  
45 purpose of committing a crime as opportunity may be discovered.

46 (i) Who, while loitering, prowling, or wandering upon the private property of another, at  
47 any time, peeks in the door or window of any inhabited building or structure, without visible or  
48 lawful business with the owner or occupant.

49 (j)(1) Any person who looks through a hole or opening, into, or otherwise views, by  
50 means of any instrumentality, including, but not limited to, a periscope, telescope, binoculars,  
51 camera, motion picture camera, camcorder, or mobile phone, the interior of a bedroom,  
52 bathroom, changing room, fitting room, dressing room, or tanning booth, or the interior of any  
53 other area in which the occupant has a reasonable expectation of privacy, with the intent to  
54 invade the privacy of a person or persons inside. This subdivision shall not apply to those areas  
55 of a private business used to count currency or other negotiable instruments.

56 (2) Any person who uses a concealed camcorder, motion picture camera, or photographic  
57 camera of any type, to secretly videotape, film, photograph, or record by electronic means,  
58 another, identifiable person under or through the clothing being worn by that other person, for  
59 the purpose of viewing the body of, or the undergarments worn by, that other person, without the  
60 consent or knowledge of that other person, with the intent to arouse, appeal to, or gratify the lust,  
61 passions, or sexual desires of that person and invade the privacy of that other person, under  
62 circumstances in which the other person has a reasonable expectation of privacy.

63 (3)(A) Any person who uses a concealed camcorder, motion picture camera, or  
64 photographic camera of any type, to secretly videotape, film, photograph, or record by electronic  
65 means, another, identifiable person who may be in a state of full or partial undress, for the  
66 purpose of viewing the body of, or the undergarments worn by, that other person, without the  
67 consent or knowledge of that other person, in the interior of a bedroom, bathroom, changing  
68 room, fitting room, dressing room, or tanning booth, or the interior of any other area in which  
69 that other person has a reasonable expectation of privacy, with the intent to invade the privacy of  
70 that other person.

71 (B) Neither of the following is a defense to the crime specified in this paragraph:

72 (i) The defendant was a cohabitant, landlord, tenant, cotenant, employer, employee, or  
73 business partner or associate of the victim, or an agent of any of these.

74 (ii) The victim was not in a state of full or partial undress.

75 (4)(A) Any person who intentionally distributes the image of the intimate body part or  
76 parts of another identifiable person, or an image of the person depicted engaged in an act of  
77 sexual intercourse, sodomy, oral copulation, sexual penetration, or an image of masturbation by  
78 the person depicted or in which the person depicted participates, under circumstances in which  
79 the persons agree or understand that the image shall remain private, the person distributing the

80 image knows or should know that distribution of the image will cause serious emotional distress,  
81 and the person depicted suffers that distress.

82 (B) A person intentionally distributes an image described in subparagraph (A) when he or  
83 she personally distributes the image, or arranges, specifically requests, or intentionally causes  
84 another person to distribute that image.

85 (C) As used in this paragraph, "intimate body part" means any portion of the genitals, the  
86 anus and in the case of a female, also includes any portion of the breasts below the top of the  
87 areola, that is either uncovered or clearly visible through clothing.

88 (D) It shall not be a violation of this paragraph to distribute an image described in  
89 subparagraph (A) if any of the following applies:

90 (i) The distribution is made in the course of reporting an unlawful activity.

91 (ii) The distribution is made in compliance with a subpoena or other court order for use in  
92 a legal proceeding.

93 (iii) The distribution is made in the course of a lawful public proceeding.

94 (5) This subdivision shall not preclude punishment under any section of law providing for  
95 greater punishment.

96 (k) In any accusatory pleading charging a violation of subdivision (b), if the defendant  
97 has been once previously convicted of a violation of that subdivision, the previous conviction  
98 shall be charged in the accusatory pleading. If the previous conviction is found to be true by the  
99 jury, upon a jury trial, or by the court, upon a court trial, or is admitted by the defendant, the  
100 defendant shall be imprisoned in a county jail for a period of not less than 45 days and shall not  
101 be eligible for release upon completion of sentence, on probation, on parole, on work furlough or  
102 work release, or on any other basis until he or she has served a period of not less than 45 days in  
103 a county jail. In all cases in which probation is granted, the court shall require as a condition  
104 thereof that the person be confined in a county jail for at least 45 days. In no event does the court  
105 have the power to absolve a person who violates this subdivision from the obligation of spending  
106 at least 45 days in confinement in a county jail.

107 In any accusatory pleading charging a violation of subdivision (b), if the defendant has  
108 been previously convicted two or more times of a violation of that subdivision, each of these  
109 previous convictions shall be charged in the accusatory pleading. If two or more of these  
110 previous convictions are found to be true by the jury, upon a jury trial, or by the court, upon a  
111 court trial, or are admitted by the defendant, the defendant shall be imprisoned in a county jail  
112 for a period of not less than 90 days and shall not be eligible for release upon completion of  
113 sentence, on probation, on parole, on work furlough or work release, or on any other basis until  
114 he or she has served a period of not less than 90 days in a county jail. In all cases in which  
115 probation is granted, the court shall require as a condition thereof that the person be confined in a  
116 county jail for at least 90 days. In no event does the court have the power to absolve a person  
117 who violates this subdivision from the obligation of spending at least 90 days in confinement in a  
118 county jail.

119 In addition to any punishment prescribed by this section, a court may suspend, for not  
120 more than 30 days, the privilege of the person to operate a motor vehicle pursuant to Section  
121 13201.5 of the Vehicle Code for any violation of subdivision (b) that was committed within  
122 1,000 feet of a private residence and with the use of a vehicle. In lieu of the suspension, the court  
123 may order a person's privilege to operate a motor vehicle restricted, for not more than six  
124 months, to necessary travel to and from the person's place of employment or education. If driving

125 a motor vehicle is necessary to perform the duties of the person's employment, the court may  
126 also allow the person to drive in that person's scope of employment.

127 (1)(1) A second or subsequent violation of subdivision (j) is punishable by imprisonment  
128 in a county jail not exceeding one year, or by a fine not exceeding two thousand dollars (\$2,000),  
129 or by both that fine and imprisonment.

130 (2) If the victim of a violation of subdivision (j) was a minor at the time of the offense,  
131 the violation is punishable by imprisonment in a county jail not exceeding one year, or by a fine  
132 not exceeding two thousand dollars (\$2,000), or by both that fine and imprisonment.

133 (m)(1) If a crime is committed in violation of subdivision (b) and the person who was  
134 solicited was a minor at the time of the offense, and if the defendant knew or should have known  
135 that the person who was solicited was a minor at the time of the offense, the violation is  
136 punishable by imprisonment in a county jail for not less than two days and not more than one  
137 year, or by a fine not exceeding ten thousand dollars (\$10,000), or by both that fine and  
138 imprisonment.

139 (2) The court may, in unusual cases, when the interests of justice are best served, reduce  
140 or eliminate the mandatory two days of imprisonment in a county jail required by this  
141 subdivision. If the court reduces or eliminates the mandatory two days' imprisonment, the court  
142 shall specify the reason on the record.

(Proposed new language underlined; language to be deleted stricken.)

**PROPONENT:** Women Lawyers Association of Los Angeles

## **STATEMENT OF REASONS**

The Problem: In California, a voyeur can surreptitiously record and distribute images and videos of the intimate body parts or sexual activities of another person without their knowledge or consent, if the person is not *identifiable*. This loophole was highlighted in *People v. Johnson* (2015) 234 Cal.App.4th 1432, which held that an 'identifiable person' did not mean 'identifiable as a human being,' because this would render 'identifiable' surplusage:

“We acknowledge that giving any meaning to ‘identifiable’ allows some offensive acts associated with ‘upskirt’ voyeurism to go unpunished. As noted above, the very nature of ‘upskirt’ or ‘down blouse’ recordings is such that in many cases the victim may not be identifiable or recognizable from the recorded visual images, and there may be no other evidence of the crime. ... We stress that the Legislature has the prerogative to amend the statute if it intended section 647, subdivision (j)(2) to have either a broader or narrower scope.” (*Id.* at 1450-1452.)

Until then, careful voyeurs who avoid detection can capture and distribute ‘upskirt’ images and videos without fear of subsequent prosecution, as intimate body parts are typically not features from which persons can be identified.

The Solution: On federal property (18 U.S.C.S. § 1801), in the District of Columbia, and in 47 states, voyeurism laws protect every person without qualification. By striking the word “identifiable” from subdivision (j) this resolution closes the ‘upskirt’ voyeurism loophole and

gives Californians the same right to privacy enjoyed in virtually every other jurisdiction. A prosecution for invasion of privacy would still require proof that the recording was made or distributed without the subject's knowledge or consent. But such evidence could be based on the recorded content, the manner in which it was shot, and/or the defendant's confession, without needing to show an 'identifiable' victim.

**IMPACT STATEMENT**

The resolution does not affect any other law, statute or rule other than those expressly identified.

**CURRENT OR PRIOR RELATED LEGISLATION**

Not known.

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## RESOLUTIONS COMMITTEE RECOMMENDATION

### APPROVE IN PRINCIPLE

#### History:

Similar to Resolution 06-04-2009, which was approved in principle.

#### Reasons:

This resolution amends Penal Code section 647 to prohibit the taking or disclosure of video of unidentified, non-consenting individuals. This resolution should be approved in principle because it remedies the inadvertent barrier to prosecution of hidden camera offenses created by the requirement of an identifiable victim.

In response to threats to privacy involving hidden cameras in changing rooms and so-called “up-skirt” and “down-blouse” photographs taken on, e.g., public transportation or escalators, nearly all 50 states now prohibit the use of a concealed camera to obtain unauthorized video or still images of another person’s body or undergarments. Unlike the laws in most other states, California’s law against unauthorized video recording (subdivisions (j)(2) and (j)(3)(A)), includes an identifiable victim as an element of the offense. This can make it difficult to prosecute the very conduct the statute was meant to address, because the nature of such images can make it difficult, if not impossible, to discern the identities of the victims. By eliminating the requirement of an identifiable victim, this resolution effectively closes this loophole.

If approved, however, the resolution might benefit from an amendment retaining the word “identifiable” in subdivision (j)(4)(A), which is aimed at so-called “revenge porn” -- the unauthorized distribution of sexual or nude photographs or video that were consensually taken, but with the understanding that they were to remain private. Because the offense involves consensually-taken images and does not require any particular form of relationship between the parties, as amended by the resolution, this subdivision arguably would apply to publications protected by the First Amendment. Thus, the limitation to identifiable victims in subdivision (j)(4)(A) could help to avoid a constitutional challenge. Of the 30 states and the District of Columbia that currently have revenge porn laws, 19 require that the image be of an identifiable person, and many others require some form of intimate or cohabitation relationship between the parties. Arizona’s revenge porn statute originally did not require an identifiable victim, but in response to an ACLU lawsuit alleging First Amendment overbreadth, the statute was amended to add such a requirement. Because the nature of revenge porn involves victims who are “identifiable” as that term was construed in *People v. Johnson* (2015) 234 Cal.App.4th 1432 (identifiable from the pictures or video, or from other sources of evidence), retaining the term “identifiable” in subdivision (j)(4)(A) should not create a problem with enforcement.