SENATE COMMITTEE ON PUBLIC SAFETY

Senator Loni Hancock, Chair
2015 - 2016 Regular

Bill No:	SB 676	**Hearing Date:**	April 28, 2015
Author:	Cannella		
Version:	April 20, 2015		
Urgency:	No	**Fiscal:**	Yes
Consultant:	JM		

Subject: ***Disorderly Conduct: Invasion of Privacy***

HISTORY

Source: Attorney General of California

Prior Legislation: SB 1255 (Cannella) Ch. 863, Stats. 2014
SB 255 (Cannella) Ch. 466 Stats. 2013

Support: Association of Deputy District Attorneys; Association for Los Angeles Deputy Sheriffs; California District Attorneys Association; California Police Chiefs Association; California State Sheriffs' Association; Crime Victims United of California; Los Angeles Police Protective League; Peace Officers Research Association of California; Riverside Sheriffs Association

Opposition: American Civil Liberties Union; California Broadcasters Association; California Hospital Association; California Medical Association

PURPOSE

The purpose of this bill is to 1) provide that any person who distributes an image of an intimate body part of an identifiable person, or an image of an identifiable person engaged in a specified sex act is guilty of a misdemeanor if the distributor of the image "knew or should have known that the depicted person had a reasonable expectation that the image would remain private;"; and 2) allow or require forfeiture of the distributed image and equipment used in the offense.

Existing law provides that every person who, with intent to place another person in reasonable fear for his or her safety, or the safety of the other person's immediate family, by means of an electronic communication device, and without consent of the other person, and for the purpose of causing that other person unwanted physical contact, injury, or harassment, by a third party, electronically distributes, publishes, e-mails, hyperlinks, or makes available for downloading, personal identifying information, including, but not limited to, a digital image of another person, or an electronic message of a harassing nature about another person, is guilty of a misdemeanor punishable by up to one year in the county jail, by a fine of not more than one thousand dollars ($1000), or by both that fine and imprisonment. (Pen. Code § 653.2, subd. (a).)

Existing law defines the term "electronic communication device" to include, but not be limited to telephones, cellular phones, computers, Internet Web pages or sites, Internet phones, hybrid cellular/Internet/wireless devices, personal digital assistants (PDA), video recorders, fax machines, or pagers. "Electronic communication" has the same meaning as the term is defined in Section 2510 (12) of Title 18 of the United States Code. (Pen. Code § 653.2, subd. (b).)

Existing law provides that a person who has "suffered harassment" may seek a temporary restraining order and an injunction to prevent such harassment. "Harassment" is defined thus:

> [U]nlawful violence, a credible threat of violence, or a knowing and willful course of conduct directed at a specific person that seriously alarms, annoys, or harasses the person, and that serves no legitimate purpose. The course of conduct must be such as would cause a reasonable person to suffer substantial emotional distress, and must actually cause substantial emotional distress to the plaintiff. (Code. Civ. Proc. § 527.6.)

Existing law defines "obscene matter" as "matter, taken as a whole, that to the average person, applying contemporary statewide standards, appeals to the prurient interest, that, taken as a whole, depicts or describes sexual conduct in a patently offensive way, and that, taken as a whole, lacks serious literary, artistic, political, or scientific value." (Pen. Code § 311, subd. (a).)

Existing law includes a misdemeanor that is committed under the following circumstances:

- The defendant electronically distributed an image of another person's intimate body part, or an image of the person engaged in specified sexual conduct.
- The defendant and the person depicted agreed or understood that the image would remain private.
- The defendant knew or should have known that the person depicted experience serious emotional distress or humiliation.
- The person depicted did suffer serious emotional distress.
- This misdemeanor is punishable by imprisonment in a county jail for up to one year, a fine of up to $1,000, or both. (Pen. Code § 647, subd. (j)(4).)

Existing law defines an "intimate body part" as any portion of the genitals, the anus, and in the case of a female, any portion of the breasts below the areola. (Pen. Code § 647, subd. (j)(4)(C).)

This bill provides that any person who distributes an image of an intimate body part of an identifiable person, or an image of an identifiable person engaged in a specified sex act, is guilty of a misdemeanor if the distributor of the image "knew or should have known that the depicted person had a reasonable expectation that the image would remain private", knew or should have known that the person depicted would suffer serious emotional distress, and the depicted person suffered such emotional distress.

This bill provides that the crime does not apply if the distribution was made in the course of a news account on a matter of legitimate public concern.[1]

[1] The emotional distress element is in existing law.

This bill provides that the crime does not apply if the distribution was made in the course of providing medical services.[2]

This bill provides that an image distributed so as to violate the ban on nonconsensual distribution of intimate body parts or sexual activity shall be subject to court ordered forfeiture and destruction.

This bill provides that a computer or telecommunications device used in the crime of nonconsensual distribution of an image of an intimate body part or sexual conduct is subject to forfeiture. The property shall be given to the holder of a security interest, to the victim for restitution and "compensatory damages," to the prosecuting agency, specified governmental entities or charitable organizations. The property may be sold and the proceeds distributed in a manner similar or equivalent to distribution of the actual property.

RECEIVERSHIP/OVERCROWDING CRISIS AGGRAVATION

For the past eight years, this Committee has scrutinized legislation referred to its jurisdiction for any potential impact on prison overcrowding. Mindful of the United States Supreme Court ruling and federal court orders relating to the state's ability to provide a constitutional level of health care to its inmate population and the related issue of prison overcrowding, this Committee has applied its "ROCA" policy as a content-neutral, provisional measure necessary to ensure that the Legislature does not erode progress in reducing prison overcrowding.

On February 10, 2014, the federal court ordered California to reduce its in-state adult institution population to 137.5% of design capacity by February 28, 2016, as follows:

- 143% of design bed capacity by June 30, 2014;
- 141.5% of design bed capacity by February 28, 2015; and,
- 137.5% of design bed capacity by February 28, 2016.

In February of this year the administration reported that as "of February 11, 2015, 112,993 inmates were housed in the State's 34 adult institutions, which amounts to 136.6% of design bed capacity, and 8,828 inmates were housed in out-of-state facilities. This current population is now below the court-ordered reduction to 137.5% of design bed capacity."(Defendants' February 2015 Status Report In Response To February 10, 2014 Order, 2:90-cv-00520 KJM DAD PC, 3-Judge Court, *Coleman v. Brown, Plata v. Brown* (fn. omitted).

While significant gains have been made in reducing the prison population, the state now must stabilize these advances and demonstrate to the federal court that California has in place the "durable solution" to prison overcrowding "consistently demanded" by the court. (Opinion Re: Order Granting in Part and Denying in Part Defendants' Request For Extension of December 31, 2013 Deadline, NO. 2:90-cv-0520 LKK DAD (PC), 3-Judge Court, *Coleman v. Brown, Plata v. Brown* (2-10-14). The Committee's consideration of bills that may impact the prison population therefore will be informed by the following questions:

- Whether a proposal erodes a measure which has contributed to reducing the prison population;

[2] The exceptions in current law for specified distributions of sexual images are not changed by this bill.

- Whether a proposal addresses a major area of public safety or criminal activity for which there is no other reasonable, appropriate remedy;
- Whether a proposal addresses a crime which is directly dangerous to the physical safety of others for which there is no other reasonably appropriate sanction;
- Whether a proposal corrects a constitutional problem or legislative drafting error; and
- Whether a proposal proposes penalties which are proportionate, and cannot be achieved through any other reasonably appropriate remedy.

COMMENTS

1. Need for This Bill

According to the author:

> Current law applies a misdemeanor charge to the distribution of intimate images that were shared in a private agreement. However, those images, as the property of the distributing party, remain with the offender even after conviction. This bill would state that upon conviction those images are subject to forfeiture to law enforcement for destruction.

2. The Bill Arguably Creates a Form of Intellectual Property Right Under Which a Person Controls Distribution of any Image of his or her Intimate Body Part

The essence of the crime defined by this bill is *distributing a sexual image* of another person under circumstances *where the defendant knew or should have known that the depicted person had a reasonable expectation that the image would remain private* and the defendant *knew or should have known* that the depicted *person would be distressed*. The bill does not state how such a privacy interest would be created. The bill could be interpreted to mean the bill creates a right for one to control images of one's intimate body parts and enforce that right through a criminal penalty. A right to control one's image appears to be very close to copyright protection. Federal law preempts state law in the creation and enforcement of copyright. (17 U.S.C. §§ 101-810.)

3. Vagueness and Related Issues

Both the United States and California Constitutions guarantee that no person shall be deprived of life, liberty, or property without due process of law. Due process requires "a reasonable degree of certainty in legislation, especially in the criminal law …" (*In re Newbern* (1960) 53 Cal.2d

786, 792.) "[A] penal statute must define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." (*Kolender v. Lawson* (1983) 461 U.S. 352, 357.)

It is not clear how a defendant charged with the crime defined by this bill would have known, or should have known, that a person depicted in a sexual image had a reasonable expectation of privacy in the image. Specifically, how would a potential defendant know if or determine that someone depicted in a sexual image had an expectation that the image would remain private? How would a potential defendant know that the expectation was reasonable? How would the

defendant know, or why should the defendant know, that distribution of the image would cause any emotional distress, let alone serious emotional distress.

In very many cases, the defendant might not know who the depicted person is. He might well have no way to contact the person. A person would have to take the risk that he would be convicted of a crime each time he distributed a sexual image, as there would be no certain or clear way to determine the depicted person's expectation or emotional state if the expectation was violated. This uncertainty also raises issues concerning the chilling of speech, as discussed below.

Further, it is not clear that the person depicted need be in California. The crime appears to be based on the defendant's conduct in California, regardless of where the depicted person lived.

4. First Amendment Issues Generally

"If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." (*Texas v. Johnson* (1989) 491 U.S. 397, 414.) Unless a particularly narrow exception applies, protection of expression under the First Amendment is not limited to certain subjects or ideas. A restriction on the "content" of expression, as distinguished from the time, place and manner of expressions is presumptively invalid. A content-based restriction on expressive conduct is subject to "strict scrutiny" and must promote a "compelling state interest" by the "least restrictive means" to achieve the compelling interest. (*Sable Communications* v. *FCC* (1989) 492 U.S. 115, 126.)

A content-based restriction on expression will be struck down as invalid on its face if it prohibits clearly protected speech, in addition to conduct that may validly be prohibited. Such a law is said to be unconstitutionally "overbroad." (*U.S. v. Stevens* (2010) 130 S.Ct. 1577, 1587.) Stevens considered a federal statute that criminalized the sale or possession of "depictions of animal cruelty," in order to prohibit fetishistic "crush videos" of the killing of animals for sexual gratification. Stevens was prosecuted for distribution of videos of dog fights and the government argued that the law was limited in intent to such depictions. The Supreme Court found that the statute was overbroad in that it might reach videos depicting hunting, arguably inhumane treatment of livestock, or activities legal in some jurisdictions but not others, such as cockfighting. (*Id*, at pp. 1588-1592.) The fact that speech is disturbing cannot be the determinant of whether it can be restricted or not.

In *Reno v ACLU* (1997) 521 U.S. 844, the United States Supreme Court applied First Amendment law and principles to the Internet. The case specifically concerned the constitutionality of the major federal law designed to protect or keep minors from indecent material on the Internet. The court held:

> We are persuaded that the CDA lacks the precision that the First Amendment requires when a statute regulates the content of speech. In order to deny minors access to potentially harmful speech, the CDA effectively suppresses a large amount of speech that adults have a constitutional right to receive and to address to one another. That burden on adult speech is unacceptable if less restrictive alternatives would be at least as effective in achieving the legitimate purpose that the statute was enacted to serve.

> In evaluating the free speech rights of adults, we have made it perfectly clear that [s]exual expression which is indecent but not obscene is protected by the First Amendment. [W]here obscenity is not involved, we have consistently held that the fact that protected speech may be offensive to some does not justify its suppression. Indeed, *Pacifica* itself admonished that "the fact that society may find speech offensive is not a sufficient reason for suppressing it. *(Id*., at pp. 874-875; internal quotations and citations omitted)

Distribution of images – including sexual images – is thus expressive speech protected under the First Amendment. The cases cited above thus provide that restrictions based on the content of this expressive conduct are presumptively invalid and must be justified, if at all, by a competing state interest. The interest advanced or protected by this bill is a privacy right in sexual images - a privacy right perhaps created in this bill – that is violated where the distributor knows or should know the depicted person reasonably expected that the image would remain private and the depicted person suffers serious emotional distress.

The bill appears to confer a per-se privacy interest for any person concerning sexual images of that person that could outweigh First Amendment protections. Under existing law, the person depicted and the distributor created a privacy expectation by agreeing or understanding that the image will remain private. This bill eliminates that provision. However, unlike existing law, this bill does not provide how a privacy interest would be created. The privacy interest is not specifically or explicitly stated, but is obviously implied by the element that the defendant knew or should have known that the person depicted had a reasonably expectation that the image shall remain private. As noted above, it can be argued that this bill would have a chilling effect on protected speech.

5. First Amendment Challenges Rejected in Cases Where Private Sexual Images Were Used to Stalk and Harass the Victim

There have been statements in stalking and harassment cases that distribution of so-called cyber revenge porn is not protected by the First Amendment. However, in these cases the distribution of the images was criminal because it was the method by which the defendant stalked and harassed the victim. As such, the "speech" could not be separated from the harassing conduct so as to be protected by the First Amendment. "Osinger's as-applied[3] challenge is similarly unavailing *given his intent to harass and intimidate* a private individual by circulating sexually explicit publications that were never in the public domain." (*U.S. v. Osinger* (9th Cir. 2014) 753 F. 3d 939, italics added/) Any findings in these cases that private sexual images are per se not protected speech appear to be dicta – a statement of finding not essential to the decision and not of precedential value.

6. This Bill Could be Interpreted as an Attempt to Define a new Form of Obscenity or a Special Form of Unprotected Sexually Oriented Expression

Material is obscene if "applying contemporary statewide standards [it] appeals to the prurient interest, that, taken as a whole, depicts or describes sexual conduct in a patently offensive way, and that, taken as a whole, lacks serious literary, artistic, political, or scientific value." (Pen. Code § 311, subd. (a).) Obscenity prosecutions are exceedingly rare, if not essentially unknown.

[3] "As applied" refers to an argument that a law is not invalid on its face – the stalking statute in Osinger – but that application of the law to the defendant's conduct is unconstitutional.

This bill concerns sexual images that are distributed in violation of a "reasonable" privacy interest – the origin of which is not clear. It can be inferred from context that a person would have a reasonable expectation of privacy in any sexual image of himself or herself, unless the depicted person distributed the image without limitation. It could be argued that this bill sets a standard that distribution of sexual images in violation of this reasonable expectation is obscene, as patently offensive and lacking any public interest or value. More specifically, it could be argued that distribution of such images is humiliating of and degrading to women, as women are typically the subjects of such images and men are the distributors. There is no public interest in solely private image, so distributing such an image without consent should not be protected speech and the harm it causes should be punished criminally.[4] This is not inconsistent with arguments on this issue. If so interpreted, the bill would arguably set a novel standard.

However, in this regard it must be noted that some of the most prominent proponents of banning so-called revenge porn have stressed that such laws must be limited to specific circumstances where a privacy interest was intentionally violated. This bill creates a much more general standard. Noted activist and law professor Danielle Citron has concluded:

> Some object to criminalizing invasions of sexual privacy because free speech will be chilled. That's why it is crucial to craft narrow statutes that *only punish individuals who knowingly and maliciously invade another's privacy and trust.* Other features of anti-revenge porn laws can ensure that defendants have clear notice about what constitutes criminal activity and exclude innocent behavior and images related to matters of public interest. (Italics added.)
>
> Another way to understand the constitutionality of revenge porn statutes is through the lens of confidentiality law …[C]onfidentiality regulations are less troubling from a First Amendment perspective because they penalize the breach of an assumed or implied duty rather than the injury caused by the publication of words. Instead of prohibiting a certain kind of speech, confidentiality law enforces express or implied promises and shared expectations. [5]

It should be noted that there is no explicit right of privacy under the United States Constitution. The California Constitution includes an explicit right to privacy. (Art. I, § 1.) The "penumbras" of specific rights in the United States Constitution include a right to privacy for matters relating to family and procreation. (*Griswold v. Connecticut* (1965) 381 US. 479, 481-486; *Roe v. Wade* (1973) 410 U.S. 113.) The United States Supreme Court has not clearly described a more general right to privacy, except as is created by the Fourth Amendment right to be free from unreasonable searches and seizures. (*People v. Gonzales*, *supra,* 56 Cal.4th535, 384.)

Assuming that the dissemination of private images with the intent to cause humiliation can be criminally prohibited, it can be argued that there is some public interest in, or at least great curiosity about, otherwise private sexual images. It appears to be self-evident that the public is interested in the sexual practices, sexual characteristics and sexual appearance of others, regardless of whether advocates of banning non-consensual distribution of private sexual images would describe the interest or curiosity as a "public interest," or whether distributing private images with intent to humiliate can be criminalized. It was reported in a 2011 Forbes article that

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[4] http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2368946

[5] http://www.forbes.com/sites/daniellecitron/2014/04/18/debunking-the-first-amendment-myths-surrounding-revenge-porn-laws/

13% of Internet searches were for sexual content and porn websites account for 4% of the total.[6] Huffington post has reported that a Website called "Homegrown Video" catalogued all content submitted to the site for six months in 2013. The amateur pornography received by the site was uploaded from all across the United States, including 1/3 of the total from conservative southern states. In the conservative states, women uploaded 57% of the amateur content. Equivalent data was reported in a similar study the site "PornHub."

Academic researchers would very likely have a great interest in photographs and other images that display or reveal the sexual practices in which people engage, regardless of what they might report in surveys or interviews. The Kinsey report and the research of Masters and Johnson appear to reflect such academic interest and curiosity. The public, not just other academics, were intensely interested in the Kinsey and Masters and Johnson studies. Those research projects became cultural phenomena.

7. Political Speech and Related Matters

Courts have long stated that political speech and speech concerning public issues are entitled to great protection under the First Amendment. (*Burson v. Freeman* (1992) 504 U.S. 191, *Perry Ed. Assn. v. Perry Local Educators' Assn*. (1983) 460 U.S. 37, 45.) Political speech can be harsh, and one could conclude that political speech may be intended to humiliate the target of the communication or expressive conduct. The Weiner incident is one example. Anthony Wiener posted a semi-nude picture of himself on his public Twitter account. Although he quickly removed the images, political activists captured the images and re-posted them. Other images Weiner had sent to a woman in Texas were reposted on the Internet. False identities were used by activists to target Weiner. Weiner certainly did not authorize or consent to others, including political activist, reposting the images. Weiner expected the images to remain private and appears to have experienced emotional distress through the release of the images. Many of the persons who captured and reposted the images of Weiner could be described as having an intent to humiliate Wiener and cause him emotional distress.

8. Possible Extension to such Non-Consensual Distribution of Humiliating Images that are not Sexual and Equal Protection Issues

This bill concerns the use of sexual images to humiliate the person depicted. However, the bill could apply in other contexts, such as where the image is distributed with the intent to humiliate a person because he or she is obese, or whose appearance or depicted conduct could otherwise be subject to the same or greater level of ridicule than a sexual image. For example, an image of a person who has overdosed on a drug or become extremely intoxicated and vomited on himself or herself would likely be more humiliating than an unclothed image of the person.

Regulation of private sexual images on the basis that such images have no legitimate interest to the public or academic researchers would appear to open the door to courts weighing the validity of a wide range of images or descriptions of other private conduct.[7] That is, if a prosecutor can argue that an image or description of a person is solely of interest to that person and those to whom the person revealed the image or description, distribution of the material could be prohibited as not protected by the First Amendment.

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[6] http://www.forbes.com/sites/julieruvolo/2011/09/07/how-much-of-the-internet-is-actually-for-porn/

[7] Obscenity is not limited to images, it can include writings. Child pornography is limited to images of actual minors. (Pen. Code § 311, subds. (b) and (h).

Criminalizing distribution of an image based on its sexual nature, while not penalizing distribution of other images, thus conceivably raises equal protection issues based on the banning of private sexual images, but no other humiliating images.

9. Civil Law Remedies for Intentional Infliction of Emotional Distress and First Amendment Protections

Civil law includes the tort (wrong against a private person or entity) of intentional infliction of emotional distress. Intentional infliction of emotional distress involves extreme and outrageous conduct by the defendant that causes the plaintiff severe or extreme emotional distress. (*Hughes v. Pair* (2009) 46 Cal.4th 1035, 1050-1051.) Nevertheless, even speech intended to create substantial emotional distress may be protected by the First Amendment, particularly where the subject of the speech concerns a public issue. Further, what constitutes a matter of public concern is not well defined. (Snyder v. Phelps (2011) 131 S. Ct. 1207, 1215-1216; *Hustler Magazine v. Falwell* (1988) 108 S. Ct. 876.)

10. Obtaining Sexual Images Through Illegal Computer Hacking

The most infamous purveyor of non-consensual personal sexual images on the Internet is Hunter Moore. Moore ran a website on which he and others posted nude photos that were often described as "revenge porn," because posters were often men eager to humiliate former partners. Moore went far beyond simply posting images provided to him by others. He employed a man named Charles Evens to hack into e-mail accounts to obtain the images. Moore and Evens recently pleaded guilty in federal court to computer hacking crimes and identity theft.[8]

In January of 2012, the topless "selfie" photo of Kayla Laws appeared on the Moore's site. Moore had hacked Laws' e-mail account to obtain the image. Laws had taken the photo in October, 2011 and never shared it with anyone. Kayla Laws' mother Charlotte Laws demanded that Moore take down Kayla's photo. When he refused, she contacted other women whose images had appeared on Moore's site and convinced the FBI to open an investigation. The investigation revealed the computer hacking that Moore and Evens had done to obtain many images.[9]

There have been numerous other instances of stolen images being distributed through the Internet. The most notable recent instances involved actors Jennifer Lawrence, Kristen Dunst and Kate Upton. There were reports and speculation that the Apple iCloud accounts had been accessed. In 2011, a Florida man was sentenced to a term of 10 years for hacking the e-mail accounts of actors Scarlett Johansson and Mila Kunis, and singer/actor Christina Aguilera.[10]

In addition to hacking issues, using the images of actors and other celebrities can constitute a violation of a celebrity's copyright or publicity rights. Under California law an actor, singer or other celebrity generally has a right to control and gain from the commercial value of his or her image, voice and other characteristics. (Cal. Civ. Code § 3344.1.)

[8] http://www.nytimes.com/aponline/2015/02/18/us/ap-us-revenge-porn.html
[9] http://www.newyorker.com/tech/elements/the-downfall-of-the-most-hated-man-on-the-internet
[10] http://www.cnn.com/2014/09/01/showbiz/jennifer-lawrence-photos/

11. Forfeiture and Confiscation Issues

This bill authorizes forfeiture of equipment and property used in non-consensual distribution of intimate images. The bill also authorizes confiscation of offending images. How could one determine if all of the images have been confiscated? One of the major harms of cyber revenge is that the image is uncontrollable. In practice, computer forfeiture is an additional punishment, not prevention of a future crime. The convicted defendant could easily obtain another computer.

The bill authorizes forfeiture of material "obtained or distributed in violation of" the numerous crimes defined in subdivision (j) of Penal Code Section 647. Some of these crimes involve window-peeping, concealed recording of the naked body of an identifiable person, distributing a sexual image that the person depicted and the distributor have agreed would remain private, and the crime defined by this bill. The forfeiture provision further provides that the image be "in the possession of" a specified government entity. It thus appears that the image was likely seized in a criminal investigation. However, there appears to be no requirement that a prosecution have been initiated or a conviction obtained. The actual images can also be found on myriad computers and servers, including those of an Internet service provider or an entity such as Facebook, Twitter or Tumblr.

It appears that better results would flow from putting the defendant on probation with the condition that he destroy all images used in the crime and that he not obtain others. He could be monitored on probation and his probation revoked if he violated probation conditions.

COULD A DEFENDANT PLACED ON PROBATION BE MONITORED TO ENSURE COMPLIANCE WITH ORDERS THAT HE DESTROY IMPROPERLY DISTRIBUTED IMAGES AND THAT HE NOT USE ELECTRONIC EQUIPMENT IMROPERLY?

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