
SENATE COMMITTEE ON PUBLIC SAFETY

Senator Nancy Skinner, Chair

2017 - 2018 Regular

Bill No: SB 784 **Hearing Date:** April 18, 2017
Author: Galgiani
Version: February 17, 2017
Urgency: No **Fiscal:** Yes
Consultant: SC

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

HISTORY

Source: Los Angeles City Attorney's Office

Prior Legislation: SB 1255 (Canella) Ch. 683, Stats. 2014
SB 255 (Cannella) Ch. 466, Stats. 2013
AB 665 (Torres) Ch. 658, Stats. 2011
AB 182 (Ackerman) Ch. 231, Stats. 1999

Support: Association for Los Angeles Deputy Sheriffs; Association of Deputy District Attorneys; California Association of Code Enforcement Officers; California College and University Police Chiefs Association; California District Attorneys Association; California Narcotic Officers Association; California Police Chiefs Association; California State Sheriffs' Association; Los Angeles County Professional Peace Officers; Los Angeles Police Protective League; Riverside Sheriffs' Association; San Diego County District Attorney

Opposition: California Attorneys for Criminal Justice; California Newspaper Publishers Association (oppose unless amended); California Public Defenders Association; Motion Picture Association of America, Inc. (oppose unless amended)

PURPOSE

The purpose of this bill is to make it a misdemeanor for a person to intentionally distribute or disseminate any image of an identifiable person who may be in a state of full or partial undress, for the purpose of viewing the body of, or the undergarments worn by, that other person, without the other person's consent or knowledge.

Existing law makes it a misdemeanor for any person who looks through a hole or opening, into, or otherwise views, by means of any instrumentality, including, but not limited to, a periscope, telescope, binoculars, camera, motion picture camera, camcorder, or mobile phone, the interior of a bedroom, bathroom, changing room, fitting room, dressing room, or tanning booth, or the interior of any other area in which the occupant has a reasonable expectation of privacy, with the intent to invade the privacy of a person or persons inside. (Pen. Code § 647, subd. (j)(1).)

Existing law makes it a misdemeanor for any person to use a concealed device to secretly videotape or record by electronic means another identifiable person under or through his or her clothing, for the purpose of viewing that person's body or undergarments without consent and under circumstances in which that person has a reasonable expectation of privacy, if the perpetrator commits the act with a prurient intent. (Pen. Code § 647, subd. (j)(2).)

Existing law makes it a misdemeanor for any person who uses a concealed device to secretly videotape or record another identifiable person who is in a state of full or partial undress, for the purpose of viewing that person's body or undergarments without consent while that person is in a bedroom, bathroom, changing room, fitting room, dressing room, or tanning booth, or the interior of any other area in which that other person has a reasonable expectation of privacy, with the intent to invade the privacy of that individual. (Pen. Code § 647, subd. (j)(3).)

Existing law makes it a misdemeanor for any person who intentionally distributes the image of the intimate body part or parts of another identifiable person, or an image of the person depicted engaged in a sexual act, as specified, under circumstances in which the persons agree or understand that the image shall remain private, the person distributing the image knows or should know that distribution of the image will cause serious emotional distress, and the person depicted suffers that distress. (Pen. Code § 647, subd. (j)(4)(A).)

Existing law generally provides that a violation of disorderly conduct is punishable by up to six months imprisonment in county jail or up to a fine of \$1000, or both the fine and imprisonment. A second violation of subdivision (j) of Penal Code section 647 is punishable by up to one year in county jail, a fine not exceeding \$2000, or both the fine and imprisonment. (Pen. Code § 647, subd. (l).)

This bill states that it is a misdemeanor for a person who intentionally distributes or disseminates or who makes available to, or viewable by, any other person, including through publication, posting through electronic media, or by any other means, any image obtained using a concealed device to secretly videotape or record another identifiable person who is in a state of full or partial undress for the purpose of viewing that person's body or undergarments in a place where the person depicted has a reasonable expectation of privacy.

This bill provides that a person intentionally distributes an image when he or she personally distributes the image, or arranges, specifically requests, or intentionally causes another person to distribute that image.

This bill exempts the following:

- The distribution is made in the course of reporting an unlawful activity;
- The distribution is made in the compliance of other court order for use in a legal proceeding; or,
- The distribution is made in the course of a lawful public proceeding.

Existing law states that an act or omission punishable in different ways by different provisions of law may be punished under any provision that applies. However, in no case may the same act or omission be punished under more than one provision of law. (Pen. Code § 654.)

COMMENTS

1. Need for This Bill

According to the author:

Penal Code sections 647(j) (2) and 647(j) (3) make it a misdemeanor to take photographs or images of an individual when that person has a reasonable expectation of privacy in locations traditionally not open to public view. These important statutes provide the public with protection against invasions of their privacy. Violating these code sections is punishable by imprisonment in county jail not exceeding six months, or by a fine not exceeding one thousand dollars (\$1,000), or by both that fine and imprisonment.

Senate Bill 1255 (2014), is a related provision that prohibits the distribution of sexually explicit images (intimate body parts or images depicting the person engaged in one of several specified sexual acts) -- images that were taken voluntarily, but were intended between the parties to remain private.

While an important advance in the protection of privacy, SB 1255 did not amend Section 647 of the Penal Code (disorderly conduct) to prohibit the distribution of images taken in violation of Penal Code sections 647(j) (2) or 647(j) (3). Although Penal Code sections 647(j)(2) and 647(j)(3) prohibit the recording of partially or fully nude images, taken without consent when there is a reasonable expectation of privacy, there is no penalty for distributing these illegally captured images.

With a rapidly evolving and expanding social media landscape, state law should continue to evolve to protect the privacy of Californians. Current law prohibits the taking of images and photographs of an individual in a situation where they have a reasonable expectation of privacy but does not prohibit the distribution of that image.

The purpose of this proposed law is to prohibit the distribution of images involving an individual in a partial or full state of undress (whether or not sexual in nature), taken without the consent of the individual. Violation would be a misdemeanor and punishable by imprisonment in county jail not exceeding six months, or by a fine not exceeding one thousand dollars (\$1,000), or by both that fine and imprisonment.

2. Constitutional Prohibitions on Double Punishment

The United States Constitution prohibits a person from being punished multiple times for the same incident or course of conduct. (*Blockburger v. United States* (1932) 284 U.S. 299.) This prohibition is also codified in Penal Code section 654 which states that in no case may the same act or omission be punished under more than one provision of law. This statute prohibits multiple “punishment” for a single act or course of conduct, thus a person may be convicted of, although not punished for, more than one crime arising out of the same act or course of conduct. In determining the appropriate punishment, the trial court must stay execution of sentence on the

convictions for which multiple punishment is prohibited. (*People v. Ortega* (1998) 19 Cal.4th 686, 692.)

However, an exception to the general rule permitting multiple conviction prohibits multiple convictions based on necessarily included offenses. (*People v. Montoya* (2004) 33 Cal.4th 1031, 1034.) “[I]f a crime cannot be committed without also necessarily committing a lesser offense, the latter is a lesser included offense within the former.” (*People v. Correa* (2012) 54 Cal. 4th 331, 337, citing *People v. Lopez* (1998) 19 Cal.4th 282, 288.)

This bill creates a new crime that includes existing subdivision (j) of Penal Code section 647, and adds the element of distribution. Because all of the elements of Penal Code section 647(j) are included in the new crime created by this bill, it is a lesser included offense of the new crime and therefore a person who surreptitiously took the image or photo cannot be convicted of both.

3. Purpose of this Bill is to Criminalize “Body Shaming”

The purpose of this bill is to criminalize “body shaming” which is essentially the act of humiliating someone by making mocking or critical comments about their body shape or size.

The act of body shaming, which often occurs when someone makes critical comments about another person’s body or overall appearance, usually on social media, typically does not rise to the level of a criminal act. One particular incident, however, did result in criminal charges. The incident involved a model who took a photo of a naked woman in the gym locker room and posted it to her Snapchat account mocking the woman’s body.

The Los Angeles City Attorney, the sponsor of this bill, prosecuted the model for disorderly conduct, specifically by invading another person’s privacy, which is a misdemeanor. In a statement to the press, the City Attorney stated: “Body-shaming is humiliating, with often painful, long-term consequences,” he said. “It mocks and stigmatizes its victims, tearing down self-respect and perpetuating the harmful idea that our unique physical appearances should be compared to air-brushed notions of ‘perfect.’ What really matters is our character and humanity. While body-shaming, in itself, is not a crime, there are circumstances in which invading one’s privacy to accomplish it can be. And we shouldn’t tolerate that.” (Winton and Rocha, *Los Angeles Prosecutors Charge Former Playboy Playmate in Gym “Body-Shaming” Case* (Nov. 6, 2016) < <http://www.latimes.com/local/lanow/la-me-body-shaming-20161104-story.html>> [as of Apr. 11, 2017].)

4. Proposed Amendments

This bill as currently written applies to both the original distribution of the image by the person who surreptitiously took the video or recording, and to any secondary distribution of the image. Because the secondary distribution may punish sources such as newspapers that may report on such incidents as a matter of public concern and thus implicates First Amendment protections, the bill should be amended to remove criminal liability for secondary distribution.

Additionally, it creates a new misdemeanor for conduct that is covered under existing law. This new misdemeanor cannot be applied to the distribution of the image by the person who surreptitiously took the video or recording because of double punishment prohibitions in the U.S. Constitution, as discussed above. But applying the new misdemeanor to secondary distribution has additional concerns, as discussed above.

Thus, the Committee proposes to amend the bill to delete the new misdemeanor and instead authorize an additional fine of up to \$1000 in cases where a defendant has been convicted of invading another person's privacy by surreptitiously taking photographs or images of that person as specified, and further intentionally distributes that image. The amendment would also specify that a victim is entitled to restitution which shall include economic losses for costs incurred to delete, remove and eliminate all such distributed images and recordings, including but not limited to, retaining professional assistance to delete, remove and eliminate all such distributed images and recordings to the extent possible and practicable, in an amount determined by the court.

5. Arguments in Support

The Los Angeles City Attorney, the sponsor of this bill, writes in support:

SB 784 sets an appropriately high bar for prosecutors who must be able to prove that the image was taken in violation of current law and intentionally distributed. It does not reach uninvolved third parties and is consistent with First Amendment principles. A person who invades an individual's privacy by taking an illicit image should not be allowed to further harm the victim by distributing the image without added consequences. SB 784 will act as a powerful deterrent and mark an important evolution in our State's privacy laws.

The San Diego District Attorney's Office writes in support of this bill:

Current law provides that a person who uses a concealed camcorder, motion picture camera, or photographic camera of any type to secretly videotape, film, photograph, or record by electronic means, another, identifiable person who may be in the state of full or partial undress, for the purpose of viewing the body of, or the undergarments worn by, that other person, without the consent or knowledge of that other person, in the interior of the bedroom, bathroom, changing room, fitting room, dressing room, or tanning booth, or the interior or any area in which that other person has a reasonable expectation to privacy, with the intent to invade the privacy of that other person, is guilty of disorderly conduct, a misdemeanor. This bill would additionally make it a crime to intentionally distribute or disseminate, or to make available or viewable, any image obtained pursuant to the provisions described above, including through publication, posting through electronic media, or by any other means.

6. Arguments in Opposition

The California Public Defenders Association, in opposition, writes:

SB 784 proposes to amend section 647, subdivision (j) to add an additional subparagraph (5), which duplicates the crime set forth in the preceding paragraph (4) but limits the offense to circumstances where the images are obtained by peeping. In other words, the conduct proposed to be made specifically punishable by the proposed amendment to the statute is already encompassed within an existing broader provision of the statute.

The California Newspaper Publishers Association is opposed to the bill unless amended stating:

Existing law makes it unlawful for a person to film or record another person in a private place, like a locker room or bathroom, with the intent to invade the privacy of another. (Penal Code 647(j)(3).) It also makes unlawful voyeuristic “up-skirt” photography, taken with the intent to invade a person’s privacy and or appeal to a prurient interest. (Penal Code 647(j)(2).

SB 784 expands the law to make it a new crime for *any* person to distribute an image that was taken in violation of section (2) or (3). This is troubling on several fronts. First, while the underlying crime of capturing this type of image contains a specific intent requirement, this intent standard is not included in the new crime of distribution. Second, the expansive criminalization of secondary distribution—the publishing of an image by any person, not just the person who illegally obtained the image— is inconsistent with the seminal U.S. Supreme Court case on the issue, *Bartnicki v. Vopper*, 532 U.S. 514 (2001), and would bar coverage of newsworthy stories.

We understand that your office is interested in eliminating the secondary distribution element of SB 784, and narrowing the bill to criminalize only distribution of the image by the person who violated Penal Code Section 647(j)(2) or (3) to unlawfully obtain the image.

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