

- SUBJECT:** Creating felony for promoting covert photographs taken for a sexual purpose
- COMMITTEE:** Criminal Jurisprudence — favorable, without amendment
- VOTE:** 8 ayes — Keel, Riddle, Ellis, Denny, Hodge, P. Moreno, Pena, Talton  
0 nays  
1 absent — Dunnam
- WITNESSES:** For — Cary Grace, City of Houston; Chuck Noll, Harris County District Attorney’s Office; Hannah Riddering, Texas National Association for Women  
Against — None  
On — John Klassen, Attorney General’s Office
- BACKGROUND:** The 76th Legislature enacted Penal Code, sec. 21.15 (HB 73 by Garcia), establishing a state jail felony (punishable by 180 days to two years in a state jail and an optional fine of up to \$10,000) for photographing or visually recording another person by videotape or other electronic means without that person’s consent and with the intent to arouse or gratify the sexual desire of any person.  
  
Penal Code, sec. 43.21(5), defines “promote” as to manufacture, issue, sell, give, provide, lend, mail, deliver, transfer, transmit, publish, distribute, circulate, disseminate, or offer or agree to do the same for purpose of resale.
- DIGEST:** HB 1060 would make it a state jail felony for a person to promote a photograph or visual recording of another person, knowing its character and content, that had been produced without that person’s consent and with the intent to arouse or gratify the sexual desire of any person.  
  
If conduct that constituted an offense under this section of the Penal Code also constituted an offense under any other law, the actor could be prosecuted under this section or the other law.

The bill would take effect September 1, 2003.

**SUPPORTERS  
SAY:**

HB 1060 would close a loophole in the Penal Code by allowing the prosecution of someone who distributed the kind of material prohibited under sec. 21.15. This bill would protect those whose privacy already has been violated from being violated a second time when a videotape or photograph is offered for view on the Internet or through the mail.

Even the successful prosecution of a former Texas A&M University student for secretly videotaping a sexual encounter with his girlfriend illustrates the limitation of the current law. In March 2003, the 21-year-old man was sentenced to five years' probation and a month in jail and had to take out a half-page ad in the college newspaper to apologize to his girlfriend, whom he had taped covertly while having consensual sex. The woman had learned of the tape after the man played it for 15 of his fraternity brothers. Under current law, the man or his friends could have distributed the tape on the Internet without facing additional penalties.

HB 1060 would not limit anyone's First Amendment right to freedom of expression. The current law is very restrictive as to what would constitute an offense. The concepts of "consent," "intent to arouse or gratify someone's sexual desire," and "promote" already exist in the Penal Code and have been well litigated.

Prosecutors will exercise their discretion prudently and will not prosecute cases involving innocent parties, such as public libraries that offer access to the Internet to the public. The bill's requirement that a distributor know "the character and content" of the photograph or recording would offer sufficient protection for those who might transmit such videotapes unwittingly.

**OPPONENTS  
SAY:**

HB 1060 would exacerbate the problems of an already vague, overly broad, and potentially unconstitutional statute. Determining whether something was intended to arouse anyone's sexual desire is difficult, because some people find sexual gratification in viewing material with no specific "traditional" sexual or erotic elements, such as partial nudity. Taken to its extreme, HB 1060 could make a display of photographs of women in swimsuits at the beach a felony.

The qualification of “knowing the character and content” is inadequate and vague. If, in a child pornography case, the government must carry some burden with respect to a distributor’s knowledge that the performer is a minor, it also should have to prove that the distributor knew whether the performer had not consented to the visual recording.

**OTHER  
OPPONENTS  
SAY:**

HB 1060 would not protect adequately those who might consent to being shown in a videotape of a sexual nature but who would object to distribution of those images to others. Current law speaks only to photographs and videotapes made without a person’s consent with the intent to arouse or gratify the sexual desire of any person. For variety of reasons, a couple may agree to photograph or videotape their intimate moments, but that initial consent does not imply a right to distribute, sell, or show those photographs or videotape to others.

**NOTES:**

The identical companion bill, SB 140 by Ellis, passed the Senate on the Local and Uncontested Calendar on March 20 and has been referred to the House Criminal Jurisprudence Committee.