

SUBJECT: Criminal offense, civil liability for disclosure of intimate visual material

COMMITTEE: Criminal Jurisprudence — favorable, without amendment

VOTE: 7 ayes — Herrero, Moody, Canales, Hunter, Leach, Shaheen, Simpson

0 nays

SENATE VOTE: On final passage, April 14 — 31-0

WITNESSES: *(On companion bill, HB 496)*

For — Chris Kaiser, Texas Association Against Sexual Assault; Randy Kildow, Texas Association of Licensed Investigators; Jennifer Tharp Comal County Criminal District Attorney; Justin Wood, Harris County District Attorney's Office; Hollie Touns; Kelly Cook; *(Registered, but did not testify: Jennifer Allmon, The Texas Catholic Conference of Bishops; Lon Craft, Texas Municipal Police Association; Kathryn Freeman, Christian Life Commission; Aaron Setliff, The Texas Council on Family Violence; Gary Spurger, Harris County Constable Pct. 4; Julie Bassett)*

Against — Mark Bennett, Harris County Criminal Lawyers; *(Registered, but did not testify: Kristin Etter, Texas Criminal Defense Lawyers Association; Matt Simpson, ACLU of Texas)*

On — *(Registered, but did not testify: Mike Hull, Texans for Lawsuit Reform)*

DIGEST: SB 1135 would create a criminal offense and allow civil lawsuits related to the disclosure or promotion of intimate visual material.

**Criminal offense.** The bill would create a new criminal offense for the unlawful disclosure or promotion of intimate visual material. A person would commit an offense if:

- without consent, an individual intentionally disclosed visual material depicting another with the other person's intimate parts

- exposed or engaged in sexual conduct;
- the visual material was obtained or created under circumstances in which the depicted person had a reasonable expectation that the material would remain private;
- the disclosure of the material caused harm to the depicted person; and
- the disclosure revealed the identity of the depicted person, including through accompanying or subsequent information or material or information or material provided by a third party in response to the disclosure of the visual material.

It would be an offense to intentionally threaten to disclose, without the consent, visual material depicting another with the other's intimate parts exposed or engaged in sexual conduct and to make such a threat to obtain a benefit in return either for not making the disclosure or in connection with disclosure.

It also would be an offense to promote such material. A person would commit an offense if, knowing the character and content of the visual material, the person promoted the material on a website or other forum that was owned or operated by the person.

It would not be a defense to prosecution that the depicted person created or consented to the creation of the material or voluntarily transmitted the material.

It would be an affirmative defense to prosecution to the disclosure or promotion of material that:

- the disclosure or promotion was made in the course of lawful and common practices of law enforcement or medical treatment, reporting unlawful activity, or a legal proceeding;
- the disclosure or promotion consisted of visual material depicting in a public or commercial setting only a person's voluntary exposure of their intimate parts or the person engaging in sexual conduct; or

- the actor was an interactive computer service, as defined under federal law, and the disclosure or promotion consisted of visual material provided by another person.

These offenses would be class A misdemeanors (up to one year in jail and/or a maximum fine of \$4,000). If conduct constituting an offense under this section also constituted an offense under another law, a person could be prosecuted under this section, the other law, or both.

**Civil liability.** The bill would make defendants liable to a person depicted in intimate visual material for damages from the disclosure of the material if:

- the defendant disclosed the material without the effective consent of the depicted person;
- the material was obtained or created under circumstances in which the depicted person had a reasonable expectation that the material would remain private;
- the disclosure of the material caused harm to the depicted person; and
- the disclosure of the material revealed the identity of the depicted person in any manner, including through accompanying or subsequent information or material or material provided by a third party in response to the disclosure of the intimate visual material.

Defendants would be liable for damages arising from the promotion of the material if, knowing the character and content of the material, the defendant promoted intimate visual material on an Internet website or other forum that was owned or operated by the defendant.

A claimant who prevailed would be awarded actual damages, including damages for mental anguish, court costs, and reasonable attorney's fees. In addition, claimants could recover exemplary damages.

Courts, on the motion of a party, would be able to issue a temporary restraining order or a temporary or permanent injunction to restrain or

prevent the disclosure or promotion of the material. Courts issuing such orders or injunctions could award the party that brought the motion damages of \$1,000 for each violation if the disclosure or promotion was willful or intentional or award \$500 for each violation if it was not willful or intentional.

The cause of action created by the bill would be cumulative of any other remedy provided by common law or statute.

Courts would have personal jurisdiction over defendants in a suit brought under the bill if the defendant resided in Texas, the claimant resided in Texas, the material was stored on a server in Texas, or the material was available to view in Texas. The bill would require that these provisions be liberally construed and applied to promote the bill's underlying purpose to protect persons from and to provide remedies to victims of the disclosure of intimate visual material.

The bill would not apply to claims brought against an interactive computer service, as defined in federal law, for disclosure or promotion consisting of intimate visual material provided by another.

The bill would take effect September 1, 2015. It would apply to material disclosed, promoted, or threatened to be disclosed on or after that date. The bill would apply only to causes of action that accrued on or after the effective date.

**SUPPORTERS  
SAY:**

SB 1135 would address the problem of the electronic distribution of sexually explicit images of someone without the subject's permission. The images, sometimes taken without consent, may be posted on websites or e-mailed to employers, schools, family members, and others. Sometimes contact or identifying information is included.

Current laws provide inadequate deterrence and punishment for these actions. Explicit images can be uploaded to websites where thousands can see them and they can be shared with other sites. Victims can suffer threats, harassment, stalking, and sexual exploitation as well as

embarrassment and shame that intrude into their work, school, or personal lives. Harm is difficult to remedy because removing images from a website rarely prevents continued distribution. Both civil and criminal avenues are important in combating these actions.

The bill would address this problem with a new offense that was carefully crafted to not be overly broad and to meet all legal and constitutional standards. The bill would not be a prohibited content-based restriction on speech but would relate to sexual defamation and would enact permissible provisions. The bill contains several thresholds an action would have to meet to fall under the offense so that common actions would not be included. These would include requiring that the material be disseminated without consent, be obtained or created when a person had a reasonable expectation of privacy, and that the actions caused harm. The offense would include threatening to disclose material described by the bill to address situations in which a threat of disclosure had been used to blackmail others.

The bill would establish certain affirmative defenses to prosecution to ensure it captured only criminal activity and not legitimate law enforcement, medical, legal, or commercial actions. It also would be an affirmative defense to prosecution if the material depicted only voluntary exposure in a public or commercial setting.

The bill would include civil penalties as another tool to get at the economic incentive related to these actions. Current causes of action can be inadequate in some of these cases, so the bill would establish liability for the unlawful disclosure of certain intimate visual material. Civil penalties could allow those who profit from the disclosure to be held accountable along with those who make the disclosure. The bill would include injunctive relief and damages related to it to give the court the power to enforce temporary restraining orders or temporary or permanent injunctions. These damages would be important to get those inflicting the harm to abide by the court's order.

**OPPONENTS**

SB 1135 would be a content-based restriction on speech, which would be

SAY: presumptively unconstitutional.

The state should be cautious about creating new crimes for nonviolent behaviors. Making such offenses potentially carry jail time could be too punitive given the nonviolent nature of these actions. In some cases, current statutes, including those for harassment and impersonating another, already criminalize some activities that occur in these situations. While distributing these images may be reprehensible, these cases generally could be handled outside the criminal justice system, where victims could seek damages through civil courts.

OTHER  
OPPONENTS  
SAY: Instead of making individuals liable for the specific actions described in SB 1135, in some cases civil suits could be brought under existing laws by raising issues such as privacy, emotional distress, or defamation.