

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 1043 Cyberharassment
SPONSOR(S): Criminal Justice Subcommittee, Stevenson
TIED BILLS: **IDEN./SIM. BILLS:** SB 1136

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Criminal Justice Subcommittee	12 Y, 0 N, As CS	Bruno	Hall
2) Justice Appropriations Subcommittee	11 Y, 0 N	Jones	Gusky
3) Judiciary Committee			

SUMMARY ANALYSIS

Sexual cyberharassment is nonconsensual sharing of sexually explicit images, often called “revenge porn.” Certain websites exist solely to shame victims by publishing revenge porn, often including a victim’s name and contact information so that a person searching for the victim’s name online – such as a current or potential employer – sees the image in the search results. Many victims have suffered employment repercussions due to revenge porn. When the posted revenge porn includes contact information, a victim may receive insulting, harassing, or even threatening messages, including threats of rape or physical violence.

In 2015, the Florida Legislature addressed revenge porn by criminalizing sexual cyberharassment. A person commits sexual cyberharassment by publishing a sexually explicit image:

- Depicting nudity or sexual conduct;
- Containing or conveying the personal identification information (PII) of the depicted person;
 - PII means a name or number that may be used, alone or in conjunction with any other information, to identify a specific person;
- To an Internet website;
- Without the depicted person’s consent;
- For no legitimate purpose; and
- With the intent to cause the depicted person substantial emotional distress.

Two limitations hinder criminal prosecution of sexual cyberharassment. The first is a requirement that the image be published on a website, thus excluding image distribution by other common electronic means such as text message, email, or social media messaging. Second, an identifiable photograph of a person may not qualify as PII, which is defined as a “name or number.”

CS/HB 1043 extends the prohibition on sexual cyberharassment to include disseminating a sexually explicit image of a person through electronic means. The bill also ensures that an identifiable photograph of a person qualifies as PII for incurring criminal or civil liability under the statute by defining PII as any information that identifies an individual, including a unique physical representation. The bill also requires that, to qualify as sexual cyberharassment, the publication or dissemination of a sexually explicit image be contrary to the depicted person’s reasonable expectation that the image would remain private. This added requirement is consistent with court rulings on the constitutionality of similar laws in other states. Evidence that the depicted person sent a sexually explicit image to another person does not, on its own, remove his or her reasonable expectation of privacy in the image.

To the extent that persons are arrested for, charged with, and convicted of the criminal offenses modified in the bill, this bill will have an indeterminate fiscal impact to state and local governments as these cases are processed through the criminal justice system. See Fiscal Impact.

The bill provides an effective date of October 1, 2019.

This document does not reflect the intent or official position of the bill sponsor or House of Representatives.

STORAGE NAME: h1043c.JUA

DATE: 4/2/2019

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

Sexual cyberharassment is nonconsensual sharing of sexually explicit images, often called “revenge porn.” Revenge porn gained international attention in 2014 when a hacker stole and published a trove of nude celebrity photographs.¹ According to a 2016 study, one in 25 Americans has been a victim of or threatened with revenge porn.² Perpetrators largely target women, who comprise up to 90 percent of revenge porn victims.³ Certain misogynist websites exist solely to shame women by publishing revenge porn, often including a victim’s name and contact information so that a person searching for the victim’s name online – such as a current or potential employer – sees the image in search results. Many victims have suffered employment repercussions due to revenge porn.⁴ When the posted revenge porn includes contact information, a victim may receive insulting, harassing, or even threatening messages, including threats of rape or physical violence.⁵

In 2015, the Florida Legislature addressed revenge porn by criminalizing sexual cyberharassment.⁶ A person commits sexual cyberharassment by publishing a sexually explicit image:

- Depicting nudity⁷ or sexual conduct;⁸
- Containing or conveying the personal identification information (PII) of the depicted person;
- To an Internet website;
- Without the depicted person’s consent;
- For no legitimate purpose; and
- With the intent of causing the depicted person substantial emotional distress.⁹

The sexual cyberharassment law borrows the definition of PII from another chapter¹⁰ addressing PII-specific crimes, defining PII as a name or number that may be used, alone or in conjunction with any other information, to identify a specific person. The PII statute lists several examples of PII, including:

- A name;
- An address;
- Contact information, such as a telephone number or email address;
- A social security number;
- A date of birth;
- A mother's maiden name;
- An official state- or federally-issued driver license or identification number;
- Another identification number, such as an alien registration number, government passport number, employer or taxpayer identification number, Medicaid or food assistance account number, bank account number, or credit or debit card number;
- Unique biometric data, such as fingerprint, voice print, retina or iris image, or other unique physical representation;

¹ Abby Ohlheiser, *The shockingly simple way the nude photos of ‘Celebgate’ were stolen*, The Washington Post (May 24, 2016), https://www.washingtonpost.com/news/the-intersect/wp/2016/03/16/the-shockingly-simple-way-the-nude-photos-of-celebgate-were-stolen/?utm_term=.20f7d3022f18 (last visited Mar. 28, 2019).

² Data and Society Research Institute, *Nonconsensual Image Sharing: One in 25 Americans has been a Victim of “Revenge Porn,”* (Dec. 13, 2016), https://datasociety.net/pubs/oh/Nonconsensual_Image_Sharing_2016.pdf (last visited Mar. 28, 2019).

³ Danielle Keats Citron and Mary Anne Franks, *Criminalizing Revenge Porn*, 49 Wake Forest L. Rev. 345 (2014).

⁴ *Id.*

⁵ *Id.*

⁶ Ch. 2015-024, Laws of Fla.

⁷ As defined in s. 847.001, F.S.

⁸ *Id.*

⁹ S. 784.049(2)(a)–(d), F.S.

¹⁰ S. 817.568, F.S., regarding criminal use of personal identification information.

- Unique electronic identification number, address, or routing code;
- Medical records;
- Telecommunication identifying information or access device; or
- Other number or information that can be used to access a person's financial resources.

A first sexual cyberharassment offense is a first degree misdemeanor;¹¹ a second or subsequent offense is a third degree felony.¹² The statute lessens certain statutory – but not constitutional – warrant requirements related to the investigation of sexual cyberharassment. In general, an officer may only arrest a person for a misdemeanor offense without a warrant when the crime is committed in the officer's presence;¹³ however, Florida law authorizes an officer to arrest a person on probable cause of sexual cyberharassment without a warrant, regardless of whether the conduct occurred in an officer's presence.¹⁴

Law enforcement may obtain a warrant to search for the means or instrumentality used to commit a misdemeanor,¹⁵ but a warrant for simply relevant evidence of a crime other than an instrumentality or to search a private dwelling generally requires probable cause of a felony.¹⁶ The sexual cyberharassment law, however, authorizes investigative search warrants for this misdemeanor-level offense, including of a private dwelling.¹⁷

A victim may also civilly sue an offender for all appropriate relief to prevent or remedy a sexual cyberharassment violation, including:

- Injunctive relief;
- Monetary damages up to \$5,000 or actual damages, whichever is greater; and
- Reasonable attorney fees and costs.¹⁸

Two limitations hinder criminal prosecution and civil remedy for sexual cyberharassment. The first is a requirement that the image be published on a website,¹⁹ excluding image distribution by other common electronic means such as text message, email, or social media messaging. Second, an identifiable photograph of a person arguably does not qualify as PII, which is defined as a “name or number.” Although the PII statute lists a “unique physical representation” as an example of PII,²⁰ the definition nevertheless requires PII to be a name or number.

Constitutional Challenges in Other States

Forty-three states and the District of Columbia have enacted laws banning revenge porn. Courts struck down some early iterations of these laws on First Amendment grounds, holding that the laws impermissibly restricted free speech based on content or viewpoint. However, narrowly tailored laws are more likely to withstand constitutional challenges.

The First Amendment to the United States Constitution provides that “Congress shall make no law [...] abridging the freedom of speech.”²¹ A law that restricts speech based on content must survive strict scrutiny review, meaning:

- The law must be narrowly tailored to promote a compelling governmental interest; and
- No other less restrictive option will accomplish that interest.²²

¹¹ A first degree misdemeanor is punishable by up to one year in county jail and a \$1,000 fine. Ss. 775.082 and 775.083, F.S.

¹² A third degree felony is punishable by up to five years in prison and a \$5,000 fine. Ss. 775.082 and 775.083, F.S.

¹³ S. 901.15(1), F.S.

¹⁴ S. 784.049(4), F.S.

¹⁵ S. 933.02, F.S.

¹⁶ Ss. 933.02 and 933.18, F.S.

¹⁷ S. 784.049(4)(b), F.S.

¹⁸ S. 784.049(5), F.S.

¹⁹ S. 784.049(2)(c), F.S.

²⁰ S. 817.568(1)(f)2., F.S.

²¹ U.S. Const. Amend. I.

²² *United States v. Playboy Ent'mt Grp., Inc.*, 529 U.S. 803, 812 (2000).

Viewpoint-based discrimination is a particularly disfavored form of content-based restriction in which content is regulated based on the ideology or opinion expressed.²³

Because revenge porn prohibitions regulate speech based on content, courts have applied strict scrutiny review. However, First Amendment advocates agree that the laws can pass constitutional muster if drafted correctly. The American Civil Liberties Union (ACLU) has identified three essential elements to the constitutionality of a revenge porn law:

- Specific intent, such as intent to cause the depicted person substantial emotional distress.
- Actual knowledge that the victim did not consent to the distribution.
- The victim's reasonable expectation that the image would remain private.²⁴

In 2015, the Arizona Attorney General settled a lawsuit with the ACLU by agreeing not to prosecute cases under its then-existing revenge porn statute.²⁵ In response, the Arizona Legislature amended its revenge porn law in 2016 to more narrowly define the crime by requiring:

- A specific intent to harm, harass, intimidate, threaten, or coerce a victim; and
- That the depicted person have a reasonable expectation of privacy in the image.²⁶

In 2018, the Texas Court of Appeals held that the state's revenge porn statute was an invalid content-based restriction on free speech.²⁷ The Texas court found a compelling state interest in protecting an individual from substantial invasion of his or her privacy; however, the court determined that the state did not employ the least restrictive means of achieving that interest because the law did not require the person disclosing the image to know that the victim had a privacy interest in the image.²⁸

Last year, the Vermont Supreme Court upheld a revenge porn law containing all three elements identified by the ACLU.²⁹ After finding that preventing nonconsensual disclosure of nude or sexual images obtained in the context of a confidential relationship is a compelling governmental interest, the court considered each element in holding that the statute was narrowly tailored so as to pass constitutional muster.³⁰

Of the three elements identified by the ACLU and weighed by the Vermont Supreme Court in upholding a revenge porn law, Florida's sexual cyberharassment law only requires specific intent that the perpetrator intend to cause substantial emotional distress to the depicted person.³¹

Effect of Proposed Changes

CS/HB 1043 extends the prohibition on sexual cyberharassment to include disseminating a sexually explicit image of a person through electronic means. The bill criminalizes and provides a civil remedy for sending sexually explicit images by text, email, or other electronic messaging services without the victim's permission.

The bill also requires that, to qualify as sexual cyberharassment, the publication or dissemination of a sexually explicit image must be contrary to the depicted person's reasonable expectation that the

²³ *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 829 (1995).

²⁴ American Civil Liberties Union of Maryland, *Testimony for the House Judiciary Committee: SB 769 – Criminal Law – Sextortion and Revenge Porn* (Mar. 27, 2018), https://www.aclu-md.org/sites/default/files/field_documents/sb_769-sexortion_etc-criminal-house.pdf (last visited Mar. 28, 2019).

²⁵ Miriam Wasser, *AZ Revenge Porn Law Not To Be Enforced, Says Federal Judge*, Phoenix New Times (Jul. 13, 2015), <https://www.phoenixnewtimes.com/news/az-revenge-porn-law-not-to-be-enforced-says-federal-judge-7486054> (last visited Mar. 28, 2019).

²⁶ Ch. 6, § 1, Laws of Arizona (2016).

²⁷ *Ex parte Jones*, 2018 WL 2228888 (Texas Ct. App. 2018).

²⁸ *Id.*

²⁹ *State v. VanBuren*, 2018 WL 4177776 (Vt. 2018).

³⁰ *Id.*

³¹ S. 784.049, F.S.

image would remain private. Evidence that the depicted person sent a sexually explicit image to another person does not, on its own, remove his or her reasonable expectation of privacy in the image.

The bill makes legislative findings that:

- Protecting privacy interests of people depicted in sexually explicit images is a compelling governmental interest.
- A person may retain a reasonable expectation that an image will remain private despite sharing the image with another person, such as an intimate partner.
- The electronic dissemination of sexually explicit images:
 - Is a common practice;
 - Allows images to be easily reproduced and shared; and
 - Causes victims psychological harm.

The bill also defines PII as any information that identifies an individual, including but not limited to:

- A name;
- Address;
- Email address;
- Telephone number;
- Social security number;
- Date of birth; or
- Any unique physical representation.

The bill seeks to ensure that an identifiable photograph of a person qualifies as PII for incurring criminal or civil liability under the statute.

The bill provides an effective date of October 1, 2019.

B. SECTION DIRECTORY:

Section 1: Amends s. 784.049, F.S., relating to sexual cyberharassment.

Section 2: Provides an effective date of October 1, 2019.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

The bill has an indeterminate, but likely insignificant, fiscal impact on state government by expanding the scope of behavior punishable as a felony.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

The bill has an indeterminate fiscal impact on local governments by expanding the scope of behavior punishable as a misdemeanor.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

To the extent that persons are arrested for, charged with, and convicted of the criminal offenses modified in the bill, this bill will have an indeterminate fiscal impact to state and local governments as these cases are processed through the criminal justice system. The bill has not yet been reviewed by the Criminal Justice Impact Conference. The Department of Corrections, in the last three years, has recorded two probation admissions and no prison admissions related to the offense of sexual cyberharassment.³² While the bill may result in increased violations of the felony and misdemeanor offenses modified in the bill, the number of future violations is unknown.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable. The bill appears to be exempt from the requirements of Article VII, Section 18, of the Florida Constitution because it is a criminal law.

2. Other:

The bill both expands and limits the scope of conduct qualifying as sexual cyberharassment and giving rise to criminal and civil liability. The specific expansions prohibiting electronic dissemination and including identifiable photographs in the definition of PII do not necessarily raise First Amendment concerns. The limitation requiring the victim to have a reasonable expectation that the image would remain private helps conform Florida's sexual cyberharassment law to recent court decisions in other states and better insulates the law from constitutional challenge.

B. RULE-MAKING AUTHORITY:

Not applicable.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On March 26, 2019, the Criminal Justice Subcommittee adopted one amendment and reported the bill favorably as a committee substitute. The amendment:

- Added a requirement that the publication or dissemination of a sexually explicit image be contrary to the depicted person's reasonable expectation that it would remain private.
- Specified that evidence that the depicted person sent a sexually explicit image to another person does not, on its own, remove his or her reasonable expectation of privacy in the image.
- Amended legislative findings to include a compelling state interest in protecting the privacy interests of a person depicted in a sexually explicit image.

This analysis is drafted to the committee substitute as passed by the Criminal Justice Subcommittee.

³² Department of Corrections, 2019 Agency Legislative Bill Analysis – SB 1136 (HB 1043) – Cyberharassment (Mar. 11, 2019).
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