

**SENATE JUDICIARY COMMITTEE**  
**Senator Thomas Umberg, Chair**  
**2021-2022 Regular Session**

SB 53 (Leyva)  
Version: March 5, 2021  
Hearing Date: March 16, 2021  
Fiscal: Yes  
Urgency: No  
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**SUBJECT**

Unsolicited images

**DIGEST**

This bill provides a cause of action against a person that knowingly sends a sexually explicit image that the person knows, or reasonably should know, is unsolicited. The bill provides for both civil and criminal penalties for violations of the bill.

**EXECUTIVE SUMMARY**

This bill takes aim at the growing incidence of individuals sending unsolicited, sexually explicit images and videos to others. This practice, sometimes referred to as “cyber flashing,” can happen on social media, dating applications, or even through an unprotected AirDrop between cell phones. Although there are no boundaries on who is targeted with such images, the most common recipients of such unwanted images are young women.

This bill provides an individual a specific cause of action and robust remedies against any person who knowingly sends an image that the person knows, or reasonably should know, is unsolicited. An image is considered unsolicited if the recipient has not requested the image, has not consented to its transmittal, or has expressly forbidden its transmittal. The bill provides for economic and noneconomic damages, and additional remedies for more egregious violations, including a statutory penalty anywhere from \$1,500 to \$30,000. The bill also makes violations a criminal infraction. That aspect of the bill will be addressed by the Senate Public Safety Committee.

This bill is sponsored by Bumble and is supported by Feminist Majority and the California Women’s Law Center. There is no known opposition.

**PROPOSED CHANGES TO THE LAW**

Existing law:

- 1) Provides that every person who willfully and lewdly, either exposes his person, or the private parts thereof, in any public place, or in any place where there are present other persons to be offended or annoyed thereby; or procures, counsels, or assists any person so to expose himself or take part in any model artist exhibition, or to make any other exhibition of himself to public view, or the view of any number of persons, such as is offensive to decency, or is adapted to excite to vicious or lewd thoughts or acts, is guilty of a misdemeanor. (Pen. Code § 314.)
- 2) Creates a private right of action against a person who intentionally distributes a photograph or recorded image of another that exposes that person's intimate body parts, as defined, or shows the other person engaged in specified sexual acts, without that person's consent, knowing that the other person had a reasonable expectation that the material would remain private, if specified conditions are met. (Civ. Code § 1708.85(a)-(c).)
- 3) Provides an individual who appears, as a result of digitization, to be giving a performance they did not actually perform or to be performing in an altered depiction a cause of action against a person who does either of the following:
  - a) creates and intentionally discloses sexually explicit material and the person knows or reasonably should have known the depicted individual in that material did not consent to its creation or disclosure; or
  - b) intentionally discloses sexually explicit material that the person did not create and the person knows the depicted individual in that material did not consent to the creation of the sexually explicit material. (Civ. Code § 1708.86.)

This bill:

- 1) Establishes a private cause of action against a person who knowingly sends an image by electronic means depicting a person engaging in an act of sexual intercourse, sodomy, oral copulation, sexual penetration, or masturbation or depicting the exposed genitals or anus of any person, that the person knows, or reasonably should know, is unsolicited.
- 2) Defines an "unsolicited" image as an image the recipient has not requested, has not consented to its transmittal, or has expressly forbidden. An image includes a moving visual image.

- 3) Makes available to a prevailing plaintiff that suffers harm as a result of receiving the unsolicited image economic and noneconomic damages proximately caused by the sending of the image, including damages for emotional distress
- 4) Makes available the following series of remedies to a plaintiff that suffers harm as a result of receiving an unsolicited image that the plaintiff expressly forbade:
  - a) economic and noneconomic damages proximately caused by the sending of the image, including damages for emotional distress;
  - b) an award of statutory damages, in lieu of the above, of a sum of not less than \$1,500 but not more than \$30,000;
  - c) punitive damages;
  - d) reasonable attorney's fees and costs; and
  - e) any other available relief, including injunctive relief.
- 5) Clarifies that these remedies are cumulative to other available remedies and that the bill does not apply to an internet service provider, mobile data provider, or operator of an online or mobile application, to the extent that the entity is transmitting, routing, or providing connections for electronic communications initiated by or at the direction of another person.
- 6) Makes a violation a criminal infraction punishable by increasing fines.

### COMMENTS

#### 1. The weaponization of explicit images

The Legislature has dealt with a variety of issues involving the creation, posting, and sending of sexually explicit material to the detriment of victims and their privacy and mental wellbeing.

First, it addressed the growing scourge of so-called "revenge porn." As described by the National Conference of State Legislatures (NCSL), revenge porn is the posting of nude or sexually explicit photographs or videos of people online without their consent, even if the photograph itself was taken with consent. California first addressed this problem directly in 2013. SB 255 (Cannella, Ch. 466, Stats. 2013) made it unlawful in California for any person who photographs or records by any means the image of the intimate body part or parts of another identifiable person, under circumstances where the parties agree or understand that the image shall remain private, to subsequently distribute the image taken, if there was intent to cause serious emotional distress and the depicted person suffers serious emotional distress. A person who commits this crime is guilty of a disorderly conduct misdemeanor. (Pen. Code Sec. 947(j)(4)(A).)

The following year, AB 2643 (Wieckowski, Ch. 859, Stats. 2014) was enacted into law, adding Section 1708.85 to the Civil Code. It created a private right of action against a person who intentionally distributes a photograph or recorded image of another that exposes that person's intimate body parts, as defined, or shows the other person engaged in specified sexual acts, without the other person's consent, knowing that the other person had a reasonable expectation that the material would remain private, if specified conditions are met. SB 157 (Wieckowski, Ch. 233, Stats. 2017) built on confidentiality protections in the civil actions brought pursuant to Civil Code Section 1708.85 so that victims could have meaningful access to justice.

Recently, the Legislature took aim at growing concerns associated with what are called "deepfakes," a term drawn from "deep learning" plus "fake." There are various manifestations, but essentially all involve the digital manipulation of audiovisual material to falsely depict an individual engaging in certain conduct. AB 602 (Berman, Ch. 491, Stats. 2019) provided a cause of action for the nonconsensual disclosure of sexually explicit material depicting individuals in realistic digitized performances. It holds liable those creating and disclosing the material when they *knew or reasonably should have known* the individual depicted did not provide consent. Additionally, the cause of action can be brought against a person who intentionally discloses the material if they *knew* the individual did not consent, a slightly higher standard.

A prevailing plaintiff who suffers harm as a result of a violation of AB 602 may recover a variety of damages, including either economic and noneconomic damages or statutory penalties ranging from \$1,500 to \$30,000. Punitive damages, attorneys' fees, and injunctive relief are also available.

This bill addresses a new, but no less disturbing, trend of individuals sending sexually explicit material to others without the recipient's consent. A Pew Research Center survey studying online harassment found that approximately 30 percent of respondents had reported someone had sent them explicit images they did not ask for.<sup>1</sup> However, the practice overwhelmingly targets younger women. The survey found 53 percent of female respondents ages 18 and 29 had received such unsolicited images. Not insignificant, 37 percent of men in the same age range reported the same.

Another survey, this one conducted by YouGov, found that 41 percent of women ages 18 to 36 had received at least one unwanted picture of a penis.<sup>2</sup> These unwanted images are sent through text, on dating sites and apps, social media, and, reportedly, using AirDrop between iPhones on public transportation.<sup>3</sup>

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<sup>1</sup> Maeve Duggan, *Online Harassment 2017* (July 2017) Pew Research Center, <https://www.pewresearch.org/internet/2017/07/11/online-harassment-2017/> (as of Feb. 25, 2021).

<sup>2</sup> Anna North, *One state has banned unsolicited dick pics. Will it fix the problem?* (September 3, 2019) Vox, <https://www.vox.com/policy-and-politics/2019/9/3/20847447/unsolicited-dick-pics-texas-law-harassment>.

<sup>3</sup> *Ibid.*

## 2. Combatting the transmittal of unsolicited images

Following the model of other statutes discussed above, the bill addresses the issue by providing harmed individuals with a right of action against senders of such images. The cause of action lies against a person who knowingly sends an image that the person knows or reasonably should know is unsolicited by electronic means depicting a person engaging in an act of sexual intercourse, sodomy, oral copulation, sexual penetration, or masturbation or depicting the exposed genitals or anus of any person. An image is unsolicited if the recipient has not requested it, did not consent to its transmittal, or expressly forbade its transmittal.

Recipients harmed by the receipt of such images are entitled to recover economic and noneconomic damages. For more egregious violations, where the plaintiff has expressly forbidden the sender from sending such images, an injured plaintiff is entitled to instead collect a statutory penalty of at least \$1,500 and up to \$30,000. Such a plaintiff can further seek punitive damages, reasonable attorney's fees and costs, and any other available relief, including injunctive relief.

This standard ensures that the egregious violators are provided a strong deterrent or face the possibility of robust civil liability. To avoid application in other unintended situations, the bill builds in a reasonableness standard while still centering ultimate liability on the consent of the recipient. Individuals, and in particular the many young women affected by this scourge, should feel safe interacting with others online, and this bill sends a clear signal that this aggressive and nonconsensual behavior, which so many have come to consider an inevitable reality, is unacceptable.

## 3. Stakeholders in support

According to the author:

Technological advancements have allowed users to interact with one another through various social media platforms, dating applications, and private messaging. In modern online communications, perpetrators are easily and legally able to sexually harass users with lewd images and videos of themselves.

With the growing accessibility and relevance of technology as a mode of communication, it has become easier for people to send unsolicited sexually explicit material of themselves. By making the electronic transmission of unsolicited lewd material of the sender punishable by fine and subject to civil remedies, California can prevent technology users from experiencing digital forms of sexual harassment and can help foster a safe and healthy technology community.

Bumble, the sponsor of the bill, conducted a user survey, finding that users report they are left “feeling violated, less trusting of others online, and more vulnerable when using the Internet.” Bumble states:

SB 53 tackles this problem head on, making sure the law acts as a deterrent and a reminder that if it’s not okay in person, it shouldn't be tolerated digitally. The aim is not to curtail free expression, and we in no way want to stifle communication between consenting adults. Standards of acceptable behavior online should match those in real life.

Writing in support, the California Women’s Law Center states: “Technological advancements have allowed users to interact with one another through various social media platforms, dating applications, and private messaging. In modern online communications, perpetrators are easily and legally able to sexually harass users with lewd images and videos.” It contends the bill will “help prevent technology-based sexual harassment by making it unlawful to send unsolicited sexually explicit material by electronic means.”

### **SUPPORT**

Bumble (sponsor)  
California Police Chiefs Association  
California State Sheriffs' Association  
California Statewide Law Enforcement Association  
California Women's Law Center  
Feminist Majority Foundation  
Internet Association  
Leda Health  
Peace Officers Research Association of California

### **OPPOSITION**

None known

### **RELATED LEGISLATION**

#### **Pending Legislation:**

SB 435 (Cortese, 2021) provides a cause of action against any person or entity that engages in online sex trafficking by making, obtaining, or distributing, including through electronic distribution, any moving or still photograph in any technological form, regardless of whether it has been altered, of a person, or their identifiable likeness, in which they are naked or that is sexual in nature, where certain conditions

are met, such as the material was coerced, stolen, or the subject was a person under the age of 18. This bill is in the Senate Judiciary Committee.

Prior Legislation:

SB 1182 (Leyva, 2020) would have provided a cause of action for knowingly sending an unsolicited, sexually explicit image. It would have provided for civil penalties consistent with the current bill. The bill died in the Senate Judiciary Committee.

SB 978 (Chang, 2020) would have created a private cause of action against a person who knowingly transmits or shares a lewd image by electronic means, if the transmission or sending of that image was not at the request of, or expressly consented to by, the plaintiff and the plaintiff can demonstrate the image was lewd, there was clear intent, and there was no, or only a limited, relationship between the plaintiff and the defendant. The bill died in the Senate Judiciary Committee.

AB 602 (Berman, Ch. 491, Stats. 2019) *See* Comment 1.

SB 157 (Wieckowski, Ch. 233, Stats. 2017) *See* Comment 1.

AB 2643 (Wieckowski, Ch. 859, Stats. 2014) *See* Comment 1.

SB 255 (Cannella, Ch. 466, Stats. 2013) *See* Comment 1.

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