

Tuesday, January 3, 2017

## **New crime bills take on bail pay, stoned driving**

By L.J. Williamson

Stoned driving tests, killing of police as a hate crime, overhauling the bail system: With the 2017-2018 legislative session barely underway, lawmakers have already set forth an ambitious agenda for changes to California criminal law. There will be more bills to come, but here are some early entries:

### Changing hate crime laws

With AB 39, Assemblyman Raul Bocanegra, D-Los Angeles, wants to establish a publicly viewable "Hate Crime Registry" providing the names and crimes of convicted offenders.

Akin to the sex offender registry — which has had numerous provisions challenged on constitutional grounds — Bocanegra said the move is a necessary response to "an alarming spike in hate crimes in the days and weeks following the presidential election and a double-digit increase in hate crimes reported to California law enforcement in 2015." Bocanegra said such a public registry will "send a clear message to perpetrators that violence rooted in bigotry and bias will not be tolerated in California."

A hate crime is one committed because of the victim's race, religion, disability, or sexual orientation. But AB 2, introduced by Assemblyman Jay Obernolte, R-Hesperia, would add status as a peace officer to that list.

Obernolte's bill follows high-profile shootings of police officers in Dallas and Palm Springs. "Given the outbreak of the recent attacks against police officers, this law is necessary to send a message to these criminals that their reprehensible behavior will not be tolerated," said Obernolte.

But new penalties for these offenses are unnecessary, said Kevin Baker, legislative director with the ACLU of California's Center for Advocacy and Policy. "California law already provides ample penalties

for these very serious crimes in more appropriate sections of the penal code. Our hate crime statute is simply not the proper home for these offenses." Baker said peace officer status is an employment category that is not analogous to immutable characteristics such as race or sexual orientation.

"Potalyzer" tests for stoned driving

Former California Highway Patrol officer turned Assemblyman Tom Lackey, R Palmdale, introduced AB 6, which would authorize an officer to use a roadside saliva sample test for drugs in DUI stops. "The ballot initiative passed this year to legalize marijuana will result in more marijuana consumers on our state's highways and roads," said Ventura Police Chief Ken Corney, president of the California Police Chiefs Association, in a statement supporting the bill. "It is imperative that we invest in a broad spectrum of technologies and research to best identify marijuana-impaired drivers."

But attorney Allison Margolin of Margolin and Lawrence has doubts about the saliva test's ability to legitimately establish probable cause. Just as having alcohol in your system while driving is not illegal unless it reaches the 0.08 percent threshold, Margolin said, the mere presence of marijuana — which is no longer a state crime — does not prove impairment, nor is there any firmly established impairment threshold. So Margolin said she doesn't think test results would be meaningful in court.

"We should hope that trained law enforcement can detect impaired driving and get impaired drivers off the road no matter what the reason for their impairment," Margolin said. "Impairment from not sleeping, for example, is no less or more something that needs to be prevented and intercepted. And officers have every right to detain, arrest, and prevent from further driving that day ... anyone who drives recklessly, which is a misdemeanor."

Barring registered sex offenders from schools

Existing law makes it a misdemeanor for a registered sex offender to enter a school without lawful business and written permission, but

Senator Connie M. Leyva, DChino, wants to make it illegal under any circumstance.

The Fontana Unified School District tried to enact a similar policy earlier this year and was promptly sued by the Alliance for Constitutional Sex Offense Laws, which argued that the board exceeded its authority by adopting policies in conflict with state law. So Leyva wants to change state law.

Fontana parents expressed vociferous support for the district ban, and Fontana School Board Member Barbara L. Chavez said that she disagreed with the policy but felt forced to approve it due to intense pressure. When she tried to explain that there are different levels of sex offenders, such as 18-year-old teens prosecuted for sex with 17-year-old partners, Chavez said she "got chewed up into pieces" by angry parents.

ACSOL president Janice Bellucci was notified of Fontana's policy by a parent who was on the registry for an offense that didn't involve a minor. The policy, Bellucci said, will interfere with parents' ability to drop off and pick up children from school, participate as volunteers, or attend events like parentteacher nights.

Bellucci objects to blanket policies that don't take individual circumstances into account. "If this bill becomes law, many children will be harmed. They will suffer due to lack of parental support for their academic and athletic activities," Bellucci said. "The bill is too broad because it includes individuals not convicted of offenses involving minors, regardless of their current risk."

But Leyva is undeterred, and described SB 26 as "important legislation to protect school children from dangerous sex offenders."

"It is vital that we tighten existing loopholes through which registered sex offenders could gain access to schools in California," Leyva said in a statement.

Overhauling bail

Working in concert, Senator Robert M. Hertzberg, DVan Nuys, and Assemblyman Rob Bonta, DOakland, introduced SB 10 and AB 42, mirrorimage bills in the Senate and Assembly that seek "to ensure that people are not held in pretrial detention simply because of their inability to afford money bail." The bills at this point are simply intent language and don't yet establish specific policies, but the bail industry is girding for a fight.

Hertzberg has expressed support for systems that evaluate individual arrestees for reoffense and flight risks. "Every day thousands of Californians who are awaiting trial are forced to be in jail because they don't have the money to post bail," Hertzberg said in a statement. "The current cash bail system is the modern equivalent of debtor's prison — it criminalizes poverty, pure and simple — and that's not right."

Donald Kilmer, an attorney for a private bail bonds company, argues for a different approach: "When you are a criminal defendant, your right to have counsel appointed if you can't afford one. Why isn't there funding for public defenders to get involved early in the process? Oftentimes, criminal defendants are facing charges without a public defender. A public defender should be there from the beginning, including making bail motions for them."

#### Handling DNA evidence

Though its predecessor failed last year amid concerns about invasions of privacy, Assemblyman Jim Cooper, DElk Grove, is once again introducing a bill that would expand DNA collection requirements to boost the DNA database in the postProp. 47 era. DNA collection would include not only felonies but certain misdemeanors, including shoplifting, check forgery, petty theft, and misdemeanor drug offenses.

Assemblyman David Chiu, DSan Francisco, is attempting to tackle another DNA evidencerelated issue: the untested rape kit backlog. "In our state, we know there is a significant backlog, but we don't know

how many rape kits have been collected, nor do we know how many have been tested or why kits have not been tested," Chiu said. AB 41 would require local law enforcement agencies to track all rape kits using a database created by the state Department of Justice, providing numbers of kits they analyze each year and reporting numbers of untested kits to the agency along with the reason for the backlog.

### Patching Proposition 57

Proponents point out that Prop. 57 creates eligibility for parole consideration — not a "get out of jail free" card — for nonviolent offenders after review by a parole board. Opponents, in their unsuccessful campaign to defeat the proposition which passed in November, responded by pointing to a long and troubling list of felonies not categorized as violent for purposes of sentencing: crimes such as rape of an unconscious person, driveby shooting, and assault with a deadly weapon.

The measure requires the Department of Corrections and Rehabilitation to certify that regulations it adopts in order to comply with the measure "protect and enhance public safety." But to address concerns raised during the campaign, lawmakers have moved to recategorize a few specifically glaring crimes as violent.

AB 27 would define rape of a victim unable to give consent as a violent felony, and AB 67 would define human trafficking, domestic violence involving strangulation, and rape of an unconscious person as violent felonies. "This bill will protect our communities by keeping violent criminals behind bars, and provide victims with the justice and respect that they deserve," said Assemblywoman Sabrina Cervantes, D Corona, a coauthor of AB 67.

"They're certainly a step in the right direction, but I would say when you look at the holes in [Prop.] 57, there's hundreds," said Ventura County District Attorney Gregory Totten. He was one of the majority of district attorneys who opposed Prop. 57, as was Sacramento County

District Attorney Anne Marie Schubert. "I think AB 67 is interesting because it says domestic violence involving strangulation," she said. "You have to strangle somebody for it to be a violent crime, instead of just beating them?"

But retired Santa Clara County Judge Eugene M. Hyman, who presided over the nation's first juvenile domestic violence and family violence court, and currently serves on the advisory board of the Training Institute for Strangulation Prevention, sees AB 67 as especially important — and not just as a patch for Prop. 57.

"Short of murder and breaking bones, this is the most serious type of crime," Hyman said. "Nonfatal strangulation places a victim at increased risk for stroke and for traumatic brain injury, so this is serious stuff."

Judges tend to take standalone crimes more seriously than when they're incorporated as a subset of a general crime, Hyman said, so strangulation would be treated as a serious separate offense rather than just a subset of the domestic violence statute if the bill passes. "This is important — I'm hopeful," he said.

[lj\\_williamson@dailyjournal.com](mailto:lj_williamson@dailyjournal.com)