

device to another person, whether or not conversation ensues from making the calls or contact. (Pen. Code, § 653m, subd. (b).)

Existing law defines “harassment” to mean a knowing and willful course of conduct directed at a specific person that a reasonable person would consider as seriously alarming, seriously annoying, seriously tormenting, or seriously terrorizing the person and that serves no legitimate purpose. (Pen. Code, § 653.2.)

This bill states that it is unlawful for a person to send an unsolicited image by electronic means of 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.

This bill provides that an image is “unsolicited” if the recipient has expressly forbidden its transmittal.

This bill states that an “image” includes, but is not limited to, a moving visual image.

This bill provides that the new offense is an infraction, punishable by a \$250 fine for a first offense, and a \$750 fine for a second or subsequent offense.

This bill clarifies that its provisions do not preclude prosecution under any other law.

Existing law creates a private right of action against a person who intentionally distributes material that exposes an intimate body part of another person or shows that other person engaging in sexual conduct if the person knew that the other person had a reasonable expectation that the material would remain private. (Civ. Code, § 1708.85.)

Existing law creates a private right of action against a person who either creates or intentionally discloses sexually explicit material without the consent of the individual depicted or where the individual did not actually perform in the realistic digitized performance, also known as pornographic “deepfakes.” (Civ. Code, § 1708.86.)

This bill creates a private cause of action against a person who knowingly sends an unsolicited 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 the exposed genitals of anus of any person.

This bill defines an image for purposes of the private right of action, which includes, but is not limited to, a moving visual image, as “unsolicited” if the recipient has not requested the image, has not consented to its transmittal, or has expressly forbidden its transmittal.

This bill provides that a prevailing plaintiff who suffers harm as a result of receiving an image, the transmittal of which had been expressly forbidden by the plaintiff, may recover the following:

- Economic and noneconomic damages proximately caused by the sending of the image, including damages for emotional distress;

- Upon request of the plaintiff at any time before the final judgement is rendered, the plaintiff may, in lieu of those damages, recover an award of statutory damages of a sum not less than \$1,500 and not more than \$30,000;
- Punitive damages;
- Reasonable attorney’s fees and costs; and,
- Any other available relief, including injunctive relief.

Existing federal law provides that no provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.” (47 U.S.C. Section 230.)

This bill specifies that its provisions do 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.

This bill states that its provisions do not apply to the following:

- Any service that transmits images or audiovisual works, including, without limitation, an on-demand subscription, or advertising-supported service;
- A health care provider transmitting an image for a legitimate medical purpose.

COMMENTS

1. Need for This Bill

According to the author of this bill:

Penal Code § 314 makes it unlawful for someone to expose 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. Every person who willfully or lewdly violates this provision would be guilty of a misdemeanor.

Current law allows for a private right of action against any person who intentionally creates and distributes sexually explicit material without the consent of the depicted individual (AB 602, Berman, 2019). This right, however, does not extend to those who receive unsolicited lewd material of the sender. While Penal Code § 314 recognizes indecent exposure as a criminal offense, California does not consider the role of technology as a facilitating means for a sender to distribute unsolicited sexually explicit material of themselves.

SB 53 would create an infraction . . . for an individual that knowingly transmits unsolicited lewd or sexually explicit material of themselves by electronic means, known as ‘cyber flashing’. SB 53 would also create a private right of action

against any person who knowingly sends unsolicited lewd images of themselves without the explicit consent of the recipient.

According to the Pew Research Center, 53 percent of young American women and 37 percent of young American men have been sent unsolicited explicit material while online. A 2017 national survey conducted by YouGovNY reports that 20 percent of male respondents believed that women would find lewd images distressing, and 17 percent believed that women would describe the material as threatening. This behavior occurs via social media, dating platforms, text messages, and email. In some cases, unsolicited sexually explicit material is ‘AirDropped’ in public spaces to unsuspecting recipients.

2. Background: Unsolicited Transmittal of Sexually Explicit Images

This bill attempts to address 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.

According to a 2017 Pew Research Center study, 53 percent of young women reported receiving explicit images they did not ask for. This is compared to 37% of young men who reported the same. The study found that overall, 44% of men and 37% of women have faced some form of online harassment. Men are somewhat more likely than women to have been called offensive names online (30% vs. 23%) or to have received physical threats (12% vs. 8%). By contrast, women – and especially young women – receive sexualized forms of online abuse at much higher rates than men. Some 21% of women ages 18 to 29 have been sexually harassed online, a figure that is more than double that of men in the same age group (9%). (For full findings, see <https://www.pewresearch.org/fact-tank/2017/07/14/men-women-experience-and-view-online-harassment-differently/>.)

3. First Amendment Considerations

A law that restricts speech has First Amendment implications. The First Amendment to the United States Constitution states: “Congress shall make no law . . . abridging the freedom of speech . . .” This fundamental right is applicable to the states through the due process clause of the Fourteenth Amendment. (*Aguilar v. Avis Rent A Car System, Inc.* (1999) 21 Cal. 4th 121, 133-134, citing *Gitlow v. People of New York* (1925) 268 U.S. 652, 666.) Article I, section 2, subdivision (a) of the California Constitution provides that: “Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press.” It is a fundamental tenant of First Amendment law that speech cannot be prohibited merely because someone justifiably finds it offensive and objectionable. (See e.g. *Cohen v. California*, (1971) 403 U.S. 15, 22; *Virginia v. Black* (2003) 538 U.S. 343, 358.)

While these guarantees are stated in broad terms, “the right to free speech is not absolute.” (*Aguilar v. Avis Rent A Car System, Inc.*, supra, 21 Cal. 4th at p. 134, citing *Near v. Minnesota* (1931) 283 U.S. 697, 708; and *Stromberg v. California* (1931) 283 U.S. 359.) As the United States Supreme Court has acknowledged: “Many crimes can consist solely of spoken words, such as soliciting a bribe (Pen. Code, § 653f), perjury (Pen. Code, § 118), or making a terrorist threat (Pen. Code, § 422).”

a. Obscenity vs. Indecency

Although obscenity is a category of speech that is unprotected by the First Amendment, indecent speech is protected. Obscene speech may be banned based on its content, whereas indecent speech cannot be outright banned but may be regulated by the government which has a legitimate interest in protecting morals and public order in society. (*Barnes v. Glen Theater, Inc.* (1991) 501 U.S. 560, 569.) The U.S. Supreme Court has ruled that most pornography and sexually explicit speech is not obscene. (*Miller v. California* (1973) 413 U.S. 15.)

Generally, laws that are content neutral face intermediate scrutiny, while laws that are content based are presumptively invalid and face strict scrutiny, a higher standard. (*Turner Broadcasting System v. Federal Communication Commission* (1994) 512 U.S. 622.) Regulation of indecent speech is a content-based restriction meaning that the regulation restricts a specific subject matter, in this case, sexually explicit speech. Thus, the standard by which the court would allow such a regulation to be upheld is strict scrutiny which requires a showing that the restriction is necessary to serve a compelling state interest. (*Sable Communications of California v. FCC* (1989) 492 U.S. 115, 126.) Thus, regardless of how important the state interest, the regulation of indecent speech must still be precise enough to achieve the purpose the regulation is intended to serve. (*Reno v. ACLU* (1977) 521 U.S. 844, 874.)

This bill restricts sexually explicit speech, specifically the transmission of an image that depicts “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.” Because this restriction, albeit impacts speech that may be justifiably offensive or objectionable to many people, is a restriction based on the content of its speech, the must be shown to law to be necessary to serve a compelling state interest. The state interest here is protecting the privacy interests of individuals from unwanted or abusive intrusion through texts, emails and other messages that depict sexually explicit images. This interest has been found to be compelling. (*People v. Astalis* (2014) 226 Cal. App. 4th Supp. 1, 8.)

The bill protects that interest by prohibiting transmittal of the images described above only once the recipient has forbidden its transmittal. This ensures that the sender is on notice that such conduct is unwanted. The restriction in this bill is similar to that found in existing law that makes it a crime to harass a phone through repeated telephone calls, although that statute has an added requirement that the person have the “intent to annoy or harass.” (Pen. Code, § 653m.) However, this bill requires the transmittal of the message to be expressly forbidden which serves to narrow the criminal conduct covered by the bill by making it unlikely that the transmittal of an image after the recipient forbid it was done accidentally or under mistake of fact. Under a strict scrutiny standard applied to content-based restrictions, this bill may still not be found to be the least restrictive means to protect that state interest because that is a very high standard.

However, it has been held that some speech may be afforded less protections under the First Amendment when it has such slight social value that any value that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. (*R.A.V. v. St. Paul* (1992) 505 U.S. 377, citing *Chaplinsky v. N.H.* (1942) 315 U.S. 568, 572.) If the court uses a lower standard such as intermediate scrutiny or rational basis, the bill’s restrictions are more likely to be upheld.

Whether this bill's restrictions are precise enough to pass constitutional muster is ultimately a question for the courts.

b. True Threats

The state may penalize threats, even those consisting of pure speech, provided the relevant statute singles out for punishment threats falling outside the scope of First Amendment protection. (*In re M.S.* (1995) 10 Cal.4th 698, 710.) States may prohibit such speech because the government has a legitimate interest in protecting individuals from fear of violence. (*R.A.V. v. City of St. Paul, supra*, 505 U.S. at p. 388.) Nonetheless, statutes criminalizing threats must be narrowly directed against only those threats that truly pose a danger to society. (*People v. Mirmirani* (1981) 30 Cal.3d 375, 388, fn. 10.) True threats are "statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." (*Virginia v. Black* (2003) 538 U.S. 343, 359, citing *Watts v. United States* (1969) 394 U.S. 705, 708.) Although the speaker does not need to intend to carry out the threat, they must have the specific intent that the statement be understood as a threat.

The bill's proponents argue that the conduct prohibited in the bill should be a crime because it is similar to the crime of indecent exposure in public. (Pen. Code, § 314.) While receiving unwanted sexually explicit images is alarming and may cause the recipient emotional distress, arguably the sender of the unwanted image does not pose the same imminent and present danger to the recipient posed by a person who exposes themselves in-person, and in many cases the intent of the sender would be ambiguous. Thus, this conduct is unlikely to qualify as a true threat within the meaning of the First Amendment.

c. Overbreadth and Vagueness

A law may also violate the First Amendment if it is overly broad or vague. The overbreadth doctrine requires that a statute restricting speech must be narrowly drawn so that the prohibition does not sweep under its coverage both protected and unprotected speech and conduct. The overbreadth involved must be substantial before the statute involved will be invalidated on its face. (*People v. Astalis, supra*, 226 Cal. App. 4th at p. 7.) The vagueness doctrine generally requires that a statute be precise enough to give fair warning to actors that contemplated conduct is criminal, and to provide adequate standards to enforcement agencies, factfinders, and reviewing courts. (*Connally v. General Const. Co.*, (1926) 269 U.S. 365.)

The bill as currently written may be subject to challenges based on vagueness or overbreadth. Specifically the bill's provisions defining "unsolicited images" is broad enough to include works of art or images that are not lewd or sexually explicit.

As discussed above, for a regulation to be overturned based on overbreadth, the overbreadth must be substantial. And while it is possible that a person may be sending an image that is prohibited by this bill that is not indecent or sexually explicit, the requirement that they first be notified not to send such images would likely narrow the potentially overbroad application. In terms of vagueness, if the criminalized conduct in the bill is not precise and clear, it could be voided for vagueness. Similar to the discussion above on indecency, the bill's provisions would need to be narrowly tailored to withstand a challenge based on vagueness.

4. Effect of this Legislation

Existing law punishes conduct that raises to the level of harassment or stalking. Specifically, existing law provides that every person who, with the intent to annoy or harass, makes repeated phone calls or makes any combination of calls or contact by use of an electronic communication device, to another person, whether or not conversation ensues from the calls or contact, is guilty of a misdemeanor. (Pen. Code, § 653m.) Harassment means a knowing and willful course of conduct directed at a specific person that a reasonable person would consider as seriously alarming, seriously annoying, seriously tormenting, or seriously terrorizing the person and that serves no legitimate purpose. (Pen. Code, §§ 653.2 and 646.9.) A similar and often related crime, stalking, applies to any person who willfully, maliciously, and repeatedly follows or willfully and maliciously harasses another person and who makes a credible threat with the intent to place that person in reasonable fear for his or her safety, or the safety of his or her immediate family. (Pen. Code, § 646.9.)

Making harassing phone calls or contact with an electronic communication device is punishable as a misdemeanor. Stalking is punishable as an alternate felony-misdemeanor. Sending unsolicited sexually explicit images may rise to the level of harassment or stalking, which require the defendant to commit such acts repeatedly, which means two or more times, to meet the required elements of the crimes.

This bill creates a new crime for conduct that may not rise to the level of harassment or stalking. Instead, it requires that the sender have been expressly forbidden by the recipient from sending the images. The new crime is punishable as an infraction, meaning that a guilty person would have to pay a fine, but does not face any jail time. If the person contests the ticket, the person can request a hearing before a judge. The most common type of infraction are found in the Vehicle Code for driving-related offenses, however there are also infractions in the Penal Code, Fish and Game Code, and Public Resources Code, among others. Typically, a law enforcement officer will issue a ticket for the violation or the person will receive a ticket in the mail, but infractions can also be filed by the prosecutor.

Like many crimes where the violating conduct is not committed in person, it may be difficult to identify or locate the individual sending these images to the recipient, unless the person is known to the recipient. This may make the new infraction difficult to enforce in instances like the AirDrop scenarios raised by the proponents of the bill.

5. Fines and Fees: Infractions

California has three categories of crimes: felonies, misdemeanors and infractions. Infractions, unlike misdemeanors and felonies, cannot be punished with a term of imprisonment and persons charged with an infraction is not entitled to a jury trial or court-appointed attorney. (Pen. Code, § 19.6.) Infractions are punishable with statutorily authorized fines, which varies depending on the offense. The statutory default for a non-vehicle code infraction is a fine not to exceed \$250. (Pen. Code, § 19.8, subd. (b).) Each county superior court issues a penalty schedule for existing infractions which determine the fine of each infraction issued in that county pursuant to the limits authorized in statute. (Pen. Code, § 1269b.)

When a statute specifies a fine, the total amount is greatly increased by the existing penalties and assessments added to each fine. Specifically, penalty assessments and additional fees include state penalty assessments, county penalty assessments, state court construction penalty

assessments, county and state DNA Identification Fund penalty fund assessments, EMS penalty assessments, among others as provided by applicable Government Code and Penal Code sections. Penalty assessments will add between \$22 to \$27 for every \$10, or part of \$10, for every fine imposed and collected by the courts. (*Uniform Bail and Penalty Schedules 2021 Edition*, Judicial Council of California, p. iii, <https://www.courts.ca.gov/documents/UBPS-2021-Final.pdf>.) The addition of these fees increase the total amount of the fine to three to four times the base fine.

This bill provides that a first offense is punishable by a fine of \$250 and a second offense is punishable by a fine of \$750. Considering all of the additional fines and fees that greatly increase the total amount of the fine and that the default fine for a non-vehicle code infraction is typically a maximum of \$250, are the fines specified in this bill disproportionately high?

6. Argument in Support

According to Bumble, the sponsor of this bill:

Everyone should feel safe online, but data shows that many individuals don't, especially women. In a recent user safety survey, we found that close to four in five female Bumble users believe that sending unwanted lewd content is unacceptable. Close to two thirds of women using Bumble believe that sending lewd photos online is as offensive as flashing people on the street; this rises to just short of three quarters of women users belonging to the LGBTQIA+ community. The experience of receiving this content isn't momentary or fleeting: users claim to have been left feeling violated, less trusting of others online, and more vulnerable when using the Internet.

This behavior is not just occurring on dating apps and social networks. These images and videos are sent via text, email, direct-message, and are even "AirDropped" in public places. At Bumble, we use state-of-the-art technology to detect such photos and warn recipients in advance – but these steps do nothing to prohibit those users from behaving badly anywhere else on line. Tech companies can only do so much to curb this abhorrent behavior. We're counting on our lawmakers to fill the gaps where our best efforts fall short.

7. Argument in Opposition

California Public Defenders Association is opposed to the bill unless amended to remove the criminal provisions:

Because proposed Penal Code section 314.5 would only be punishable as an infraction, the accused would not be entitled to a court appointed counsel or a jury trial. Conviction of this infraction could have life-long consequences for the individual's immigration status or employment. Infractions are treated as convictions in Immigration Court. In this case, SB 53 could lead to the denial of discretionary immigration relief and deportation or removal from family and friends.

SB 53 would allow for criminal prosecution of an individual regardless of their intent to harm. Upon conviction, they would not only be required to pay a huge

fine, but they would have on their record a conviction of a Penal Code section that resembles “indecent exposure,” Penal Code section 314, a registerable offense (Penal Code section 290). This is a heavy consequence for a law violation classified as an infraction.

As public defenders, we represent the most vulnerable members of the community. Our clients are indigent and already struggling to make ends meet. A violation of this statute would be punishable by a \$250 fine for a first offense, and by a \$750 fine for second or subsequent offense. This is only the base fine and will be doubled or tripled by additional court fees and fines. An inability to pay this fine in one lump sum would exacerbate our clients’ financial struggles by placing them on a payment plan, allowing for garnishment of wages, and adverse reporting to credit bureaus in the event they are unable to pay.

CPDA has additional specific concerns regarding how SB 53 will impact youth and accelerate “the school to prison pipeline.” We know from our practice that the type of conduct SB 53 seeks to deter and punish is most often engaged in by youth. Youth, inclusive of adults under the age of 26, are known and proven to be impetuous, irrational and susceptible to peer pressure. Deterring youth from sending unsolicited sexual content should not be left to the juvenile and criminal justice systems. The legislature should shift focus to state mandated programs designed to educate youth on the concerns around sending unsolicited sexual content.

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