

Tab 1	SB 752 by Gainer (CO-INTRODUCERS) Pizzo; (Compare to H 00387) Probationary or Supervision Services for Misdemeanor Offenders					
648722	D	S	RCS	CJ, Gainer	Delete everything after	01/25 12:10 PM
Tab 2	SB 796 by Bradley; (Similar to CS/H 00287) Tampering with or Fabricating Physical Evidence					
322426	D	S	RCS	CJ, Bradley	Delete everything after	01/25 12:10 PM
Tab 3	SB 868 by Stewart; (Identical to H 00525) Sexual Battery on a Mentally Incapacitated Person					
Tab 4	SB 1012 by Burgess (CO-INTRODUCERS) Book, Perry; (Similar to H 00697) Victims of Crimes					
Tab 5	SB 1046 by Hooper; (Identical to H 00773) Public Records/Law Enforcement Geolocation Information					
Tab 6	SB 1200 by Bean; (Similar to H 00653) Wrongful Convictions					
Tab 7	SB 1204 by Broxson; (Identical to H 00873) Public Records/Information or Records/Executions					
Tab 8	SB 1534 by Boyd (CO-INTRODUCERS) Diaz, Garcia; (Identical to H 01511) Retail Theft					
241712	A	S	RCS	CJ, Boyd	Delete L.59 - 94:	01/25 12:10 PM
Tab 9	SB 1736 by Hooper; (Similar to H 00453) Records of Physical Examinations of Officers					
555638	A	S	RCS	CJ, Hooper	Before L.13:	01/25 12:10 PM
Tab 10	SB 1798 by Book; (Compare to H 01453) Sexually Explicit Material					
414724	D	S	RCS	CJ, Book	Delete everything after	01/25 12:10 PM
874658	AA	S	RCS	CJ, Book	Delete L.254 - 618:	01/25 12:10 PM

The Florida Senate
COMMITTEE MEETING EXPANDED AGENDA

CRIMINAL JUSTICE
Senator Pizzo, Chair
Senator Brandes, Vice Chair

MEETING DATE: Tuesday, January 25, 2022
TIME: 10:00 a.m.—12:00 noon
PLACE: *Toni Jennings Committee Room*, 110 Senate Building

MEMBERS: Senator Pizzo, Chair; Senator Brandes, Vice Chair; Senators Baxley, Bean, Burgess, Gainer, Hooper, Perry, Powell, and Taddeo

TAB	BILL NO. and INTRODUCER	BILL DESCRIPTION and SENATE COMMITTEE ACTIONS	COMMITTEE ACTION
1	SB 752 Gainer (Compare H 387)	Probationary or Supervision Services for Misdemeanor Offenders; Deleting a prohibition on private entities providing probationary or supervision services to certain misdemeanor offenders, etc. CJ 01/11/2022 Temporarily Postponed CJ 01/25/2022 Fav/CS ACJ AP	Fav/CS Yeas 9 Nays 0
2	SB 796 Bradley (Similar CS/H 287)	Tampering with or Fabricating Physical Evidence; Providing enhanced criminal penalties for tampering with or fabricating physical evidence in certain criminal proceedings and investigations, etc. CJ 01/25/2022 Fav/CS JU RC	Fav/CS Yeas 9 Nays 0
3	SB 868 Stewart (Identical H 525)	Sexual Battery on a Mentally Incapacitated Person; Revising the definition of the term "mentally incapacitated"; revising provisions concerning sexual battery upon a person who is mentally incapacitated, etc. JU 01/10/2022 Favorable CJ 01/25/2022 Favorable RC	Favorable Yeas 9 Nays 0
4	SB 1012 Burgess (Similar H 697)	Victims of Crimes; Requiring law enforcement personnel to ensure that victims are given information about their right to employ private counsel; encouraging The Florida Bar to develop a registry of attorneys willing to serve as crime victim advocates on a pro bono basis, etc. CJ 01/25/2022 Favorable JU RC	Favorable Yeas 9 Nays 0

COMMITTEE MEETING EXPANDED AGENDA

Criminal Justice

Tuesday, January 25, 2022, 10:00 a.m.—12:00 noon

TAB	BILL NO. and INTRODUCER	BILL DESCRIPTION and SENATE COMMITTEE ACTIONS	COMMITTEE ACTION
5	SB 1046 Hooper (Identical H 773)	Public Records/Law Enforcement Geolocation Information; Defining the term "law enforcement geolocation information"; providing an exemption from public records requirements for law enforcement geolocation information held by a law enforcement agency; providing for future legislative review and repeal of the exemption; providing a statement of public necessity, etc. CJ 01/25/2022 Favorable GO RC	Favorable Yeas 9 Nays 0
6	SB 1200 Bean (Similar H 653)	Wrongful Convictions; Authorizing certain prosecuting attorneys to file a motion to vacate or set aside a judgment if he or she has evidence or information that a convicted person is innocent; requiring the court to appoint counsel for such convicted person if he or she does not otherwise have legal counsel and if an evidentiary hearing is required; providing hearing and court procedures; authorizing the appeal of a denial of the prosecuting attorney's motion to vacate or set aside a judgment by any party, etc. CJ 01/25/2022 Favorable JU RC	Favorable Yeas 9 Nays 0
7	SB 1204 Broxson (Identical H 873)	Public Records/Information or Records/Executions; Providing an exemption from public records requirements for information or records that identify or could reasonably lead to the identification of any person or entity that participates in an execution; providing for retroactive application; providing for future legislative review and repeal of the exemption; providing a statement of public necessity, etc. CJ 01/25/2022 Favorable JU RC	Favorable Yeas 9 Nays 0
8	SB 1534 Boyd (Identical H 1511)	Retail Theft; Prohibiting certain retail theft at multiple locations within a specified timeframe; providing exceptions; providing criminal penalties, etc. CJ 01/25/2022 Fav/CS ACJ AP	Fav/CS Yeas 9 Nays 0

COMMITTEE MEETING EXPANDED AGENDA

Criminal Justice

Tuesday, January 25, 2022, 10:00 a.m.—12:00 noon

TAB	BILL NO. and INTRODUCER	BILL DESCRIPTION and SENATE COMMITTEE ACTIONS	COMMITTEE ACTION
9	SB 1736 Hooper (Similar H 453)	Records of Physical Examinations of Officers; Requiring an employing agency to maintain records of employee physical examinations for a specified period of time after employee separation from the agency; creating a presumption that applies to employees whose records are not maintained for that period of time, etc. CJ 01/25/2022 Fav/CS GO RC	Fav/CS Yeas 9 Nays 0
10	SB 1798 Book (Compare H 1453)	Sexually Explicit Material; Increasing the monetary damages that an aggrieved person may receive as a result of violations relating to sexual cyberharassment; prohibiting persons from willfully and maliciously creating and disseminating or selling any sexually explicit image of a depicted individual without that individual's consent; authorizing a law enforcement officer to arrest without a warrant any person he or she has probable cause to believe has violated specified provisions; prohibiting a person from knowingly and unlawfully obtaining a specified sexually explicit image of a person with a certain intent; revising existing unlawful conduct relating to possessing with the intent to promote and knowingly possessing, controlling, or intentionally viewing presentations that include child pornography, rather than sexual conduct by a child, etc. CJ 01/25/2022 Fav/CS CF AP	Fav/CS Yeas 9 Nays 0

Other Related Meeting Documents

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Committee on Criminal Justice

BILL: CS/SB 752

INTRODUCER: Criminal Justice Committee and Senators Gainer and Pizzo

SUBJECT: Probationary or Supervision Services for Misdemeanor Offenders

DATE: January 25, 2022

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Siples	Jones	CJ	Fav/CS
2.			ACJ	
3.			AP	

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/SB 752 removes a statutory prohibition on a private entity providing probationary or supervision services to misdemeanor offenders who are sentenced by a circuit court. Under current law, a private or a public entity may only provide probation services to offenders sentenced by a county court.

Currently, the Department of Corrections (DOC) must supervise felony and misdemeanor offenders who are sentenced to or placed on probation or other supervision by a circuit court. The bill authorizes the DOC to supervise misdemeanor offenders when such supervision is ordered by the circuit court, but retains the requirement that DOC supervise felony offenders.

The bill transfers the authority to approve a contract with a private entity to provide supervision services for misdemeanor offenders from the county court judge or administrative judge to the chief judge of the circuit.

The bill will have an indeterminate fiscal impact on the DOC. See Section V. Fiscal Impact Statement.

The bill is effective July 1, 2022.

II. Present Situation:

Court Jurisdiction

Florida has a two-tiered trial court system that consists of circuit courts and county courts. The state Constitution requires a circuit court to be established in each judicial circuit established by the Legislature, of which there are twenty.¹

Circuit courts have exclusive original jurisdiction over:

- All actions at law not cognizable by the county courts;
- Proceedings related to settling estates of decedents and minors, granting testamentary letters, guardianship, involuntary hospitalization, the determination of incompetency, and other jurisdiction usually pertaining to probate courts;
- All cases in equity including cases related to juveniles, except traffic offenses as provided in chs. 316 and 985, F.S.;
- All felonies and all misdemeanors arising out of the same circumstances as a felony which is also charged;
- All cases involving the legality of any tax assessment or toll or denial of refund, except as provided in s. 72.011, F.S.;
- Ejectment actions; and
- All actions involving the title and boundaries of real property.²

The state Constitution also establishes a county court in each county.³ County courts have original jurisdiction over:

- Misdemeanor cases not cognizable by the circuit courts;
- Violations of municipal and county ordinances; and
- Actions at law, except those within the exclusive jurisdiction of the circuit courts, in which the matter in controversy does not exceed \$30,000, exclusive of interest, costs, and attorney fees.⁴

Generally, felony offenses are adjudicated by the circuit court and misdemeanor offenses are adjudicated by the county court. However, circuit courts routinely adjudicate misdemeanor charges when:

- A misdemeanor charge arises out of the same circumstances as a felony; or
- A felony charge is reduced or dismissed in circuit court and the court retains jurisdiction over the remaining misdemeanor charge.

¹ Art. V, ss. 1 and 5, FLA. CONST. A list of judicial circuits can be found at <https://www.flcourts.org/Florida-Courts/Trial-Courts-Circuit> (last visited January 7, 2022).

² Section 26.012(2), F.S.

³ Art. V, s. 6, FLA. CONST.

⁴ Section 34.01(1), F.S. The jurisdictional limit for civil actions was \$15,000 prior to January 1, 2020, at which time the jurisdictional limit was raised to \$30,000. The jurisdictional limit is scheduled to rise to \$50,000 on January 1, 2023. The law provides a process by which the jurisdictional limit is to be reviewed and adjusted every 10 years beginning July 1, 2030; however it may not be lower than \$50,000.

Probation and Other Supervision

Probation is a form of community supervision requiring specified contacts with probation officers and compliance with certain terms and conditions.⁵ The court determines the terms and conditions of probation.⁶ Section 948.03, F.S., provides standard conditions of probation; however, a court may sentence an offender to special terms and conditions at the time of sentencing, such as substance abuse treatment.

County Court

A defendant who is placed on probation after being found guilty of a misdemeanor may not be sentenced to a term of supervision exceeding six months, unless otherwise ordered by the court.⁷ Any person sentenced to misdemeanor probation by the county court must pay at least \$40 per month, as determined by the court, to the court approved public or private entity providing misdemeanor supervision.⁸

A private entity or public entity, including licensed substance abuse education and intervention programs, may provide probation services to offenders sentenced by a county court, when such services are provided under the supervision of the board of county commissioners or the court.⁹ For example, the Salvation Army provides supervision services including drug testing, job assistance, community service placement, and substance abuse assistance and rehabilitation to misdemeanor probationers in multiple Florida counties.¹⁰ Professional Probation Services and its affiliated company, Judicial Correction Services, provide services in a number of Florida counties.¹¹

Any private entity providing supervision services for misdemeanor probationers must contract with the county in which the services will be provided.¹² In a county with a population of less than 70,000, the county court judge, or in a county with more than one county court judge, the administrative judge of the county court must approve the contract. The terms of the contract must include, but are not limited to:

- The extent of the services to be rendered by the entity providing supervision and rehabilitation.
- Staff qualifications and criminal record checks of staff.
- Staffing levels.
- The number of face-to-face contacts with probationers.
- Procedures for handling the collection of probationer fees and restitution.

⁵ Section 948.01(8), F.S.

⁶ Section 948.03, F.S.

⁷ Section 948.15(1), F.S.

⁸ Section 948.09(1)(b), F.S.

⁹ Section 948.15(2), F.S.

¹⁰ Such misdemeanor probation services are provided in Citrus, Dixie, Duval, Gilchrist, Highlands, and Marion counties. The Salvation Army, *Correctional Services*, available at <https://salvationarmyflorida.org/correctional-services/> (last visited January 7, 2022).

¹¹ See Professional Probation Services, *Our Companies*, available at <https://ppsfamily.com/our-companies/> (last visited January 7, 2022).

¹² Section 948.15(3), F.S.

- Procedures for handling indigent probationers that ensure placement irrespective of ability to pay.
- Circumstances under which revocation of a probationer's supervision may be recommended.
- Reporting and record keeping requirements.
- Default and contract termination procedures.
- Procedures that aid probationers with job assistance.
- Procedures for accessing criminal history records of probationers.¹³

On a quarterly basis, the entity must report to the chief judge a summary of the number of probationers supervised by the private entity, payment of the required contribution under supervision or rehabilitation, and the number of probationers for whom supervision will be terminated. The entity must permit its records to be inspected upon the request of the county, the court, the Auditor General, the Office of Program Policy Analysis and Government Accountability, or any agent thereof.¹⁴

A private entity that charges a fee for providing supervision services to probationers must register with the board of county commissioners in the county in which the entity offers services. The entity must provide specified information for each program it operates, including:

- The length of time the program has been operating in the county;
- A list of the staff and a summary of their qualifications;
- A summary of the types of services that are offered under the program; and
- The fees the entity charges for court-ordered services and any procedures for indigent probationers.¹⁵

A private entity, including a licensed substance abuse education and intervention program, providing misdemeanor supervision services must comply with all other applicable provisions of law.¹⁶

Circuit Court

If the circuit court places a defendant on probation for a felony, the DOC must supervise the defendant.¹⁷ A defendant who is placed on probation for a misdemeanor may not be placed under the DOC's supervision unless the circuit court was the court of original jurisdiction.¹⁸ The DOC currently supervises more than 164,000 offenders on probation or in community control throughout Florida.¹⁹

Any person placed on probation under ch. 948, F.S., must pay the DOC supervision fees equal to the total month or portion of a month of supervision times the court-ordered amount, but such

¹³ *Id.*

¹⁴ *Id.*

¹⁵ Section 948.15(4), F.S.

¹⁶ Section 948.15(5), F.S.

¹⁷ Section 948.01(1)(a), F.S.

¹⁸ Section 948.01(2), F.S.

¹⁹ Florida Department of Corrections, *Probation Services*, available at <http://www.dc.state.fl.us/cc/index.html> (last visited January 7, 2022).

amount cannot exceed the actual per diem cost of supervision.²⁰ The DOC must consider an offender's ability to pay in establishing a written pay plan. Any funds collected from felony probationers may be used by the DOC to offset the costs associated with community supervision programs.²¹

Subsections 948.01(1) and (5), F.S., prohibit a private entity from providing probationary or supervision services to felony or misdemeanor offenders sentenced to probation or other supervision by the circuit court. As such, a private entity is authorized to provide supervision services to a misdemeanor offender sentenced by the county court, but cannot provide such services to a misdemeanor offender sentenced by the circuit court.

III. Effect of Proposed Changes:

The bill repeals the statutory prohibition on a private entity providing probationary or supervision services to misdemeanor offenders who are sentenced by a circuit court. The bill authorizes a private entity to provide probationary or supervision services to any misdemeanor offender who is placed on probation, regardless of whether such sentence is imposed by a county or circuit court. The bill authorizes the DOC to supervise misdemeanor offenders when such supervision is ordered by the circuit court, but retains the requirement that the DOC supervise felony offenders.

The bill transfers the authority to approve a contract with a private entity to provide supervision services for misdemeanor offenders from the county court judge or administrative judge to the chief judge of the circuit.

The bill is effective July 1, 2022.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

The bill may have an indeterminate impact on county governments that contract with private entities to provide misdemeanor probationary services. However, these provisions relate to the defense, prosecution, or punishment of criminal offenses, and criminal laws are exempt from the requirements of Art. VII, s. 18(d) of the Florida Constitution, relating to unfunded mandates.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

²⁰ Section 948.09(1)(a)1., F.S.

²¹ *Id.* Additionally, a felony probationer must pay a \$2-per-month surcharge to be used by the DOC to pay for correctional probation officers' training and equipment, including radios, and firearms training, firearms, and similar equipment. Section 948.09(1)(a)2., F.S.

D. State Tax or Fee Increases:

None.

E. Other Constitutional Issues:

None identified.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Private entities who contract to provide probationary services to misdemeanor offenders may experience an increase in workload.

C. Government Sector Impact:

The bill may have an indeterminate fiscal impact on those counties that contract with private entities to provide probation and supervision services of misdemeanor offenders, due to a possible increase in probationers.

The bill will have an indeterminate fiscal impact on the DOC, as some probationers may be diverted away from the DOC's supervision.²²

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends sections 948.01 and 948.15 of the Florida Statutes.

²² Department of Corrections, *2022 Agency Legislative Analysis of SB 752*, pg. 3, (Dec. 10, 2021) (on file with the Senate Committee on Criminal Justice).

IX. Additional Information:

- A. **Committee Substitute – Statement of Substantial Changes:**
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS by Criminal Justice on January 25, 2022:

The committee substitute:

- Authorizes the DOC to supervise misdemeanor offenders when ordered to do so by the circuit court;
- Requires the chief judge of the circuit to approve a contract with a private entity to provide supervision services for misdemeanor offenders, rather than the county court judge or administrative judge; and
- Makes conforming changes.

- B. **Amendments:**

None.



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LEGISLATIVE ACTION

Senate	.	House
Comm: RCS	.	
01/25/2022	.	
	.	
	.	
	.	

The Committee on Criminal Justice (Gainer) recommended the following:

Senate Amendment (with title amendment)

Delete everything after the enacting clause
and insert:

Section 1. Paragraph (a) of subsection (1) and subsection
(5) of section 948.01, Florida Statutes, is amended to read:

948.01 When court may place defendant on probation or into
community control.—

(1) Any state court having original jurisdiction of
criminal actions may at a time to be determined by the court,



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11 with or without an adjudication of the guilt of the defendant,
12 hear and determine the question of the probation of a defendant
13 in a criminal case, except for an offense punishable by death,
14 who has been found guilty by the verdict of a jury, has entered
15 a plea of guilty or a plea of nolo contendere, or has been found
16 guilty by the court trying the case without a jury.

17 (a) If the court places the defendant on probation or into
18 community control for a felony, the department shall provide
19 immediate supervision by an officer employed in compliance with
20 the minimum qualifications for officers as provided in s.

21 943.13. The department may provide supervision to misdemeanor
22 offenders sentenced or placed on probation by a circuit court,
23 when so ordered by the sentencing court. A private entity may
24 not provide probationary or supervision services to felony ~~or~~
25 ~~misdemeanor~~ offenders sentenced or placed on probation or other
26 supervision ~~by the circuit court.~~

27 (5) The imposition of sentence may not be suspended and the
28 defendant thereupon placed on probation or into community
29 control unless the defendant is placed under the custody of the
30 department or another public or private entity. A private entity
31 may not provide probationary or supervision services to felony
32 ~~or misdemeanor~~ offenders sentenced or placed on probation or
33 other supervision ~~by the circuit court.~~

34 Section 2. Subsections (2) and (3) of section 948.15,
35 Florida Statutes, are amended to read:

36 948.15 Misdemeanor probation services.—

37 (2) A private entity or public entity, including a licensed
38 substance abuse education and intervention program, under the
39 supervision of the board of county commissioners or the court



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40 may provide probation services and licensed substance abuse
41 education and treatment intervention programs for misdemeanor
42 offenders sentenced or placed on probation ~~by the county court.~~

43 (3) Any private entity, including a licensed substance
44 abuse education and intervention program, providing services for
45 the supervision of misdemeanor probationers must contract with
46 the county in which the services are to be rendered. The chief
47 judge ~~In a county having a population of fewer than 70,000, the~~
48 ~~county court judge, or the administrative judge of the county~~
49 ~~court in a county that has more than one county court judge,~~
50 must approve the contract. Terms of the contract must state, but
51 are not limited to:

52 (a) The extent of the services to be rendered by the entity
53 providing supervision or rehabilitation.

54 (b) Staff qualifications and criminal record checks of
55 staff.

56 (c) Staffing levels.

57 (d) The number of face-to-face contacts with the offender.

58 (e) Procedures for handling the collection of all offender
59 fees and restitution.

60 (f) Procedures for handling indigent offenders which ensure
61 placement irrespective of ability to pay.

62 (g) Circumstances under which revocation of an offender's
63 probation may be recommended.

64 (h) Reporting and recordkeeping requirements.

65 (i) Default and contract termination procedures.

66 (j) Procedures that aid offenders with job assistance.

67 (k) Procedures for accessing criminal history records of
68 probationers.



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69
70 In addition, the entity shall supply the chief judge's office
71 with a quarterly report summarizing the number of offenders
72 supervised by the private entity, payment of the required
73 contribution under supervision or rehabilitation, and the number
74 of offenders for whom supervision or rehabilitation will be
75 terminated. All records of the entity must be open to inspection
76 upon the request of the county, the court, the Auditor General,
77 the Office of Program Policy Analysis and Government
78 Accountability, or agents thereof.

79 Section 3. This act shall take effect July 1, 2022.

80

81 ===== T I T L E A M E N D M E N T =====

82 And the title is amended as follows:

83 Delete everything before the enacting clause
84 and insert:

85 A bill to be entitled
86 An act relating to probationary or supervision
87 services for misdemeanor offenders; amending s.
88 948.01, F.S.; authorizing the Department of
89 Corrections to supervise certain misdemeanor
90 offenders; deleting a prohibition on private entities
91 providing probationary or supervision services to
92 certain misdemeanor offenders; amending s. 948.15,
93 F.S.; authorizing a private or public entity to
94 provide probation services and other specified
95 programming to misdemeanor offenders; revising who may
96 approve specified contracts; providing an effective
97 date.

By Senator Gainer

2-00980-22

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1 A bill to be entitled
 2 An act relating to probationary or supervision
 3 services for misdemeanor offenders; amending s.
 4 948.01, F.S.; deleting a prohibition on private
 5 entities providing probationary or supervision
 6 services to certain misdemeanor offenders; providing
 7 an effective date.

8
 9 Be It Enacted by the Legislature of the State of Florida:

10
 11 Section 1. Paragraph (a) of subsection (1) and subsection
 12 (5) of section 948.01, Florida Statutes, are amended to read:
 13 948.01 When court may place defendant on probation or into
 14 community control.—

15 (1) Any state court having original jurisdiction of
 16 criminal actions may at a time to be determined by the court,
 17 with or without an adjudication of the guilt of the defendant,
 18 hear and determine the question of the probation of a defendant
 19 in a criminal case, except for an offense punishable by death,
 20 who has been found guilty by the verdict of a jury, has entered
 21 a plea of guilty or a plea of nolo contendere, or has been found
 22 guilty by the court trying the case without a jury.

23 (a) If the court places the defendant on probation or into
 24 community control for a felony, the department shall provide
 25 immediate supervision by an officer employed in compliance with
 26 the minimum qualifications for officers as provided in s.
 27 943.13. A private entity may not provide probationary or
 28 supervision services to felony ~~or misdemeanor~~ offenders
 29 sentenced or placed on probation or other supervision ~~by the~~

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CODING: Words ~~stricken~~ are deletions; words underlined are additions.

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30 ~~circu~~it court.

31 (5) The imposition of sentence may not be suspended and the
 32 defendant thereupon placed on probation or into community
 33 control unless the defendant is placed under the custody of the
 34 department or another public or private entity. A private entity
 35 may not provide probationary or supervision services to felony
 36 ~~or misdemeanor~~ offenders sentenced or placed on probation or
 37 other supervision ~~by the circuit court~~.

38 Section 2. This act shall take effect July 1, 2022.

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CODING: Words ~~stricken~~ are deletions; words underlined are additions.



2022 AGENCY LEGISLATIVE BILL ANALYSIS

AGENCY: Department of Corrections

<u>BILL INFORMATION</u>	
BILL NUMBER:	SB 752
BILL TITLE:	Probationary or Supervision Services for Misdemeanor Offenders
BILL SPONSOR:	Senator Gainer
EFFECTIVE DATE:	July 1, 2022

<u>COMMITTEES OF REFERENCE</u>
1) Criminal Justice
2) Appropriations Subcommittee on Criminal and Civil Justice
3) Appropriations
4)
5)

<u>PREVIOUS LEGISLATION</u>	
BILL NUMBER:	
SPONSOR:	
YEAR:	
LAST ACTION:	

<u>CURRENT COMMITTEE</u>

<u>SIMILAR BILLS</u>	
BILL NUMBER:	
SPONSOR:	

<u>IDENTICAL BILLS</u>	
BILL NUMBER:	
SPONSOR:	

Is this bill part of an agency package?
No.

<u>BILL ANALYSIS INFORMATION</u>	
DATE OF ANALYSIS:	December 10, 2021
LEAD AGENCY ANALYST:	Joe Winkler, Angella New
ADDITIONAL ANALYST(S):	
LEGAL ANALYST:	Todd Studley
FISCAL ANALYST:	Suzanne Hamilton

POLICY ANALYSIS

1. EXECUTIVE SUMMARY

Amends s. 948.01(1)(a) and (5), F.S., provides language deleting the prohibition on private entities from providing supervision to offenders placed on probation for misdemeanor offenses. Provides for an effective date of July 1, 2022.

2. SUBSTANTIVE BILL ANALYSIS

1. PRESENT SITUATION:

Section 948.01, F.S. provides when a court may place a defendant on probation or into community control. These instances include:

(1)(a): If the court places the defendant on probation or into community control for a felony, the Florida Department of Corrections (FDC or Department) shall provide immediate supervision by an officer employed in compliance with the minimum qualifications for officers as provided in s. 943.13, F.S. A private entity may not provide probationary or supervision services to felony or misdemeanor offenders sentenced or placed on probation or other supervision by the circuit court.

(5): The imposition of sentence may not be suspended and the defendant thereupon placed on probation or into community control unless the defendant is placed under the custody of the Department or another public or private entity. A private entity may not provide probationary or supervision services to felony or misdemeanor offenders sentenced or placed on probation or other supervision by the circuit court.

Over the past three fiscal years there has been an annual average of 3,984 probation admissions where the supervision type is coded as misdemeanor. These sentencing practices may have resulted from plea negotiations where there were no dispositions on included felony offenses in a case or felonies that were plead down to misdemeanors.

2. EFFECT OF THE BILL:

The bill continues to not allow felony offenders to be supervised by a private entity regardless of the court of sentence and allows offenders placed on supervision, regardless of the court delegation, for misdemeanor offenses, to be supervised by private entities. Based on the bill language courts will be able to, although are not required to, order that these offenders be supervised by private entities, instead of the Department.

The actual number of offenders that will be diverted away from FDC supervision by this bill are unknown, therefore the impact is indeterminate.

3. DOES THE BILL DIRECT OR ALLOW THE AGENCY/BOARD/COMMISSION/DEPARTMENT TO DEVELOP, ADOPT, OR ELIMINATE RULES, REGULATIONS, POLICIES, OR PROCEDURES? Y N

If yes, explain:	
Is the change consistent with the agency's core mission?	Y <input type="checkbox"/> N <input type="checkbox"/>
Rule(s) impacted (provide references to F.A.C., etc.):	

4. WHAT IS THE POSITION OF AFFECTED CITIZENS OR STAKEHOLDER GROUPS?

Proponents and summary of position:	
Opponents and summary of position:	

5. ARE THERE ANY REPORTS OR STUDIES REQUIRED BY THIS BILL? Y N

If yes, provide a description:	
Date Due:	

Bill Section Number(s):	

6. ARE THERE ANY NEW GUBERNATORIAL APPOINTMENTS OR CHANGES TO EXISTING BOARDS, TASK FORCES, COUNCILS, COMMISSIONS, ETC. REQUIRED BY THIS BILL? Y N

Board:	
Board Purpose:	
Who Appoints:	
Changes:	
Bill Section Number(s):	

FISCAL ANALYSIS

1. DOES THE BILL HAVE A FISCAL IMPACT TO LOCAL GOVERNMENT? Y N

Revenues:	Unknown
Expenditures:	Unknown
Does the legislation increase local taxes or fees? If yes, explain.	
If yes, does the legislation provide for a local referendum or local governing body public vote prior to implementation of the tax or fee increase?	

2. DOES THE BILL HAVE A FISCAL IMPACT TO STATE GOVERNMENT? Y N

Revenues:	Unknown
Expenditures:	The actual number of offenders that will be diverted away from FDC supervision by this bill are unknown, therefore the impact is indeterminate. The technology impact is indeterminate.
Does the legislation contain a State Government appropriation?	No
If yes, was this appropriated last year?	

3. DOES THE BILL HAVE A FISCAL IMPACT TO THE PRIVATE SECTOR? Y N

Revenues:	Unknown
Expenditures:	Unknown
Other:	

4. DOES THE BILL INCREASE OR DECREASE TAXES, FEES, OR FINES?

Y N

If yes, explain impact.	
Bill Section Number:	

TECHNOLOGY IMPACT

1. DOES THE BILL IMPACT THE AGENCY'S TECHNOLOGY SYSTEMS (I.E. IT SUPPORT, LICENSING SOFTWARE, DATA STORAGE, ETC.)? Y N

If yes, describe the anticipated impact to the agency including any fiscal impact.	The technology impact is indeterminate.
--	---

FEDERAL IMPACT

1. DOES THE BILL HAVE A FEDERAL IMPACT (I.E. FEDERAL COMPLIANCE, FEDERAL FUNDING, FEDERAL AGENCY INVOLVEMENT, ETC.)? Y N

If yes, describe the anticipated impact including any fiscal impact.	
--	--

ADDITIONAL COMMENTS

N/A.

LEGAL - GENERAL COUNSEL'S OFFICE REVIEW

Issues/concerns/comments:	The bill does not conflict with other state or federal law. The bill would allow for the Department to supervise misdemeanor offenses in some situations, as is the current practice as authorized by State law. The language would authorize a private entity to supervise misdemeanor offenses as determined by the Chief Judge of the Circuit.
---------------------------	---

The Florida Senate

APPEARANCE RECORD

Deliver both copies of this form to
Senate professional staff conducting the meeting

SB752

Bill Number or Topic

1/25/22

Meeting Date

CT

Committee

Amendment Barcode (if applicable)

Name

AARON WAYT FLASSN OF CRIM DEF LAWYERS

Phone

Address

Email

Street

City

State

Zip

Speaking:

For

Against

Information

OR

Waive Speaking:

In Support

Against

PLEASE CHECK ONE OF THE FOLLOWING:



I am appearing without
compensation or sponsorship.

I am a registered lobbyist,
representing:

I am not a lobbyist, but received
something of value for my appearance
(travel, meals, lodging, etc.),
sponsored by:

While it is a tradition to encourage public testimony, time may not permit all persons wishing to speak to be heard at this hearing. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard. If you have questions about registering to lobby please see Fla. Stat. §11.045 and Joint Rule 1, [2020-2022 Joint Rules.pdf \(flsenate.gov\)](#)

This form is part of the public record for this meeting.

S-001 (08/10/2021)

The Florida Senate

APPEARANCE RECORD

Deliver both copies of this form to Senate professional staff conducting the meeting

SB 752

Bill Number or Topic

1/25/22

Meeting Date

Criminal Justice

Committee

Amendment Barcode (if applicable)

Name

Phil Archer - State Attorney - 18th Cir

Phone

(321) 637-5575

Address

2725 Judge Fran Jamieson Way

Email

parcher@sa18.org

Street

Viera

City

FL

State

32940

Zip

Speaking:

For

Against

Information

OR

Waive Speaking:

In Support

Against

PLEASE CHECK ONE OF THE FOLLOWING:

I am appearing without compensation or sponsorship.

I am a registered lobbyist, representing:

I am not a lobbyist, but received something of value for my appearance (travel, meals, lodging, etc.), sponsored by:

While it is a tradition to encourage public testimony, time may not permit all persons wishing to speak to be heard at this hearing. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard. If you have questions about registering to lobby please see Fla. Stat. §11.045 and Joint Rule 1. [2020-2022 Joint Rules.pdf \(flsenate.gov\)](#)

This form is part of the public record for this meeting.

S-001 (08/10/2021)



THE FLORIDA SENATE

Tallahassee, Florida 32399-1100

COMMITTEES:

Appropriations Subcommittee on
Transportation,
Tourism, and Economic Development,
Chair
Appropriations
Appropriations Subcommittee on Criminal
and Civil Justice
Criminal Justice
Ethics and Elections
Transportation

SENATOR GEORGE B. GAINER
2nd District

January 25, 2022

Re: SB 752

Dear Chair Pizzo,

I am respectfully requesting Chair Pizzo be allowed to present Senate Bill 752, related to Probationary or Supervision Services, which is on the agenda for the Criminal Justice meeting today.

I appreciate your consideration of this bill. If there are any questions or concerns, please do not hesitate to call my office at (850) 487-5002.

Thank you,

A handwritten signature in blue ink that reads "George B. Gainer".

Senator George Gainer
District 2

REPLY TO:

- 840 West 11th Street, Panama City, Florida 32401 (850) 747-5454
- Northwest Florida State College, 100 East College Boulevard, Building 330, Rooms 105 and 112, Niceville,
- 408 Senate Building, 404 South Monroe Street, Tallahassee, Florida 32399-1100 (850) 487-5002

Florida 32578 (850) 747-5454

Senate's Website: www.flsenate.gov

WILTON SIMPSON
President of the Senate

AARON BEAN
President Pro Tempore

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Committee on Criminal Justice

BILL: CS/SB 796

INTRODUCER: Criminal Justice Committee and Senator Bradley

SUBJECT: Tampering with or Fabricating Physical Evidence

DATE: January 25, 2022

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Cellon	Jones	CJ	Fav/CS
2.			JU	
3.			RC	

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/SB 796 creates a second degree felony offense of tampering with or fabricating evidence relating to a criminal trial or proceeding or an investigation involving a capital offense, or an offense involving the death of a person. The bill ranks the offense as a Level 6 offense in the Offense Severity Ranking Chart (OSRC).

The bill makes a violation of s. 918.13(1)(b), F.S., a Level 3 offense in the OSRC.

This bill will likely have a “positive indeterminate” prison bed impact (an unquantifiable increase in prison beds). See Section V. Fiscal Impact Statement.

The bill is effective October 1, 2022.

II. Present Situation:

Tampering With or Fabricating Physical Evidence

Section 918.13, F.S., prohibits a person, knowing that a criminal trial or proceeding, or an investigation by a prosecuting authority, law enforcement agency, grand jury, or legislative committee is pending or about to be instituted, from:

- Altering, destroying, concealing, or removing any record, document, or thing with the purpose to impair its verity or availability in the proceeding or investigation, or

- Making, presenting, or using any record, document, or thing, knowing it to be false.

A person convicted of tampering with or fabricating physical evidence commits a third degree felony.¹ Under current law, the criminal penalty does not vary based on the severity of the underlying crime that is being investigated or prosecuted, so a person convicted of tampering with evidence in a murder investigation is subject to the same penalty as a person that tampers with evidence in a case involving misdemeanor marijuana possession.

A person may only be convicted of tampering with evidence in circumstances where the person has the specific intent to destroy or conceal evidence to such an extent that it is unavailable for trial or investigation.²

Capital Offenses

A capital felony is the most serious classification of felony offenses. A capital felony is a crime that is punishable by either death or life imprisonment without the possibility of parole.³ Currently, first degree murder and certain drug trafficking offenses are capital offenses.⁴

Offense Severity Ranking Chart

Felony offenses subject to the Criminal Punishment Code are listed in a single offense severity ranking chart (OSRC), which uses 10 offense levels to rank felonies from least severe (Level 1) to most severe (Level 10). A person's primary offense, any other current offenses, and prior offenses are scored using the points designated for the offense severity level of each offense. The final calculation, following the scoresheet formula, determines the lowest permissible sentence that the trial court may impose, absent a valid reason for departure.⁵

If an offense is unranked, the Criminal Punishment Code specifies a default level on the OSRC depending on the felony degree of the offense. The criminal offense of altering, destroying, or concealing physical evidence is ranked as a Level 3 offense on the OSRC.⁶ The criminal offense of making, presenting, or using physical evidence while knowing it is false is not currently ranked in the OSRC and defaults to a Level 1 offense.⁷

III. Effect of Proposed Changes:

The bill creates a new felony offense building upon the current offense of tampering with or fabricating evidence. The new offense provides that tampering with or fabricating evidence relating to a criminal trial or proceeding or an investigation involving a capital offense, or an offense involving the death of a person is a second degree felony.⁸ The bill ranks the new second

¹ A third degree felony is punishable by up to 5 years imprisonment and a \$5,000 fine. Sections 775.082 and 775.083, F.S.

² *E.I. v. State*, 25 So.3d 626 (Fla. 2d DCA 2009).

³ Section 775.082(1)(a), F.S.

⁴ *See* ss. 782.04(2)(a) and 893.135, F.S.

⁵ Section 921.0022(3)(c), F.S.

⁶ *Id.*

⁷ Section 921.0023, F.S.

⁸ A second degree felony is punishable by up to 15 years imprisonment and a \$10,000 fine. Sections 775.082 and 775.083, F.S.

degree felony offense as a Level 6 in the OSRC. Additionally, the bill makes a violation of s. 918.13(1)(b), F.S., a Level 3 offense in the OSRC.

The bill is effective October 1, 2022.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

The bill does not appear to require cities and counties to expend funds or limit their authority to raise revenue or receive state-shared revenues as specified by Article VII, Section 18 of the State Constitution.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. State Tax or Fee Increases:

None.

E. Other Constitutional Issues:

None identified.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

The Criminal Justice Impact Conference has not yet considered CS/SB 796, however the Office of Economic and Demographic Research has provided a Proposed Estimate for CS/HB 287 which is identical to CS/SB 796.⁹ The Proposed Estimate for CS/HB 287 is that the bill will have a Positive Indeterminate impact (an unquantifiable increase in prison beds) on the Department of Corrections.¹⁰

⁹ The Proposed Estimates for CS/HB 287 and SB 796 are on file with the Senate Criminal Justice Committee.

¹⁰ *Id.*

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends the following sections of the Florida Statutes: 918.13 and 921.0022.

IX. Additional Information:

- A. **Committee Substitute – Statement of Substantial Changes:**
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS by Criminal Justice on January 25, 2022:

The committee substitute:

- Includes s. 918.13(1)(b), F.S., the third degree felony crime of fabricating physical evidence in the Offense Severity Ranking Chart at Level 3.
- Ranks the second degree felony offense of tampering with or fabricating evidence relating to a criminal trial or proceeding or an investigation involving a capital offense, or an offense involving the death of a person in the Offense Severity Ranking Chart at Level 6. This offense is created in the bill.
- Deletes a second degree felony offense of tampering with or fabricating evidence relating to a criminal trial or proceeding or an investigation involving a violent felony offense described in s. 775.084(1)(b)1., F.S.

- B. **Amendments:**

None.



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LEGISLATIVE ACTION

Senate	.	House
Comm: RCS	.	
01/25/2022	.	
	.	
	.	
	.	

The Committee on Criminal Justice (Bradley) recommended the following:

Senate Amendment (with title amendment)

Delete everything after the enacting clause
and insert:

Section 1. Section 918.13, Florida Statutes, is amended to
read:

918.13 Tampering with or fabricating physical evidence.—

(1) It is unlawful for any ~~No~~ person, knowing that a
criminal trial, ~~or~~ proceeding, ~~or an~~ investigation by a duly
constituted prosecuting authority, law enforcement agency, grand



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11 jury or legislative committee of this state is pending or is
12 about to be instituted, to shall:

13 (a) Alter, destroy, conceal, or remove any record,
14 document, or other item thing with the purpose to impair its
15 verity or availability in such proceeding or investigation; or

16 (b) Make, present, or use any record, document, or other
17 item thing, knowing it to be false.

18 (2) (a) Except as provided in paragraph (b), a ~~Any~~ person
19 who violates subsection (1) commits ~~any provision of this~~
20 ~~section shall be guilty of~~ a felony of the third degree,
21 punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

22 (b) A person who violates subsection (1) relating to a
23 criminal trial, proceeding, or investigation that relates to a
24 capital felony commits a felony of the second degree, punishable
25 as provided in s. 775.082, s. 775.083, or s. 775.084.

26 Section 2. Paragraphs (c) and (f) of subsection (3) of
27 section 921.0022, Florida Statutes, are amended to read:

28 921.0022 Criminal Punishment Code; offense severity ranking
29 chart.-

30 (3) OFFENSE SEVERITY RANKING CHART

31 (c) LEVEL 3

32
33

Florida Statute	Felony Degree	Description
119.10(2)(b)	3rd	Unlawful use of confidential information from police reports.

34



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35	316.066	3rd	Unlawfully obtaining or using
	(3) (b) - (d)		confidential crash reports.
36	316.193 (2) (b)	3rd	Felony DUI, 3rd conviction.
37	316.1935 (2)	3rd	Fleeing or attempting to elude law enforcement officer in patrol vehicle with siren and lights activated.
38	319.30 (4)	3rd	Possession by junkyard of motor vehicle with identification number plate removed.
39	319.33 (1) (a)	3rd	Alter or forge any certificate of title to a motor vehicle or mobile home.
40	319.33 (1) (c)	3rd	Procure or pass title on stolen vehicle.
41	319.33 (4)	3rd	With intent to defraud, possess, sell, etc., a blank, forged, or unlawfully obtained title or registration.
42	327.35 (2) (b)	3rd	Felony BUI.
43			



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- 44 328.05(2) 3rd Possess, sell, or counterfeit
fictitious, stolen, or
fraudulent titles or bills of
sale of vessels.
- 45 328.07(4) 3rd Manufacture, exchange, or
possess vessel with counterfeit
or wrong ID number.
- 46 376.302(5) 3rd Fraud related to reimbursement
for cleanup expenses under the
Inland Protection Trust Fund.
- 47 379.2431 3rd Taking, disturbing, mutilating,
(1) (e) 5. destroying, causing to be
destroyed, transferring,
selling, offering to sell,
molesting, or harassing marine
turtles, marine turtle eggs, or
marine turtle nests in
violation of the Marine Turtle
Protection Act.
- 379.2431 3rd Possessing any marine turtle
(1) (e) 6. species or hatchling, or parts
thereof, or the nest of any
marine turtle species described
in the Marine Turtle Protection
Act.



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48	379.2431 (1) (e) 7.	3rd	Soliciting to commit or conspiring to commit a violation of the Marine Turtle Protection Act.
49	400.9935 (4) (a) or (b)	3rd	Operating a clinic, or offering services requiring licensure, without a license.
50	400.9935 (4) (e)	3rd	Filing a false license application or other required information or failing to report information.
51	440.1051 (3)	3rd	False report of workers' compensation fraud or retaliation for making such a report.
52	501.001 (2) (b)	2nd	Tampers with a consumer product or the container using materially false/misleading information.
53	624.401 (4) (a)	3rd	Transacting insurance without a certificate of authority.
54	624.401 (4) (b) 1.	3rd	Transacting insurance without a



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			certificate of authority; premium collected less than \$20,000.
55	626.902 (1) (a) & (b)	3rd	Representing an unauthorized insurer.
56	697.08	3rd	Equity skimming.
57	790.15 (3)	3rd	Person directs another to discharge firearm from a vehicle.
58	806.10 (1)	3rd	Maliciously injure, destroy, or interfere with vehicles or equipment used in firefighting.
59	806.10 (2)	3rd	Interferes with or assaults firefighter in performance of duty.
60	810.09 (2) (c)	3rd	Trespass on property other than structure or conveyance armed with firearm or dangerous weapon.
61	812.014 (2) (c) 2.	3rd	Grand theft; \$5,000 or more but less than \$10,000.
62			



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63	812.0145 (2) (c)	3rd	Theft from person 65 years of age or older; \$300 or more but less than \$10,000.
64	812.015 (8) (b)	3rd	Retail theft with intent to sell; conspires with others.
65	812.081 (2)	3rd	Theft of a trade secret.
66	815.04 (5) (b)	2nd	Computer offense devised to defraud or obtain property.
67	817.034 (4) (a) 3.	3rd	Engages in scheme to defraud (Florida Communications Fraud Act), property valued at less than \$20,000.
68	817.233	3rd	Burning to defraud insurer.
69	817.234 (8) (b) & (c)	3rd	Unlawful solicitation of persons involved in motor vehicle accidents.
70	817.234 (11) (a)	3rd	Insurance fraud; property value less than \$20,000.
71	817.236	3rd	Filing a false motor vehicle insurance application.



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72	817.2361	3rd	Creating, marketing, or presenting a false or fraudulent motor vehicle insurance card.
73	817.413(2)	3rd	Sale of used goods of \$1,000 or more as new.
74	817.49(2)(b)1.	3rd	Willful making of a false report of a crime causing great bodily harm, permanent disfigurement, or permanent disability.
75	831.28(2)(a)	3rd	Counterfeiting a payment instrument with intent to defraud or possessing a counterfeit payment instrument with intent to defraud.
76	831.29	2nd	Possession of instruments for counterfeiting driver licenses or identification cards.
77	838.021(3)(b)	3rd	Threatens unlawful harm to public servant.
	843.19	2nd	Injure, disable, or kill police, fire, or SAR canine or



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78			police horse.
	860.15(3)	3rd	Overcharging for repairs and parts.
79			
	870.01(2)	3rd	Riot.
80			
	870.01(4)	3rd	Inciting a riot.
81			
	893.13(1)(a)2.	3rd	Sell, manufacture, or deliver cannabis (or other s. 893.03(1)(c), (2)(c)1., (2)(c)2., (2)(c)3., (2)(c)6., (2)(c)7., (2)(c)8., (2)(c)9., (2)(c)10., (3), or (4) drugs).
82			
	893.13(1)(d)2.	2nd	Sell, manufacture, or deliver s. 893.03(1)(c), (2)(c)1., (2)(c)2., (2)(c)3., (2)(c)6., (2)(c)7., (2)(c)8., (2)(c)9., (2)(c)10., (3), or (4) drugs within 1,000 feet of university.
83			
	893.13(1)(f)2.	2nd	Sell, manufacture, or deliver s. 893.03(1)(c), (2)(c)1., (2)(c)2., (2)(c)3., (2)(c)6., (2)(c)7., (2)(c)8., (2)(c)9., (2)(c)10., (3), or (4) drugs



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84

within 1,000 feet of public
housing facility.

893.13(4)(c) 3rd Use or hire of minor; deliver
to minor other controlled
substances.

85

893.13(6)(a) 3rd Possession of any controlled
substance other than felony
possession of cannabis.

86

893.13(7)(a)8. 3rd Withhold information from
practitioner regarding previous
receipt of or prescription for
a controlled substance.

87

893.13(7)(a)9. 3rd Obtain or attempt to obtain
controlled substance by fraud,
forgery, misrepresentation,
etc.

88

893.13(7)(a)10. 3rd Affix false or forged label to
package of controlled
substance.

89

893.13(7)(a)11. 3rd Furnish false or fraudulent
material information on any
document or record required by
chapter 893.



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918.13(1) 3rd Tampering with or fabricating
~~918.13(1)(a)~~ physical evidence ~~Alter,~~
~~destroy, or conceal~~
~~investigation evidence.~~

95

944.47 3rd Introduce contraband to
(1)(a)1. & 2. correctional facility.

96

944.47(1)(c) 2nd Possess contraband while upon
the grounds of a correctional
institution.

97

985.721 3rd Escapes from a juvenile
facility (secure detention or
residential commitment
facility).

98

99

100 (f) LEVEL 6

101

102

Florida Statute	Felony Degree	Description
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103

316.027(2)(b)	2nd	Leaving the scene of a crash involving serious bodily injury.
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104

316.193(2)(b)	3rd	Felony DUI, 4th or subsequent
---------------	-----	-------------------------------



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battery by strangulation.

113

784.048 (3) 3rd Aggravated stalking; credible threat.

114

784.048 (5) 3rd Aggravated stalking of person under 16.

115

784.07 (2) (c) 2nd Aggravated assault on law enforcement officer.

116

784.074 (1) (b) 2nd Aggravated assault on sexually violent predators facility staff.

117

784.08 (2) (b) 2nd Aggravated assault on a person 65 years of age or older.

118

784.081 (2) 2nd Aggravated assault on specified official or employee.

119

784.082 (2) 2nd Aggravated assault by detained person on visitor or other detainee.

120

784.083 (2) 2nd Aggravated assault on code inspector.

121

787.02 (2) 3rd False imprisonment; restraining



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with purpose other than those
in s. 787.01.

122

790.115(2)(d) 2nd Discharging firearm or weapon
on school property.

123

790.161(2) 2nd Make, possess, or throw
destructive device with intent
to do bodily harm or damage
property.

124

790.164(1) 2nd False report concerning bomb,
explosive, weapon of mass
destruction, act of arson or
violence to state property, or
use of firearms in violent
manner.

125

790.19 2nd Shooting or throwing deadly
missiles into dwellings,
vessels, or vehicles.

126

794.011(8)(a) 3rd Solicitation of minor to
participate in sexual activity
by custodial adult.

127

794.05(1) 2nd Unlawful sexual activity with
specified minor.

128



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129	800.04 (5) (d)	3rd	Lewd or lascivious molestation; victim 12 years of age or older but less than 16 years of age; offender less than 18 years.
130	800.04 (6) (b)	2nd	Lewd or lascivious conduct; offender 18 years of age or older.
131	806.031 (2)	2nd	Arson resulting in great bodily harm to firefighter or any other person.
132	810.02 (3) (c)	2nd	Burglary of occupied structure; unarmed; no assault or battery.
133	810.145 (8) (b)	2nd	Video voyeurism; certain minor victims; 2nd or subsequent offense.
134	812.014 (2) (b) 1.	2nd	Property stolen \$20,000 or more, but less than \$100,000, grand theft in 2nd degree.
135	812.014 (6)	2nd	Theft; property stolen \$3,000 or more; coordination of others.
	812.015 (9) (a)	2nd	Retail theft; property stolen



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\$750 or more; second or
subsequent conviction.

136

812.015(9)(b) 2nd Retail theft; aggregated
property stolen within 30 days
is \$3,000 or more; coordination
of others.

137

812.13(2)(c) 2nd Robbery, no firearm or other
weapon (strong-arm robbery).

138

817.4821(5) 2nd Possess cloning paraphernalia
with intent to create cloned
cellular telephones.

139

817.49(2)(b)2. 2nd Willful making of a false
report of a crime resulting in
death.

140

817.505(4)(b) 2nd Patient brokering; 10 or more
patients.

141

825.102(1) 3rd Abuse of an elderly person or
disabled adult.

142

825.102(3)(c) 3rd Neglect of an elderly person or
disabled adult.

143

825.1025(3) 3rd Lewd or lascivious molestation



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of an elderly person or
disabled adult.

144

825.103(3)(c) 3rd Exploiting an elderly person or
disabled adult and property is
valued at less than \$10,000.

145

827.03(2)(c) 3rd Abuse of a child.

146

827.03(2)(d) 3rd Neglect of a child.

147

827.071(2) & (3) 2nd Use or induce a child in a
sexual performance, or promote
or direct such performance.

148

836.05 2nd Threats; extortion.

149

836.10 2nd Written or electronic threats
to kill, do bodily injury, or
conduct a mass shooting or an
act of terrorism.

150

843.12 3rd Aids or assists person to
escape.

151

847.011 3rd Distributing, offering to
distribute, or possessing with
intent to distribute obscene
materials depicting minors.



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152	847.012	3rd	Knowingly using a minor in the production of materials harmful to minors.
153	847.0135 (2)	3rd	Facilitates sexual conduct of or with a minor or the visual depiction of such conduct.
154	914.23	2nd	Retaliation against a witness, victim, or informant, with bodily injury.
155	<u>918.13 (2) (b)</u>	<u>2nd</u>	<u>Tampering with or fabricating physical evidence relating to a capital felony.</u>
156	944.35 (3) (a) 2.	3rd	Committing malicious battery upon or inflicting cruel or inhuman treatment on an inmate or offender on community supervision, resulting in great bodily harm.
157	944.40	2nd	Escapes.
158	944.46	3rd	Harboring, concealing, aiding escaped prisoners.
159			

By Senator Bradley

5-00997-22 2022796__

1 A bill to be entitled
 2 An act relating to tampering with or fabricating
 3 physical evidence; amending s. 918.13, F.S.; providing
 4 enhanced criminal penalties for tampering with or
 5 fabricating physical evidence in certain criminal
 6 proceedings and investigations; amending s. 921.0022,
 7 F.S.; ranking the offense of tampering with or
 8 fabricating physical evidence on the offense severity
 9 ranking chart of the Criminal Punishment Code to
 10 conform to changes made by the act; providing an
 11 effective date.
 12
 13 Be It Enacted by the Legislature of the State of Florida:
 14
 15 Section 1. Section 918.13, Florida Statutes, is amended to
 16 read:
 17 918.13 Tampering with or fabricating physical evidence.—
 18 (1) It is unlawful for any ~~Ne~~ person, knowing that a
 19 criminal trial or proceeding or an investigation by a duly
 20 constituted prosecuting authority, law enforcement agency, grand
 21 jury, or legislative committee of this state is pending or is
 22 about to be instituted, to shall:
 23 (a) Alter, destroy, conceal, or remove any record,
 24 document, or other item ~~thing~~ with the purpose to impair its
 25 verity or availability in such proceeding or investigation; or
 26 (b) Make, present, or use any record, document, or other
 27 item ~~thing~~, knowing it to be false.
 28 (2) (a) Except as provided in paragraph (b), a ~~Any~~ person
 29 who violates subsection (1) commits ~~any provision of this~~

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30 ~~section shall be guilty of~~ a felony of the third degree,
 31 punishable as provided in s. 775.082, s. 775.083, or s. 775.084.
 32 (b)1. Except as provided in subparagraph 2., a person who
 33 violates subsection (1) relating to a criminal trial or
 34 proceeding, or an investigation that relates to a violent felony
 35 offense described in s. 775.084(1)(b)1., commits a felony of the
 36 second degree, punishable as provided in s. 775.082, s. 775.083,
 37 or s. 775.084.
 38 2. A person who violates subsection (1) relating to a
 39 criminal trial or proceeding or an investigation that relates to
 40 a capital felony, or a criminal offense which results in the
 41 death of a person, commits a felony of the second degree,
 42 punishable as provided in s. 775.082, s. 775.083, or s. 775.084.
 43 Section 2. Paragraph (c) of subsection (3) of section
 44 921.0022, Florida Statutes, is amended to read:
 45 921.0022 Criminal Punishment Code; offense severity ranking
 46 chart.—
 47 (3) OFFENSE SEVERITY RANKING CHART
 48 (c) LEVEL 3
 49
 50 Florida Felony Description
 Statute Degree
 119.10(2)(b) 3rd Unlawful use of confidential
 information from police
 reports.
 51 316.066 3rd Unlawfully obtaining or using
 (3)(b)-(d) confidential crash reports.

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52

316.193(2)(b) 3rd Felony DUI, 3rd conviction.

53

316.1935(2) 3rd Fleeing or attempting to elude law enforcement officer in patrol vehicle with siren and lights activated.

54

319.30(4) 3rd Possession by junkyard of motor vehicle with identification number plate removed.

55

319.33(1)(a) 3rd Alter or forge any certificate of title to a motor vehicle or mobile home.

56

319.33(1)(c) 3rd Procure or pass title on stolen vehicle.

57

319.33(4) 3rd With intent to defraud, possess, sell, etc., a blank, forged, or unlawfully obtained title or registration.

58

327.35(2)(b) 3rd Felony BUI.

59

328.05(2) 3rd Possess, sell, or counterfeit fictitious, stolen, or fraudulent titles or bills of

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60

sale of vessels.

61

328.07(4) 3rd Manufacture, exchange, or possess vessel with counterfeit or wrong ID number.

62

376.302(5) 3rd Fraud related to reimbursement for cleanup expenses under the Inland Protection Trust Fund.

63

379.2431
(1)(e)5. 3rd Taking, disturbing, mutilating, destroying, causing to be destroyed, transferring, selling, offering to sell, molesting, or harassing marine turtles, marine turtle eggs, or marine turtle nests in violation of the Marine Turtle Protection Act.

64

379.2431
(1)(e)6. 3rd Possessing any marine turtle species or hatchling, or parts thereof, or the nest of any marine turtle species described in the Marine Turtle Protection Act.

65

379.2431
(1)(e)7. 3rd Soliciting to commit or conspiring to commit a

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violation of the Marine Turtle
Protection Act.

65

400.9935(4)(a) 3rd Operating a clinic, or offering
or (b) services requiring licensure,
without a license.

66

400.9935(4)(e) 3rd Filing a false license
application or other required
information or failing to
report information.

67

440.1051(3) 3rd False report of workers'
compensation fraud or
retaliation for making such a
report.

68

501.001(2)(b) 2nd Tampers with a consumer product
or the container using
materially false/misleading
information.

69

624.401(4)(a) 3rd Transacting insurance without a
certificate of authority.

70

624.401(4)(b)1. 3rd Transacting insurance without a
certificate of authority;
premium collected less than
\$20,000.

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71

626.902(1)(a) & 3rd Representing an unauthorized
(b) insurer.

72

697.08 3rd Equity skimming.

73

790.15(3) 3rd Person directs another to
discharge firearm from a
vehicle.

74

806.10(1) 3rd Maliciously injure, destroy, or
interfere with vehicles or
equipment used in firefighting.

75

806.10(2) 3rd Interferes with or assaults
firefighter in performance of
duty.

76

810.09(2)(c) 3rd Trespass on property other than
structure or conveyance armed
with firearm or dangerous
weapon.

77

812.014(2)(c)2. 3rd Grand theft; \$5,000 or more but
less than \$10,000.

78

812.0145(2)(c) 3rd Theft from person 65 years of
age or older; \$300 or more but
less than \$10,000.

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79

812.015(8)(b) 3rd Retail theft with intent to
sell; conspires with others.

80

812.081(2) 3rd Theft of a trade secret.

81

815.04(5)(b) 2nd Computer offense devised to
defraud or obtain property.

82

817.034(4)(a)3. 3rd Engages in scheme to defraud
(Florida Communications Fraud
Act), property valued at less
than \$20,000.

83

817.233 3rd Burning to defraud insurer.

84

817.234 3rd Unlawful solicitation of
(8)(b) & (c) persons involved in motor
vehicle accidents.

85

817.234(11)(a) 3rd Insurance fraud; property value
less than \$20,000.

86

817.236 3rd Filing a false motor vehicle
insurance application.

87

817.2361 3rd Creating, marketing, or
presenting a false or
fraudulent motor vehicle

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88

insurance card.

817.413(2)

3rd

Sale of used goods of \$1,000 or
more as new.

89

817.49(2)(b)1.

3rd

Willful making of a false
report of a crime causing great
bodily harm, permanent
disfigurement, or permanent
disability.

90

831.28(2)(a)

3rd

Counterfeiting a payment
instrument with intent to
defraud or possessing a
counterfeit payment instrument
with intent to defraud.

91

831.29

2nd

Possession of instruments for
counterfeiting driver licenses
or identification cards.

92

838.021(3)(b)

3rd

Threatens unlawful harm to
public servant.

93

843.19

2nd

Injure, disable, or kill
police, fire, or SAR canine or
police horse.

94

860.15(3)

3rd

Overcharging for repairs and

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95 parts.

96 870.01(2) 3rd Riot.

97 870.01(4) 3rd Inciting a riot.

98 893.13(1)(a)2. 3rd Sell, manufacture, or deliver
cannabis (or other s.
893.03(1)(c), (2)(c)1.,
(2)(c)2., (2)(c)3., (2)(c)6.,
(2)(c)7., (2)(c)8., (2)(c)9.,
(2)(c)10., (3), or (4) drugs).

99 893.13(1)(d)2. 2nd Sell, manufacture, or deliver
s. 893.03(1)(c), (2)(c)1.,
(2)(c)2., (2)(c)3., (2)(c)6.,
(2)(c)7., (2)(c)8., (2)(c)9.,
(2)(c)10., (3), or (4) drugs
within 1,000 feet of
university.

100 893.13(1)(f)2. 2nd Sell, manufacture, or deliver
s. 893.03(1)(c), (2)(c)1.,
(2)(c)2., (2)(c)3., (2)(c)6.,
(2)(c)7., (2)(c)8., (2)(c)9.,
(2)(c)10., (3), or (4) drugs
within 1,000 feet of public
housing facility.

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101 893.13(4)(c) 3rd Use or hire of minor; deliver
to minor other controlled
substances.

102 893.13(6)(a) 3rd Possession of any controlled
substance other than felony
possession of cannabis.

103 893.13(7)(a)8. 3rd Withhold information from
practitioner regarding previous
receipt of or prescription for
a controlled substance.

104 893.13(7)(a)9. 3rd Obtain or attempt to obtain
controlled substance by fraud,
forgery, misrepresentation,
etc.

105 893.13(7)(a)10. 3rd Affix false or forged label to
package of controlled
substance.

106 893.13(7)(a)11. 3rd Furnish false or fraudulent
material information on any
document or record required by
chapter 893.

893.13(8)(a)1. 3rd Knowingly assist a patient,
other person, or owner of an

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animal in obtaining a controlled substance through deceptive, untrue, or fraudulent representations in or related to the practitioner's practice.

107

893.13(8)(a)2. 3rd Employ a trick or scheme in the practitioner's practice to assist a patient, other person, or owner of an animal in obtaining a controlled substance.

108

893.13(8)(a)3. 3rd Knowingly write a prescription for a controlled substance for a fictitious person.

109

893.13(8)(a)4. 3rd Write a prescription for a controlled substance for a patient, other person, or an animal if the sole purpose of writing the prescription is a monetary benefit for the practitioner.

110

918.13(1)(a) & 3rd Tampering with or fabricating physical evidence ~~Alter, destroy, or conceal~~ (b)

5-00997-22

2022796__

~~investigation evidence.~~

111

944.47 3rd Introduce contraband to (1)(a)1. & 2. correctional facility.

112

944.47(1)(c) 2nd Possess contraband while upon the grounds of a correctional institution.

113

985.721 3rd Escapes from a juvenile facility (secure detention or residential commitment facility).

114

115

Section 3. This act shall take effect October 1, 2022.

SB 796 – Tampering with or Fabricating Physical Evidence

This bill amends s. 918.13, F.S., elevating the current Level 1, 3rd degree felony for fabricating physical evidence to a **Level 3, 3rd degree felony**. Currently, only tampering with physical evidence is a Level 3, 3rd degree felony. This bill also adds an **unranked, 2nd degree felony (Level 4 by default)** for committing these acts “relating to a criminal trial or proceeding or an investigation that relates to a violent felony offense described in s. 775.084(1)(b)1, F.S.”, and an **unranked, 2nd degree felony (Level 4 by default)** for committing these acts “relating to a criminal trial or proceeding or an investigation that relates to a capital felony, or a criminal offense which results in the death of a person.”

Per DOC, in FY 18-19, there were 68 new commitments to prison for tampering with evidence (incarceration rate: 12.0%). In FY 19-20, there were 57 new commitments (incarceration rate: 14.1%). In FY 20-21, there were 28 new commitments (incarceration rate: 12.4%). There were no new commitments for fabricating physical evidence. It is not known how many additional offenders would fall under this new language.

In FY 18-19, the incarceration rate for a Level 3, 3rd degree felony was 9.7%, and in FY 19-20 the incarceration rate was 8.9%. In FY 20-21, the incarceration rate for a Level 3, 3rd degree felony was 8.6%. The incarceration rate for a Level 4, 2nd degree felony was 28.2% in FY 18-19, and in FY 19-20 the incarceration rate was 28.0%. In FY 20-21, the incarceration rate for a Level 4, 2nd degree felony was 25.8%.

EDR PROPOSED ESTIMATE: Positive Indeterminate

Requested by: Senate



THE FLORIDA SENATE

Tallahassee, Florida 32399-1100

SENATOR JENNIFER BRADLEY
5th District

COMMITTEES:
Community Affairs, *Chair*
Agriculture, *Vice Chair*
Appropriations Subcommittee on Agriculture,
Environment, and General Government
Education
Ethics and Elections
Judiciary
Reapportionment

SELECT SUBCOMMITTEE:
Select Subcommittee on Congressional
Reapportionment, *Chair*

JOINT COMMITTEES:
Joint Legislative Auditing Committee
Joint Select Committee on Collective Bargaining

November 16, 2021

Senator Jason W.B. Pizzo, Chairman
Senate Committee on Criminal Justice
405 Senate Building
404 South Monroe Street
Tallahassee, FL 32399-1100

Dear Chairman Pizzo:

I respectfully request that Senate Bill 796 be placed on the committee's agenda at your earliest convenience. This bill relates to tampering with or fabricating physical evidence.

Thank you for your consideration.

Sincerely,

A handwritten signature in cursive script that reads "Jennifer Bradley".

Jennifer Bradley

cc: Lauren Jones, Staff Director
Sue Arnold, Administrative Assistant

REPLY TO:

- 1279 Kingsley Avenue, Kingsley Center, Suite 117, Orange Park, Florida 32073 (904) 278-2085
- 324 Senate Building, 404 South Monroe Street, Tallahassee, Florida 32399-1100 (850) 487-5005

Senate's Website: www.flsenate.gov

WILTON SIMPSON
President of the Senate

AARON BEAN
President Pro Tempore

The Florida Senate

APPEARANCE RECORD

Deliver both copies of this form to Senate professional staff conducting the meeting

1/25/22
Meeting Date

796
Bill Number or Topic

Criminal Justice
Committee

Amendment Barcode (if applicable)

Name Buddy Jacobs, General Counsel State Attorneys of Fla. Phone 904-261-3693

Address 961687 Gateway Blvd. Email a.jacobs@comcast.com
Street

City

State

Zip

Speaking: For Against Information OR Waive Speaking: In Support Against

PLEASE CHECK ONE OF THE FOLLOWING:

I am appearing without compensation or sponsorship.

I am a registered lobbyist, representing: State Attorneys of Fla.

I am not a lobbyist, but received something of value for my appearance (travel, meals, lodging, etc.), sponsored by:

While it is a tradition to encourage public testimony, time may not permit all persons wishing to speak to be heard at this hearing. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard. If you have questions about registering to lobby please see Fla. Stat. §11.045 and Joint Rule 1. [2020-2022 Joint Rules.pdf \(flsenate.gov\)](#)

This form is part of the public record for this meeting.

S-001 (08/10/2021)

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Committee on Criminal Justice

BILL: SB 868

INTRODUCER: Senator Stewart

SUBJECT: Sexual Battery on a Mentally Incapacitated Person

DATE: January 24, 2022

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Ravelo</u>	<u>Cibula</u>	<u>JU</u>	Favorable
2.	<u>Stokes</u>	<u>Jones</u>	<u>CJ</u>	Favorable
3.	_____	_____	<u>RC</u>	_____

I. Summary:

SB 868 amends s. 794.011, F.S., to change the definition of “mentally incapacitated,” to mean temporarily incapable of appraising or controlling a person’s own conduct due to the influence of a narcotic, an anesthetic, or an intoxicating substance.

The bill removes the previous requirements that a narcotic, anesthetic, or intoxicating substance be administered without a person’s consent or due to any other act committed upon that person without his or her consent, in order to be found “mentally incapacitated.”

Current law provides specified circumstances in which the crime of sexual battery may be charged as a first degree felony. One such circumstance is when the offender, without prior knowledge or consent of the victim, administers or has knowledge of someone else administering to the victim any narcotic, anesthetic, or other intoxicating substance that renders the victim *mentally incapacitated* or physically incapacitated. The change in the definition of mentally incapacitated means an offense of sexual battery which occurs against a victim who is under the influence of a substance is a first degree felony.

There may be a positive indeterminate prison bed impact on the Department of Corrections. See Section V. Fiscal Impact Statement.

The bill takes effect October 1, 2022.

II. Present Situation:

Sexual Battery

Section 794.011, F.S., defines the crime of “sexual battery” to mean oral, anal, or vaginal penetration by, or union with, the sexual organ of another or the anal or vaginal penetration of

another by any other object; however, sexual battery does not include an act done for a bona fide medical purpose.¹ Sexual battery offenses are categorized by certain factors including the offender's age, the victim's age, and specified circumstances. Generally, absent any specified circumstances, a sexual battery is a second degree felony.²

Section 794.011(4), F.S., provides that when sexual battery is committed and any of the below specified circumstances are present, the person commits a first degree felony. Florida law punishes first degree felonies in one of two ways. Generally, a first degree felony is punishable by up to 30 years of imprisonment.³ However, when specifically provided for in statute, a first degree felony may be punished by imprisonment for a term of years not exceeding life imprisonment.⁴

Section 794.011(4)(a) and (d), F.S., provides it a first degree felony punishable by imprisonment for a term of years not exceeding life when:

- A person 18 years of age or older commits sexual battery on a person 12 years of age or older, but younger than 18 years of age without that person's consent, under any of the specified circumstances.
- A person commits sexual battery on a person 12 years of age or older without that person's consent, under any of the specified circumstances, and that person was previously convicted of certain crimes.⁵

Section 794.011(4)(b) and (c), F.S., provides it is a first degree felony punishable by up to 30 years of imprisonment when:

- A person 18 years of age or older commits sexual battery on a person 18 years of age or older without that person's consent, under any of the specified circumstances.
- A person younger than 18 years of age commits sexual battery on a person 12 years of age or older without that person's consent, under any of the specified circumstances.

Section 794.011(4)(e), F.S., provides the following specified circumstances that apply to the offenses described above:

- The victim is physically helpless⁶ to resist;

¹ Section 794.011(1)(h), F.S.

² The maximum term of imprisonment for a second degree felony is 15 years imprisonment and a fine not exceeding \$10,000. Sections 775.082 and 775.083, F.S.

³ Section 775.083, provides first degree felonies may also be punishable by a fine not exceeding \$10,000.

⁴ Section 775.082, F.S.

⁵ The specified crimes include: s. 787.01(2), F.S., relating to kidnapping, or s. 787.02(2), F.S., relating to false imprisonment, when the violation involved a victim who was a minor and, in the course of committing that violation, the defendant committed against the minor a sexual battery under this chapter or a lewd act under s. 800.04 or s. 847.0135(5), F.S.; s. 787.01(3)(a)2. or 3., F.S., relating to kidnapping; s. 787.02(3)(a)2. or 3., F.S., relating to false imprisonment; s. 800.04, F.S., relating to lewd or lascivious offenses committed upon or in the presence of persons less than 16 years of age; s. 825.1025, F.S., relating to lewd or lascivious offenses committed upon or in the presence of an elderly or disabled person; s. 847.0135(5), F.S., relating to computer pornography; or ch. 794, F.S., relating to sexual battery, except s. 794.011(10), F.S., which criminalizes false allegations against specified persons.

⁶ Section 794.011(1)(e), F.S., provides that "physically helpless" means unconscious, asleep, or for any other reason physically unable to communicate unwillingness to an act.

- The offender coerces the victim to submit by threatening the use of force or violence likely to cause serious personal injury to the victim, and the victim reasonably believes that the offender has the present ability to execute the threat;
- The offender coerces the victim to submit by threatening to retaliate against the victim, or any other person, and the victim reasonably believes that the offender has the ability to execute the threat in the future;
- The offender, without the prior knowledge or consent of the victim, administers or has knowledge of someone else administering to the victim any narcotic, anesthetic, or other intoxicating substance that mentally or physically incapacitates⁷ the victim;
- The victim is mentally defective,⁸ and the offender has reason to believe this or has actual knowledge of the fact;
- The victim is physically incapacitated; or
- The offender is a law enforcement officer, correctional officer, or correctional probation officer, or is an elected official exempt from such certification,⁹ or any other person in a position of control or authority in a probation, community control, controlled release, detention, custodial, or similar setting, and such officer, official, or person is acting in such a manner as to lead the victim to reasonably believe that the offender is in a position of control or authority as an agent or employee of the government.

Mental Incapacitation

A mentally incapacitated person is “temporarily incapable of appraising or controlling a person’s own conduct due to the influence of a narcotic, anesthetic, or intoxicating substance administered without his or her consent or due to any other act committed upon that person without his or her consent.”¹⁰

A person is not deemed “mentally incapacitated,” under s. 794.011, F.S., if they knowingly and voluntarily consumed a narcotic, anesthetic, or other intoxicating substance. Accordingly, “the Florida sexual battery statute does not place voluntary drug or alcohol consumption on the same footing as involuntary consumption; if they were to be treated as equivalent, the statute would say so.”¹¹

With respect to the issue of consent to sexual activity, “[t]he prevailing view is that voluntary consumption of drugs or alcohol, does not, without more, render consent involuntary.”¹² However, evidence of the victim’s mental incapacity is admissible to prove that the consent to sexual activity was not intelligent, knowing, or voluntary; and the court must instruct the jury accordingly.¹³

⁷ Section 794.011(1)(j), F.S., provides that “physically incapacitated” means bodily impaired or handicapped and substantially limited in ability to resist or flee.

⁸ Section 794.011(1)(b), F.S., provides that “mentally defective” means a mental disease or defect which renders a person temporarily or permanently incapable of appraising the nature of his or her conduct.

⁹ Under s. 943.253, F.S.

¹⁰ Section 794.011(1)(c), F.S.

¹¹ *Coley v. State*, 616 So. 2d 1017, 1023 (Fla. 3d DCA 1993).

¹² *Id.*

¹³ *See* s. 794.022(4), F.S.

III. Effect of Proposed Changes:

The bill amends s. 794.011, F.S., to change the definition of “mentally incapacitated,” to mean temporarily incapable of appraising or controlling a person’s own conduct due to the influence of a narcotic, an anesthetic, or an intoxicating substance (substance).

The bill removes the previous requirements that the substance *be administered without a person’s consent or due to any other act committed upon that person without his or her consent*, in order to be found “mentally incapacitated.”

Currently, when a person is a victim of a sexual battery and is “mentally incapacitated” the offense is a first degree felony, as described in the Present Situation. By eliminating the requirement that the victim’s mental incapacitation is due to being under the influence of a substance that was administered *without the victim’s consent* means that a sexual battery offense against a victim who is under the influence of a substance is a first degree felony. Currently, it is a second degree felony when a person commits a sexual battery against a victim who was voluntarily under the influence of a substance.

Specifically, the change of the definition “mentally incapacitated” means that a sexual battery is a first degree felony when:

- A person 18 years of age or older commits sexual battery on a person 12 years of age or older, but younger than 18 years of age without that person’s consent, and *the victim is mentally incapacitated*, and the offender has reason to believe this or has actual knowledge of this fact.
- A person commits sexual battery on a person 12 years of age or older without that person’s consent, and *the victim is mentally incapacitated*, and the offender has reason to believe this or has actual knowledge of this fact, and that person was previously convicted of specified crimes.
- A person 18 years of age or older commits sexual battery on a person 18 years of age or older without that person’s consent, and *the victim is mentally incapacitated*, and the offender has reason to believe this or has actual knowledge of this fact.
- A person younger than 18 years of age commits sexual battery on a person 12 years of age or older without that person’s consent, and *the victim is mentally incapacitated*, and the offender has reason to believe this or has actual knowledge of this fact.

The bill takes effect October 1, 2022.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

This bill appears to be exempt from the requirements of Article VII, Section 18 of the Florida Constitution because it is a criminal law.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. State Tax or Fee Increases:

None.

E. Other Constitutional Issues:

None identified.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

The Criminal Justice Impact Conference, which provides the final, official estimate of prison bed impact, if any, of legislation, has not yet reviewed the bill. The bill increases the number of sexual battery cases that will carry a penalty of a first degree felony. Thus this bill may have a positive indeterminate prison bed impact (unquantifiable increase in prison beds) on the Department of Corrections.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends section 794.011 of the Florida Statutes.

IX. Additional Information:

A. Committee Substitute – Statement of Changes:

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.

This Senate Bill Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.

By Senator Stewart

13-01049-22

2022868__

1 A bill to be entitled
2 An act relating to sexual battery on a mentally
3 incapacitated person; amending s. 794.011, F.S.;
4 revising the definition of the term "mentally
5 incapacitated"; revising provisions concerning sexual
6 battery upon a person who is mentally incapacitated;
7 providing an effective date.

8
9 Be It Enacted by the Legislature of the State of Florida:

10 Section 1. Paragraph (c) of subsection (1) and subsection
11 (4) of section 794.011, Florida Statutes, are amended to read:
12 794.011 Sexual battery.—

13 (1) As used in this chapter:

14 (c) "Mentally incapacitated" means temporarily incapable of
15 appraising or controlling a person's own conduct due to the
16 influence of a narcotic, an anesthetic, or an intoxicating
17 substance ~~administered without his or her consent or due to any~~
18 ~~other act committed upon that person without his or her consent.~~

19
20 (4) (a) A person 18 years of age or older who commits sexual
21 battery upon a person 12 years of age or older but younger than
22 18 years of age without that person's consent, under any of the
23 circumstances listed in paragraph (e), commits a felony of the
24 first degree, punishable by a term of years not exceeding life
25 or as provided in s. 775.082, s. 775.083, s. 775.084, or s.
26 794.0115.

27 (b) A person 18 years of age or older who commits sexual
28 battery upon a person 18 years of age or older without that
29 person's consent, under any of the circumstances listed in

Page 1 of 4

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13-01049-22

2022868__

30 paragraph (e), commits a felony of the first degree, punishable
31 as provided in s. 775.082, s. 775.083, s. 775.084, or s.
32 794.0115.

33 (c) A person younger than 18 years of age who commits
34 sexual battery upon a person 12 years of age or older without
35 that person's consent, under any of the circumstances listed in
36 paragraph (e), commits a felony of the first degree, punishable
37 as provided in s. 775.082, s. 775.083, s. 775.084, or s.
38 794.0115.

39 (d) A person commits a felony of the first degree,
40 punishable by a term of years not exceeding life or as provided
41 in s. 775.082, s. 775.083, s. 775.084, or s. 794.0115 if the
42 person commits sexual battery upon a person 12 years of age or
43 older without that person's consent, under any of the
44 circumstances listed in paragraph (e), and such person was
45 previously convicted of a violation of:

46 1. Section 787.01(2) or s. 787.02(2) when the violation
47 involved a victim who was a minor and, in the course of
48 committing that violation, the defendant committed against the
49 minor a sexual battery under this chapter or a lewd act under s.
50 800.04 or s. 847.0135(5);

51 2. Section 787.01(3)(a)2. or 3.;

52 3. Section 787.02(3)(a)2. or 3.;

53 4. Section 800.04;

54 5. Section 825.1025;

55 6. Section 847.0135(5); or

56 7. This chapter, excluding subsection (10) of this section.

57 (e) The following circumstances apply to paragraphs (a)-

58 (d):

Page 2 of 4

CODING: Words ~~stricken~~ are deletions; words underlined are additions.

13-01049-22

2022868__

- 59 1. The victim is physically helpless to resist.
- 60 2. The offender coerces the victim to submit by threatening
- 61 to use force or violence likely to cause serious personal injury
- 62 on the victim, and the victim reasonably believes that the
- 63 offender has the present ability to execute the threat.
- 64 3. The offender coerces the victim to submit by threatening
- 65 to retaliate against the victim, or any other person, and the
- 66 victim reasonably believes that the offender has the ability to
- 67 execute the threat in the future.
- 68 4. The victim is mentally incapacitated, and the offender
- 69 has reason to believe this or has actual knowledge of this fact
- 70 offender, without the prior knowledge or consent of the victim,
- 71 administers or has knowledge of someone else administering to
- 72 the victim any narcotic, anesthetic, or other intoxicating
- 73 substance that mentally or physically incapacitates the victim.
- 74 5. The victim is mentally defective, and the offender has
- 75 reason to believe this or has actual knowledge of this fact.
- 76 6. The victim is physically incapacitated.
- 77 7. The offender is a law enforcement officer, correctional
- 78 officer, or correctional probation officer as defined in s.
- 79 943.10(1), (2), (3), (6), (7), (8), or (9), who is certified
- 80 under s. 943.1395 or is an elected official exempt from such
- 81 certification by virtue of s. 943.253, or any other person in a
- 82 position of control or authority in a probation, community
- 83 control, controlled release, detention, custodial, or similar
- 84 setting, and such officer, official, or person is acting in such
- 85 a manner as to lead the victim to reasonably believe that the
- 86 offender is in a position of control or authority as an agent or
- 87 employee of government.

Page 3 of 4

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13-01049-22

2022868__

- 88 Section 2. This act shall take effect October 1, 2022.

Page 4 of 4

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The Florida Senate

Committee Agenda Request

To: Senator Jason Pizzo, Chair
Committee on Criminal Justice

Subject: Committee Agenda Request

Date: January 11, 2022

I respectfully request that **Senate Bill #868**, relating to Sexual Battery on a Mentally Incapacitated Person, be placed on the:

- committee agenda at your earliest possible convenience.
- next committee agenda.

A handwritten signature in cursive script that reads "Linda Stewart".

Senator Linda Stewart
Florida Senate, District 13

The Florida Senate

APPEARANCE RECORD

Deliver both copies of this form to
Senate professional staff conducting the meeting

1/25/2022

Meeting Date

Criminal Justice

Committee

868

Bill Number or Topic

Amendment Barcode (if applicable)

Name Katrina Duesterhaus

Phone 772.267.6353

Address 10220 SW 4th St.

Street

Email katforflorida@gmail.com

Miami

City

FL

State

33174

Zip

Speaking: For Against Information **OR** Waive Speaking: In Support Against

PLEASE CHECK ONE OF THE FOLLOWING:

I am appearing without compensation or sponsorship.

I am a registered lobbyist, representing:

I am not a lobbyist, but received something of value for my appearance (travel, meals, lodging, etc.), sponsored by:

While it is a tradition to encourage public testimony, time may not permit all persons wishing to speak to be heard at this hearing. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard. If you have questions about registering to lobby please see Fla. Stat. §11.045 and Joint Rule 1. [2020-2022 Joint Rules.pdf \(flsenate.gov\)](#)

This form is part of the public record for this meeting.

S-001 (08/10/2021)

1-25-22

The Florida Senate
APPEARANCE RECORD

SB 868

Deliver both copies of this form to
Senate professional staff conducting the meeting

Bill Number or Topic

Meeting Date
Criminal Justice

Amendment Barcode (if applicable)

Committee
Name Joseph Parr

Phone 772-538-1745

Address 421 N. Woodland Blvd

Email jparr@stetson.edu

Street
DeLand FL 32723

City State Zip

Speaking: For Against Information **OR** Waive Speaking: In Support Against

PLEASE CHECK ONE OF THE FOLLOWING:

I am appearing without compensation or sponsorship.

I am a registered lobbyist, representing:

I am not a lobbyist, but received something of value for my appearance (travel, meals, lodging, etc.), sponsored by:

While it is a tradition to encourage public testimony, time may not permit all persons wishing to speak to be heard at this hearing. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard. If you have questions about registering to lobby please see Fla. Stat. §11.045 and Joint Rule 1. [2020-2022 Joint Rules.pdf \(flsenate.gov\)](#)

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The Florida Senate

APPEARANCE RECORD

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1/25/22

Meeting Date

SB803

Bill Number or Topic

Criminal Justice

Committee

Amendment Barcode (if applicable)

Name

Veronica Fuentes

Phone

201-981-2569

Address

809 N Woodland Blvd Ste B

Email

vfuentes1@stetson.edu

Street

Deland

City

FL

State

32720

Zip

Speaking:

For

Against

Information

OR

Waive Speaking:

In Support

Against

PLEASE CHECK ONE OF THE FOLLOWING:

I am appearing without compensation or sponsorship.

I am a registered lobbyist, representing:

I am not a lobbyist, but received something of value for my appearance (travel, meals, lodging, etc.), sponsored by:

While it is a tradition to encourage public testimony, time may not permit all persons wishing to speak to be heard at this hearing. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard. If you have questions about registering to lobby please see Fla. Stat. §11.045 and Joint Rule 1. [2020-2022 Joint Rules.pdf \(flsenate.gov\)](#)

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S-001 (08/10/2021)

The Florida Senate

APPEARANCE RECORD

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SB 8103

Bill Number or Topic

Amendment Barcode (if applicable)

1/25/22

Meeting Date

Criminal Justice

Committee

Name Sara Smith-Paez

Phone 352 286 5898

Address 1359 E Evans Circle Apt B

Email ssmith47@stetson.edu

Deltona

City

FL

State

32725

Zip

Speaking: [X] For [] Against [] Information OR Waive Speaking: [] In Support [] Against

PLEASE CHECK ONE OF THE FOLLOWING:

[X] I am appearing without compensation or sponsorship.

[] I am a registered lobbyist, representing:

[] I am not a lobbyist, but received something of value for my appearance (travel, meals, lodging, etc.), sponsored by:

While it is a tradition to encourage public testimony, time may not permit all persons wishing to speak to be heard at this hearing. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard. If you have questions about registering to lobby please see Fla. Stat. § 11.045 and Joint Rule 1. 2020-2022 Joint Rules.pdf (flsenate.gov)

APPEARANCE RECORD

1/25/2022

Meeting Date

SB868

Bill Number or Topic

CRIMINAL JUSTICE

Committee

Deliver both copies of this form to
Senate professional staff conducting the meeting

Amendment Barcode (if applicable)

Name TRISH NEELY

Phone 850 322 3317

Address 2024 SHANGRI LA LANE

Street

Email

TALLY

City

FL

State

32303

Zip

Speaking: For Against Information

OR

Waive Speaking: In Support Against

PLEASE CHECK ONE OF THE FOLLOWING:

I am appearing without compensation or sponsorship.

I am a registered lobbyist, representing:

I am not a lobbyist, but received something of value for my appearance (travel, meals, lodging, etc.), sponsored by:

LEAGUE WOMEN VOTERS FLORIDA

While it is a tradition to encourage public testimony, time may not permit all persons wishing to speak to be heard at this hearing. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard. If you have questions about registering to lobby please see Fla. Stat. §11.045 and Joint Rule 1. [2020-2022 Joint Rules.pdf \(flsenate.gov\)](#)

This form is part of the public record for this meeting.

S-001 (08/10/2021)

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Committee on Criminal Justice

BILL: SB 1012

INTRODUCER: Senator Burgess and others

SUBJECT: Victims of Crimes

DATE: January 24, 2022

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Stokes	Jones	CJ	Favorable
2.	_____	_____	JU	_____
3.	_____	_____	RC	_____

I. Summary:

SB 1012 amends s. 960.001, F.S., to provide that, in addition to other specified information, victims must be informed of their right to employ private counsel consistent with the constitutional rights of the accused. Additionally, this bill encourages the Florida Bar to develop a registry of attorneys who are willing to serve on a pro bono basis as advocates for crime victims.

The bill does not appear to require law enforcement agencies to incur any additional costs. See Section V. Fiscal Impact Statement.

This bill is effective July 1, 2022.

II. Present Situation:

Victim Rights

Victims of crime in Florida are guaranteed certain rights that are provided in the Florida Constitution as well as in the Florida Statutes. In 2018, Florida voters passed Marsy's Law, an amendment to the Florida Constitution, to expand victim's rights.¹

Florida Constitution

Marsy's Law provides that every victim, beginning at the time of his or her victimization, has the right to:

- Due process and to be treated with fairness and respect for the victim's dignity.
- Be free from intimidation, harassment, and abuse.

¹ Section 16 (b), Art. 1, Fla. Const.

- Within the judicial process, to be reasonably protected from the accused and any person acting on behalf of the accused.²
- Have the safety and welfare of the victim and the victim's family considered when setting bail, including setting pretrial release conditions that protect the safety and welfare of the victim and the victim's family.
- Prevent the disclosure of information or records that could be used to locate or harass the victim or the victim's family, or which could disclose confidential or privileged information of the victim.
- The prompt return of the victim's property when no longer needed as evidence.
- Full and timely restitution in every case and from each convicted offender for all losses suffered, both directly and indirectly, by the victim as a result of the criminal conduct.
- Proceedings free from unreasonable delay, and to a prompt and final conclusion of the case and any related postjudgment proceedings.^{3,4}

Additionally, Marsy's law provides that, upon request, victims have the right to:

- Reasonable, accurate, and timely notice of, and to be present at, all public proceedings involving the criminal conduct, including, but not limited to, trial, plea, sentencing, or adjudication, even if the victim will be a witness at the proceeding. A victim must also be provided reasonable, accurate, and timely notice of any release or escape of the offender and any proceeding during which a right of the victim is implicated.
- Be heard in any public proceeding involving pretrial or other release from any form of legal constraint, plea, sentencing, adjudication, or parole, and any proceeding during which a right of the victim is implicated.
- Confer with the prosecuting attorney concerning any plea agreements, participation in pretrial diversion programs, release, restitution, sentencing, or any other disposition of the case.
- Provide information regarding the impact of the offender's conduct on the victim and the victim's family to the individual responsible for conducting any presentence investigation or compiling any presentence investigation report, and to have any such information considered in any sentencing recommendations submitted to the court.
- Receive a copy of any presentence report, and any other report or record relevant to the exercise of a victim's right, except for such portions made confidential or exempt by law.

² This does not create a special relationship between the crime victim and any law enforcement agency or office absent a special relationship or duty as defined by Florida Law. FL Const. Art. 1, s. 16 (b)(3).

³ Section 16 (b)(10), Art. 1, Fla. Const., provides that the state attorney may file in a good faith demand for a speedy trial and the trial court must hold a calendar call, with notice, within 15 days of the filing demand, to schedule a trial to commence on a date at least 5 days but no more than 60 days after the date of the calendar call unless the trial judge enters an order with specific findings of fact justifying a trial date more than 60 days after the calendar call. Additionally, all state-level appeals and collateral attacks on any judgment must be complete within 2 years from the date of appeal in non-capital cases and within 5 years from the date of appeal in capital cases, unless a court enters an order with specific finding as to why the court was unable to comply with this requirement and the circumstances causing the delay. Each year, the chief judge of any district court of appeal or the chief justice of the Supreme Court must report on a case by case basis to the Speaker of the House of Representatives and the President of the Senate all cases where the court entered an order regarding inability to comply with this requirement. The Legislature may enact legislation to implement this requirement.

⁴ Section 16 (b), Art. 1, Fla. Const.

- Be informed of the conviction, sentence, adjudication, place and time of incarceration, or other disposition of the convicted offender, any scheduled release date of the offender, and the release of or the escape of the offender from custody.
- Be informed of all postconviction processes and procedures, to participate in such processes and procedures, to provide information to the release authority to be considered before any release decision is made, and to be notified of any release decision regarding the offender. The parole or early release authority must extend the right to be heard to any person harmed by the offender.
- Be informed of clemency and expunction procedures, to provide information to the governor, the court, any clemency board, and other authority in these procedures, and to have the information considered before a clemency or expunction decision is made; and to be notified of such decision in advance of any release of the offender.⁵

Additionally, victims have a constitutional right to be informed of these rights, and to be informed that they may seek the advice of an attorney with respect to their rights. This information must be made available to the general public and provided to all crime victims in the form of a card or by other means intended to effectively advise the victim of their rights.⁶

Florida Statutes

Section 960.001, F.S., provides certain agencies⁷ within the criminal justice system must develop and implement guidelines for the use of their agencies, which are consistent with s. 16(b), Art. 1, Fla. Const., and achieve the following objectives by providing:

- A victim's rights information card or brochure.⁸
- Information concerning services available to victims of adult and juvenile crimes, including:
 - The availability of crime victim compensation, if applicable;
 - Crisis intervention services, supportive or bereavement counseling, social service support referrals, and community-based victim treatment programs;
 - The role of the victim in the criminal or juvenile justice process, including what the victim may expect from the system as well as what the system expects from the victim;
 - The stages in the criminal or juvenile justice process which are of significance to the victim and the manner in which information about such stages can be obtained;
 - The right of a victim who is not incarcerated, or the victim's representative, to be informed, to be present and to be heard when relevant, at all crucial stages;
 - The right of an incarcerated victim to be informed and submit written statements at all crucial states; and
 - The right of a victim to a prompt and timely disposition of the case.⁹

⁵ Section 16 (b)(6), Art. 1, Fla. Const.

⁶ Section 16 (b)(11), Art. 1, Fla. Const.

⁷ Section 960.001(1), F.S., provides that the Department of Legal Affairs, the state attorneys, the Department of Corrections, the Department of Juvenile Justice, the Florida Commission on Offender Review, the State Courts Administrator and circuit court administrators, the FDLE, and every sheriff's department, police department, or other law enforcement agency as defined in s. 943.10(4), F.S., must develop such guidelines.

⁸ Section 960.001(1)(o), F.S., provides that a victim of a crime must be provided with a victim's rights information card or brochure containing essential information concerning the rights of a victim and services available to a victim as required by state law.

⁹ Section 960.001(1)(a)1.-7., F.S.

- Information regarding the “victim notification card,”¹⁰ for purposes of notifying a victim or other appropriate contact.
- Consultation with the victim or guardian, or family of the victim.
- Information concerning victim or witness protection.
- Presence of a victim advocate during discovery deposition, or a forensic medical exam. The victim of a sexual offense must be advised of his or her right to have the courtroom cleared of certain persons when testifying.
- Local witness coordination services.
- Notification regarding judicial proceedings, the rights to be present, submit an impact statement, and of any scheduling changes.
- General victim assistance.
- Notification that the victim may request the offender attend a different school, if the victim attends the same school as the offender.
- Information concerning the release or escape of an offender.
- Notification of the rights to request restitution, and return of the victim’s property.
- Notification to a victim’s employer or creditor that the victim is needed in the prosecution of the case, or has been subjected to financial strain because of the case.
- Victim assistance education and training.
- Crime prevention programs.
- Prohibition of a government official asking or requiring a victim of a sexual offense submit to a polygraph examination or other truth-telling device.¹¹

The Florida Bar

The Florida Bar (Bar) is the organization of all lawyers who are licensed by the Supreme Court of Florida to practice law in the state. The Supreme Court of Florida has exclusive and ultimate authority to regulate the admission of persons to the practice of law and the discipline of those persons. The Court does this through both the Bar, and the Florida Board of Bar Examiners. The Bar, nor the Florida Board of Bar Examiners are supported by state tax dollars.¹²

The Bar’s core functions are to prosecute unethical lawyers, administer a client protection fund to cover certain financial losses a client may suffer due to misappropriation by a lawyer, administer a substance abuse program, and provide continuing education services for lawyers.¹³ The Bar operates a general lawyer referral service, as well as a referral service providing legal advice for low fees in the areas of disability and elder law.¹⁴ The Bar does not appear to maintain a statewide registry of attorneys that provide pro bono legal services.

¹⁰ Section 960.001(1)(b), F.S., provides the notification card must contain at minimum, the name, address, and phone number of the victim, or when appropriate, the next of kin or other designated contact, and any relevant identification or case numbers assigned to the case. The victim, next of kin, or other designated contact must be given an opportunity to complete such card, however he or she may choose not to complete it.

¹¹ Section 960.001(1)(a)-(u), F.S.

¹² The Florida Bar, *Frequently Asked Questions*, <https://www.floridabar.org/about/faq/> (last visited January 19, 2022).

¹³ *Id.*

¹⁴ The Florida Bar, *What We Do*, <https://www.floridabar.org/about/faq/what-we-do/#Findingyoulawyer> (last visited January 19, 2022).

III. Effect of Proposed Changes:

This bill amends s. 960.001, F.S., to provide that, in addition to other specified information, victims must be informed of their right to employ private counsel consistent with the constitutional rights of the accused. Additionally, this bill encourages The Florida Bar to develop a registry of attorneys who are willing to serve on a pro bono basis as advocates for crime victims.

This bill is effective July 1, 2022.

IV. Constitutional Issues:**A. Municipality/County Mandates Restrictions:**

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. State Tax or Fee Increases:

None.

E. Other Constitutional Issues:

None identified.

V. Fiscal Impact Statement:**A. Tax/Fee Issues:**

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

The Florida Constitution has required a crime victim to be notified of his or her right to retain private counsel since the amendment to article I, section 16 went into effect on January 8, 2019. Since the bill codifies an existing constitutional requirement, law enforcement agencies already providing such information should not incur any additional costs in updating victim information materials.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends section 960.001 of the Florida Statutes.

IX. Additional Information:

A. Committee Substitute – Statement of Changes:

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.

By Senator Burgess

20-00474-22

20221012__

A bill to be entitled

An act relating to victims of crimes; amending s. 960.001, F.S.; requiring law enforcement personnel to ensure that victims are given information about their right to employ private counsel; encouraging The Florida Bar to develop a registry of attorneys willing to serve as crime victim advocates on a pro bono basis; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Paragraph (a) of subsection (1) of section 960.001, Florida Statutes, is amended to read:

960.001 Guidelines for fair treatment of victims and witnesses in the criminal justice and juvenile justice systems.—

(1) The Department of Legal Affairs, the state attorneys, the Department of Corrections, the Department of Juvenile Justice, the Florida Commission on Offender Review, the State Courts Administrator and circuit court administrators, the Department of Law Enforcement, and every sheriff's department, police department, or other law enforcement agency as defined in s. 943.10(4) shall develop and implement guidelines for the use of their respective agencies, which guidelines are consistent with the purposes of this act and s. 16(b), Art. I of the State Constitution and are designed to implement s. 16(b), Art. I of the State Constitution and to achieve the following objectives:

(a) *Information concerning services available to victims of adult and juvenile crime.*—As provided in s. 27.0065, state attorneys and public defenders shall gather information

Page 1 of 3

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20-00474-22

20221012__

regarding the following services in the geographic boundaries of their respective circuits and shall provide such information to each law enforcement agency with jurisdiction within such geographic boundaries. Law enforcement personnel shall ensure, through distribution of a victim's rights information card or brochure at the crime scene, during the criminal investigation, and in any other appropriate manner, that victims are given, as a matter of course at the earliest possible time, information about:

1. The availability of crime victim compensation, if applicable;

2. Crisis intervention services, supportive or bereavement counseling, social service support referrals, and community-based victim treatment programs;

3. The role of the victim in the criminal or juvenile justice process, including what the victim may expect from the system as well as what the system expects from the victim;

4. The stages in the criminal or juvenile justice process which are of significance to the victim and the manner in which information about such stages can be obtained;

5. The right of a victim, who is not incarcerated, including the victim's parent or guardian if the victim is a minor, the lawful representative of the victim or of the victim's parent or guardian if the victim is a minor, and the next of kin of a homicide victim, to be informed, to be present, and to be heard when relevant, at all crucial stages of a criminal or juvenile proceeding, to the extent that this right does not interfere with constitutional rights of the accused, as provided by s. 16(b), Art. I of the State Constitution;

Page 2 of 3

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20-00474-22

20221012__

59 6. In the case of incarcerated victims, the right to be
60 informed and to submit written statements at all crucial stages
61 of the criminal proceedings, parole proceedings, or juvenile
62 proceedings; ~~and~~

63 7. The right of a victim to a prompt and timely disposition
64 of the case in order to minimize the period during which the
65 victim must endure the responsibilities and stress involved to
66 the extent that this right does not interfere with the
67 constitutional rights of the accused; and

68 8. The right of a victim to employ private counsel
69 consistent with the constitutional rights of the accused. The
70 Florida Bar is encouraged to develop a registry of attorneys who
71 are willing to serve on a pro bono basis as advocates for crime
72 victims.

73 Section 2. This act shall take effect July 1, 2022.

The Florida Senate

APPEARANCE RECORD

Deliver both copies of this form to Senate professional staff conducting the meeting

1/25/2022

Meeting Date

1012

Bill Number or Topic

Criminal Justice

Committee

Amendment Barcode (if applicable)

Name Adam Ross

Phone 727-510-9821

Address PO Box 17500

Email adam.ross@FLSAB.GOV

Street

Clearwater

FL

33762

City

State

Zip

Speaking: For Against Information OR Waive Speaking: In Support Against

PLEASE CHECK ONE OF THE FOLLOWING:

I am appearing without compensation or sponsorship.

I am a registered lobbyist, representing:

State Attorney's office
Sixth Judicial Circuit

I am not a lobbyist, but received something of value for my appearance (travel, meals, lodging, etc.), sponsored by:

While it is a tradition to encourage public testimony, time may not permit all persons wishing to speak to be heard at this hearing. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard. If you have questions about registering to lobby please see Fla. Stat. §11.045 and Joint Rule 1: [2020-2022 Joint Rules.pdf \(flsenate.gov\)](#)

This form is part of the public record for this meeting.

S-001 (08/10/2021)



The Florida Senate

Committee Agenda Request

To: Senator Jason Pizzo, Chair
Committee on Criminal Justice

Subject: Committee Agenda Request

Date: December 15, 2021

I respectfully request that **Senate Bill #1012**, relating to Victims of Crime, be placed on the:

- committee agenda at your earliest possible convenience.
- next committee agenda.

A handwritten signature in blue ink that reads "Danny".

Senator Danny Burgess
Florida Senate, District 20

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Committee on Criminal Justice

BILL: SB 1046

INTRODUCER: Senator Hooper

SUBJECT: Public Records/Law Enforcement Geolocation Information

DATE: January 24, 2022

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Erickson</u>	<u>Jones</u>	<u>CJ</u>	Favorable
2.	_____	_____	<u>GO</u>	_____
3.	_____	_____	<u>RC</u>	_____

I. Summary:

SB 1046 creates a public records exemption for law enforcement geolocation information held by a law enforcement agency. This is information collected using a global positioning system or another mapping, locational, or directional information system that allows tracking of the location or movement of a law enforcement officer or a law enforcement vehicle.

The bill contains a statement of public necessity for the exemption, which provides findings in support of the exemption and indicates that it is to be applied retroactively. The bill is subject to the Open Government Sunset Review Act and the exemption will be repealed on October 2, 2027, unless reviewed and reenacted by the Legislature. Because the bill creates a new public records exemption, a two-thirds vote of the members present and voting in each chamber of the Legislature is required for passage.

The effective date of the bill is July 1, 2022.

II. Present Situation:

Access to Public Records - Generally

The Florida Constitution provides that the public has the right to inspect or copy records made or received in connection with official governmental business.¹ The right to inspect or copy applies to the official business of any public body, officer, or employee of the state, including all three branches of state government, local governmental entities, and any person acting on behalf of the government.²

¹ FLA. CONST. art. I, s. 24(a).

² *Id.*

Additional requirements and exemptions related to public records are found in various statutes and rules, depending on the branch of government involved. For instance, s. 11.0431, F.S., provides public access requirements for legislative records. Relevant exemptions are codified in s. 11.0431(2)-(3), F.S., and adopted in the rules of each house of the Legislature.³ Florida Rule of Judicial Administration 2.420 governs public access to judicial branch records.⁴ Lastly, ch. 119, F.S., known as the Public Records Act, provides requirements for public records held by executive agencies.

Executive Agency Records – The Public Records Act

The Public Records Act provides that all state, county and municipal records are open for personal inspection and copying by any person, and that providing access to public records is a duty of each agency.⁵

Section 119.011(12), F.S., defines “public records” to include:

All documents, papers, letters, maps, books, tapes, photographs, films, sound recordings, data processing software, or other material, regardless of the physical form, characteristics, or means of transmission, made or received pursuant to law or ordinance or in connections with the transaction of official business by any agency.

The Florida Supreme Court has interpreted this definition to encompass all materials made or received by an agency in connection with official business that are used to “perpetuate, communicate, or formalize knowledge of some type.”⁶

The Florida Statutes specify conditions under which public access to public records must be provided. The Public Records Act guarantees every person’s right to inspect and copy any public record at any reasonable time, under reasonable conditions, and under supervision by the custodian of the public record.⁷ A violation of the Public Records Act may result in civil or criminal liability.⁸

The Legislature may exempt public records from public access requirements by passing a general law by a two-thirds vote of both the House and the Senate.⁹ The exemption must state

³ See Rule 1.48, *Rules and Manual of the Florida Senate*, (2018-2020) and Rule 14.1, *Rules of the Florida House of Representatives*, Edition 2, (2018-2020)

⁴ *State v. Wooten*, 260 So. 3d 1060 (Fla. 4th DCA 2018).

⁵ Section 119.01(1), F.S. Section 119.011(2), F.S., defines “agency” as “any state, county, district, authority, or municipal officer, department, division, board, bureau, commission, or other separate unit of government created or established by law including, for the purposes of this chapter, the Commission on Ethics, the Public Service Commission, and the Office of Public Counsel, and any other public or private agency, person, partnership, corporation, or business entity acting on behalf of any public agency.”

⁶ *Shevin v. Byron, Harless, Schaffer, Reid and Assoc., Inc.*, 379 So. 2d 633, 640 (Fla. 1980).

⁷ Section 119.07(1)(a), F.S.

⁸ Section 119.10, F.S. Public records laws are found throughout the Florida Statutes, as are the penalties for violating those laws.

⁹ FLA. CONST. art. I, s. 24(c).

with specificity the public necessity justifying the exemption and must be no broader than necessary to accomplish the stated purpose of the exemption.¹⁰

General exemptions from the public records requirements are contained in the Public Records Act.¹¹ Specific exemptions often are placed in the substantive statutes relating to a particular agency or program.¹²

When creating a public records exemption, the Legislature may provide that a record is “exempt” or “confidential and exempt.” There is a difference between records the Legislature has determined to be exempt from the Public Records Act and those which the Legislature has determined to be exempt from the Public Records Act *and confidential*.¹³ Records designated as “confidential and exempt” are not subject to inspection by the public and may only be released under the circumstances defined by statute.¹⁴ Records designated as “exempt” may be released at the discretion of the records custodian under certain circumstances.¹⁵

Open Government Sunset Review Act

The provisions of s. 119.15, F.S., known as the Open Government Sunset Review Act¹⁶ (the Act), prescribe a legislative review process for newly created or substantially amended¹⁷ public records or open meetings exemptions, with specified exceptions.¹⁸ The Act requires the repeal of such exemption on October 2nd of the fifth year after creation or substantial amendment, unless the Legislature reenacts the exemption.¹⁹

The Act provides that a public records or open meetings exemption may be created or maintained only if it serves an identifiable public purpose and is no broader than is necessary.²⁰ An exemption serves an identifiable purpose if it meets one of the following purposes *and* the Legislature finds that the purpose of the exemption outweighs open government policy and cannot be accomplished without the exemption:

¹⁰ *Id. See, e.g., Halifax Hosp. Medical Center v. News-Journal Corp.*, 724 So. 2d 567 (Fla. 1999) (holding that a public meetings exemption was unconstitutional because the statement of public necessity did not define important terms and did not justify the breadth of the exemption); *Baker County Press, Inc. v. Baker County Medical Services, Inc.*, 870 So. 2d 189 (Fla. 1st DCA 2004) (holding that a statutory provision written to bring another party within an existing public records exemption is unconstitutional without a public necessity statement).

¹¹ *See, e.g.*, s. 119.071(1)(a), F.S. (exempting from public disclosure examination questions and answer sheets of examinations administered by a governmental agency for the purpose of licensure).

¹² *See, e.g.*, s. 213.053(2)(a), F.S. (exempting from public disclosure information contained in tax returns received by the Department of Revenue).

¹³ *WFTV, Inc. v. The Sch. Bd. of Seminole County*, 874 So. 2d 48, 53 (Fla. 5th DCA 2004).

¹⁴ *Id.*

¹⁵ *Williams v. City of Minneola*, 575 So. 2d 683 (Fla. 5th DCA 1991).

¹⁶ Section 119.15, F.S.

¹⁷ An exemption is considered to be substantially amended if it is expanded to include more records or information or to include meetings as well as records. Section 119.15(4)(b), F.S.

¹⁸ Section 119.15(2)(a) and (b), F.S., provides that exemptions required by federal law or applicable solely to the Legislature or the State Court System are not subject to the Open Government Sunset Review Act.

¹⁹ Section 119.15(3), F.S.

²⁰ Section 119.15(6)(b), F.S.

- It allows the state or its political subdivisions to effectively and efficiently administer a governmental program, and administration would be significantly impaired without the exemption;²¹
- It protects sensitive, personal information, the release of which would be defamatory, cause unwarranted damage to the good name or reputation of the individual, or would jeopardize the individual's safety. If this public purpose is cited as the basis of an exemption, however, only personal identifying information is exempt;²² or
- It protects information of a confidential nature concerning entities, such as trade or business secrets.²³

The Act also requires specified questions to be considered during the review process.²⁴ In examining an exemption, the Act directs the Legislature to question the purpose and necessity of reenacting the exemption.

If the exemption is continued and expanded, then a public necessity statement and a two-thirds vote for passage are required.²⁵ If the exemption is continued without substantive changes or if the exemption is continued and narrowed, then a public necessity statement and a two-thirds vote for passage are *not* required. If the Legislature allows an exemption to expire, the previously exempt records will remain exempt unless otherwise provided by law.²⁶

Geolocation Data

“Geolocation data is data collected via an electronic communications network or service that indicates the position of equipment used by people who are connected to the network or service.”²⁷ Some technologies that collect geolocation data include global positioning system (GPS) units and smartphones. In addition to including information on “latitude, longitude, and altitude of the equipment,” geolocation data can include the “time data was collected, direction of travel and other detailed information.”²⁸

²¹ Section 119.15(6)(b)1., F.S.

²² Section 119.15(6)(b)2., F.S.

²³ Section 119.15(6)(b)3., F.S.

²⁴ Section 119.15(6)(a), F.S. The specified questions are:

- What specific records or meetings are affected by the exemption?
- Whom does the exemption uniquely affect, as opposed to the general public?
- What is the identifiable public purpose or goal of the exemption?
- Can the information contained in the records or discussed in the meeting be readily obtained by alternative means? If so, how?
- Is the record or meeting protected by another exemption?
- Are there multiple exemptions for the same type of record or meeting that it would be appropriate to merge?

²⁵ See generally s. 119.15, F.S.

²⁶ Section 119.15(7), F.S.

²⁷ *Subcommittee on Cybersecurity, Privacy and Data: Geolocation Data*, Task Force on Autonomous Vehicles (Oregon), available at <https://www.oregon.gov/ODOT/Get-Involved/Documents/Geolocation%20data%20ER%207-22.pdf> (last visited on Jan. 18, 2022).

²⁸ *Id.*

One concern identified with the use of geolocation data is that the “data can be used to identify people and discern details of where they live, work and travel, potentially enabling stalking and harassment and revealing sensitive destinations...”²⁹

Geolocation Data on Law Enforcement Officers and Law Enforcement Vehicles

Geolocation data on a law enforcement officer may be available to the agency employing the officer. For example, an important source for location information on the officer could be an agency-issued or agency-owned cellphone.³⁰ The agency may have the ability to obtain location information from the cellphone provider either through a built-in GPS capability in the cellphone, a smart app, or through other available means. This location information may include real-time or historical location information.

Geolocation information on a law enforcement officer may also be available to the law enforcement agency if the officer is driving or riding in an agency-issued or agency-owned vehicle equipped with GPS technology or other means of locating the vehicle and tracking its movement.³¹ There are multiple reasons why a law enforcement agency would track the location and movement of its vehicles including:

- “Identify[ing] which police vehicle is closest to a crime scene and [ensuring] those police officers stay within their assigned zone,” which “can also be helpful if a police officer ever goes missing on the job”;³² and
- “[Providing] directions and up-to-date traffic information, helping police officers get to the scene of a crime or emergency sooner.”³³

Geolocation Data Relating to the Home Address of a Law Enforcement Officer

Section 119.071(4)(d)2.a., F.S., in part, provides a public records exemption for:

- The home addresses of active or former sworn law enforcement personnel or of active or former civilian personnel employed by a law enforcement agency;
- The home addresses and places of employment of the spouses and children of such personnel; and
- The locations of schools and day care facilities attended by the children of such personnel.

The term “home addresses” means the dwelling location at which an individual resides and includes the physical address, mailing address, street address, parcel identification number, plot identification number, legal property description, neighborhood name and lot number, *GPS coordinates, and any other descriptive property information that may reveal the home address.*³⁴

²⁹ *Id.*

³⁰ See Marc Chase McAliister, *GPS and Cell Phone Tracking of Employees*, 70 Fla. L. Rev. 1265 (2019), available at <https://scholarship.law.ufl.edu/cgi/viewcontent.cgi?article=1438&context=flr> (last visited on Jan. 19, 2022).

³¹ *Id.*

³² *How Police Use GPS for Personal and Vehicle Tracking*, BrickHouse Security, available at <https://www.brickhousesecurity.com/gps-trackers/how-police-use-gps/> (last visited on Jan. 19, 2022).

³³ *Id.*

³⁴ Section 119.071(4)(d)1.a., F.S. (emphasis provided by staff).

III. Effect of Proposed Changes:

The bill, which takes effect July 1, 2022, amends s. 119.071, F.S., to create a public records exemption for law enforcement geolocation information held by a law enforcement agency. The bill defines the term “law enforcement geolocation information” as information collected using a global positioning system or another mapping, locational, or directional information system that allows tracking of the location or movement of a law enforcement officer or a law enforcement vehicle.

The bill specifies that the exemption does not apply to uniform traffic citations, crash reports, homicide reports, arrest reports, incident reports, or any other official reports issued by an agency which contain law enforcement geolocation information.

Staff notes that there may be some overlap between the public records exemption created by the bill and the public record exemption in s. 119.071(4)(d)2.a., F.S., relating to home addresses of law enforcement personnel and home addresses and other specified location information of spouses and children of such personnel. However, the exemption created by the bill is not limited to the home address and location information specified in s. 119.071(4)(d)2.a., F.S.

Staff notes that the exemption may also act as a safeguard to protect some information that is likely exempt from public release under a current exemption but that may not be clearly identified as being associated with that exemption. For example, s. 119.071(2)(d), F.S., provides a public records exemption for any information revealing law enforcement surveillance techniques. This exemption doesn’t specifically mention law enforcement geolocation data, though that data may be relevant to identifying law enforcement surveillance techniques.

The bill contains a statement of public necessity for the exemption, which provides findings in support of the exemption and indicates that it is to be applied retroactively. The bill is subject to the Open Government Sunset Review Act and the new exemption will be repealed on October 2, 2027, unless reviewed and reenacted by the Legislature. Because the bill creates a new public records exemption, a two-thirds vote of the members present and voting in each chamber of the Legislature is required for passage.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

Vote Requirement

Article I, s. 24(c), of the Florida Constitution requires a two-thirds vote of the members present and voting in each chamber for final passage of a bill creating or expanding an exemption to the public records requirements. This bill enacts a new exemption for law enforcement geolocation information held by a law enforcement agency, thus, the bill requires a two-thirds vote to be enacted.

Public Necessity Statement

Article I, s. 24(c), of the Florida Constitution requires a bill creating or expanding an exemption to the public records requirements to state with specificity the public necessity justifying the exemption. Section 2 of the bill contains a statement of public necessity for the exemption.

Breadth of Exemption

Article I, s. 24(c), of the Florida Constitution requires an exemption to the public records requirements to be no broader than necessary to accomplish the stated purpose of the law. The purpose of the exemption created by the bill is articulated in the statement of public necessity:

The Legislature recognizes that the regular and unregulated release of law enforcement geolocation information can pose a danger to officers while on patrol, can potentially result in the exposure of law enforcement officers' residences, can release otherwise exempt surveillance and investigative techniques, and can inadvertently disclose information about private residents which would otherwise be exempt.

The exemption does not appear to be broader than necessary to accomplish the purpose of the law. The bill defines "law enforcement geolocation information" and also specifies records to which the exemption does not apply.

C. Trust Funds Restrictions:

None.

D. State Tax or Fee Increases:

None.

E. Other Constitutional Issues:

None identified.

V. Fiscal Impact Statement:**A. Tax/Fee Issues:**

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends section 119.071 of the Florida Statutes.

IX. Additional Information:

A. Committee Substitute – Statement of Changes:

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.

By Senator Hooper

16-00985A-22

20221046__

A bill to be entitled

An act relating to public records; amending s. 119.071, F.S.; defining the term "law enforcement geolocation information"; providing an exemption from public records requirements for law enforcement geolocation information held by a law enforcement agency; providing for retroactive application; providing applicability; providing for future legislative review and repeal of the exemption; providing a statement of public necessity; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Paragraph (e) is added to subsection (4) of section 119.071, Florida Statutes, to read:

119.071 General exemptions from inspection or copying of public records.—

(4) AGENCY PERSONNEL INFORMATION.—

(e)1. As used in this paragraph, the term "law enforcement geolocation information" means information collected using a global positioning system or another mapping, locational, or directional information system that allows tracking of the location or movement of a law enforcement officer or a law enforcement vehicle.

2. Law enforcement geolocation information held by a law enforcement agency is exempt from s. 119.07(1) and s. 24(a), Art. I of the State Constitution. This exemption applies to such information held by an agency before, on, or after the effective

Page 1 of 2

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16-00985A-22

20221046__

date of the exemption. This exemption does not apply to uniform traffic citations, crash reports, homicide reports, arrest reports, incident reports, or any other official reports issued by an agency which contain law enforcement geolocation information.

3. This paragraph is subject to the Open Government Sunset Review Act in accordance with s. 119.15 and shall stand repealed on October 2, 2027, unless reviewed and saved from repeal through reenactment by the Legislature.

Section 2. The Legislature finds that it is a public necessity that geolocation information of law enforcement officers and law enforcement vehicles be made exempt from s. 119.07(1), Florida Statutes, and s. 24(a), Article I of the State Constitution so that the safety of this state's law enforcement officers and the privacy of this state's residents may be reasonably assured. The Legislature recognizes that the regular and unregulated release of law enforcement geolocation information can pose a danger to officers while on patrol, can potentially result in the exposure of law enforcement officers' residences, can release otherwise exempt surveillance and investigative techniques, and can inadvertently disclose information about private residents which would otherwise be exempt. Therefore, the Legislature finds that it is a public necessity that law enforcement geolocation information be made exempt from public record requirements and that such exemption be applied retroactively.

Section 3. This act shall take effect July 1, 2022.

Page 2 of 2

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The Florida Senate

Committee Agenda Request

To: Senator Jason Pizzo, Chair
Committee on Criminal Justice

Subject: Committee Agenda Request

Date: December 13, 2021

I respectfully request that **Senate Bill #1046**, relating to Public Records/Law Enforcement Geolocation Information, be placed on the:

- committee agenda at your earliest possible convenience.
- next committee agenda.

A handwritten signature in black ink, appearing to read "Ed Hooper", written over a horizontal line.

Senator Ed Hooper
Florida Senate, District 16

The Florida Senate

APPEARANCE RECORD

SB 1046

1/25/2022

Meeting Date

Bill Number or Topic

Deliver both copies of this form to Senate professional staff conducting the meeting

Criminal Justice

Committee

Amendment Barcode (if applicable)

Name GARY BRADFORD

Phone 800-733-3722

Address 300 E. Broadway St

Email GBRADFORD1958@yahoo.com

Street

Tallahassee FL 32302

City

State

Zip

Speaking: For Against Information OR Waive Speaking: In Support Against

PLEASE CHECK ONE OF THE FOLLOWING:

I am appearing without compensation or sponsorship.

I am a registered lobbyist, representing:

FL-PBA

I am not a lobbyist, but received something of value for my appearance (travel, meals, lodging, etc.), sponsored by:

While it is a tradition to encourage public testimony, time may not permit all persons wishing to speak to be heard at this hearing. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard. If you have questions about registering to lobby please see Fla. Stat. §11.045 and Joint Rule 1. [2020-2022 Joint Rules.pdf \(flsenate.gov\)](#)

This form is part of the public record for this meeting.

S-001 (08/10/2021)

January 25, 2022

Meeting Date

Senate Criminal Justice

Committee

Name Jennifer Cook Pritt

Address 2636 Mitcham Drive

Street

Tallahassee

City

FL

State

32308

Zip

The Florida Senate

APPEARANCE RECORD

Deliver both copies of this form to
Senate professional staff conducting the meeting

SB 1046

Bill Number or Topic

Amendment Barcode (if applicable)

Phone 850-219-3631

Email jpritt@fpca.com

Reset Form

Speaking: For Against Information **OR** Waive Speaking: In Support Against

PLEASE CHECK ONE OF THE FOLLOWING:

I am appearing without compensation or sponsorship.

I am a registered lobbyist, representing:

Florida Police Chiefs Association

I am not a lobbyist, but received something of value for my appearance (travel, meals, lodging, etc.), sponsored by:

While it is a tradition to encourage public testimony, time may not permit all persons wishing to speak to be heard at this hearing. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard. If you have questions about registering to lobby please see Fla. Stat. §11.045 and Joint Rule 1. [2020-2022 Joint Rules.pdf \(flsenate.gov\)](#)

This form is part of the public record for this meeting.

S-001 (08/10/2021)

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Committee on Criminal Justice

BILL: SB 1200

INTRODUCER: Senator Bean

SUBJECT: Wrongful Convictions

DATE: January 24, 2022

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Cellon	Jones	CJ	Favorable
2.			JU	
3.			RC	

I. Summary:

SB 1200 creates a statewide mechanism and standards to enable a prosecuting attorney to bring a motion before the court where a person's conviction occurred to vacate or set aside that judgment. The motion may be brought at any time. The prosecutor must have evidence or information that the convicted person is innocent.

The bill provides time-frames for a hearing on the matter, for counsel to be appointed for the convicted person if needed, for a continuance if necessary for the defense attorney, and for the process to be followed if the motion is denied.

The prosecutor shall notify the victim or the victim's family of all court dates, who each have the right to be heard at a hearing to address the motion filed.

The bill becomes effective July 1, 2022.

II. Present Situation:

Background

Conviction Integrity Review (CIR) units are divisions of prosecutorial offices that work to prevent, identify, and correct false convictions.¹ There were 74 CIR units in the United States in 2020.² One hundred twenty-nine exonerations took place in 2020, and CIR units throughout the country helped secure 61 of those exonerations.³ As of 2021, Florida had a total of 78

¹ The National Registry of Exonerations, 2020 Annual Report, March 30, 2021, page 2; available at <https://www.law.umich.edu/special/exoneration/Documents/2021AnnualReport.pdf> (last visited January 14, 2021).

² *Id.*

³ *Id.*

exonerations, including eleven defendants who had been sentenced to death.⁴ To date, Florida CIR units spearheaded the investigations and worked to get the judgments and sentences vacated in seven cases of wrongful conviction.

Currently, five state attorney's offices in Florida have established CIR⁵ units within their offices. These offices are located in the:

- Fourth Circuit, covering Duval, Clay, and Nassau Counties;
- Ninth Circuit, covering Orange and Osceola Counties;
- Thirteenth Circuit, covering Hillsborough County;
- Fifteenth Circuit, covering Palm Beach County; and
- Seventeenth Circuit, covering Broward County.⁶

All five of the CIR units have essentially the same procedures in place that includes criteria a person convicted of a felony must meet to warrant more than an initial screening. The CIR units require that a convicted person present a plausible claim of innocence, explained in the application (or petition) for the CIR unit's help. The claim must be capable of being either substantiated by credible, factual information/evidence not previously considered by the original fact finder, jury, or judge.⁷

Not all cases are accepted for a review by the CIR unit. For example, if litigation in the case is still pending, the CIR unit will not accept the case. If a CIR unit accepts a case, it conducts a thorough investigation of the case that led to the person's conviction, and the claim of innocence. Some of the units report that they rely upon an independent review panel of legal experts to work with the units to review and evaluate the cases under investigation.⁸

CIR UNIT Procedural Hurdles

The Florida Rules of Criminal Procedure do not currently provide a mechanism by which the CIR units have the ability to approach the court directly with the CIR units' evidence that a convicted person is innocent. Therefore, but for engagement with a defense attorney by the CIR units, and the willingness by the courts to entertain a defense motion even though it might be

⁴ The National Registry of Exonerations, available at <https://www.law.umich.edu/special/exoneration/Pages/detailist.aspx?View={FAF6EDDB-5A68-4F8F-8A52-2C61F5BF9EA7}&FilterField1=ST&FilterValue1=FL> (last visited January 14, 2022).

⁵ Sometimes referred to as Conviction Review Units (CRUs).

⁶ Office of the State Attorney for the Fourth Judicial Circuit, *Conviction Integrity Review*, available at <https://www.sao4th.com/about/programs-and-initiatives/conviction-integrity-review/>; Office of the State Attorney for the Ninth Judicial Circuit, *Conviction Integrity Policy*, available at <https://www.sao9.net/conviction-integrity.html>; Section 119.011 Office of the State Attorney for the Thirteenth Circuit, *Conviction Review Unit*, available at <https://www.sao13th.com/conviction-review-unit-cru/>; Office of the State Attorney for the Fifteenth Circuit, *Conviction Review Unit*, available at <http://www.sa15.state.fl.us/stateattorney/OurOffice/divisions/indexcru.htm>; Office of the State Attorney for the Seventeenth Circuit, *Conviction Review Unit*, available at <https://browardsao.com/conviction-review-unit/> (all sites last visited January 14, 2022).

⁷ See Office of the State Attorney for the Fourth Judicial Circuit, *Conviction Integrity Review*, available at <https://www.sao4th.com/about/programs-and-initiatives/conviction-integrity-review/> (last visited January 18, 2022).

⁸ See Office of the State Attorney for the Seventeenth Judicial Circuit, *Conviction Review Unit*, available at <https://browardsao.com/conviction-review-unit/> (last visited January 18, 2022).

somewhat unconventional or technically untimely, the wrongfully convicted people helped by the CIR units in Florida might still be in prison.⁹

In at least one instance, the Hillsborough CIR unit was placed in the position of being unable to completely acquiesce to a defense motion because the motion alleged matters the State Attorney was unwilling to adopt.¹⁰ This situation illustrates one reason the CIR units are seeking procedural autonomy. Review of the following cases further indicates the piecemeal method by which the cases are currently resolved.

The Work of the CIR Units in Florida

The first CIR unit was created in Florida in the Fourth Circuit. The work of the CIR unit resulted in the 2019 exoneration of two men, Clifford Williams and Nathan Myers, who were sentenced to life in prison for the 1976 Jacksonville murder of Jeanette Williams.¹¹ The CIR unit's investigation confirmed multiple alibi witnesses for the whereabouts of the two men at the time of the murder, and who further confirmed that another man, Nathaniel Lawson, admitted to committing the murder. The CIR unit's investigation was able to independently confirm Lawson's presence at the scene at the time of the shooting.¹² After a hearing on the matter, Mr. Williams' and Mr. Myers' convictions and sentences were vacated by the 4th Circuit Court on March 28, 2019. They had served 42 years and 11 months in prison.¹³

Subsequently, the CIR units have identified, investigated, and cooperated with defense attorneys to clear cases of wrongful convictions in the 4th, 9th, 13th and 17th circuits. These cases are:

- *Robert DuBoise, 2020, 13th (Hillsborough)* – Robert DuBoise was cleared of a rape and murder conviction after the 13th Circuit CIR unit found 3 slides containing DNA from the rape kit performed by the medical examiner during the autopsy. The slides had been in the medical examiner's office since 1983. Upon analysis, DuBoise was cleared as a contributor and the DNA lab results yielded a presumptive "hit" on another individual.¹⁴ Attorneys from the Innocence Project filed the motion in court which resulted in DuBoise's conviction being vacated by the judge and the state attorney dismissing all charges. DuBoise had been in prison for 37 years.¹⁵ In this case the State Attorney was unable to agree to all of the issues

⁹ Professional staff of the Senate Criminal Justice Committee consultations with Shelley Thibodeau, Director, Conviction Integrity Review Division State Attorney's Office 4th Circuit, and Arielle Demby Berger, ASA in Charge of the Conviction Review Unit, Office of the State Attorney, 17th Judicial Circuit.

¹⁰ The National Registry of Exonerations, available at <https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=5807> (last visited January 16, 2022).

¹¹ State Attorney's Office of the Fourth Judicial Circuit of Florida, *Conviction Integrity Investigation, State of Florida v. Hubert Nathan Meyers, State of Florida v. Clifford Williams, Jr.*, March 28, 2019, p. 42, available at https://secureservercdn.net/198.71.233.254/9c2.a8b.myftpupload.com/wp-content/uploads/2019/03/CIR_Investigative_Report_FINAL_3.28.19_R.pdf (last visited January 14, 2022).

¹² *Id.*, at p. 4.

¹³ The Florida Senate, *Senate Bill 28 Special Master's Final Report*, January 23, 2020, at p. 1-2, available at <http://www.flsenate.gov/Session/Bill/2020/28/Analyses/2020s00028.sm.PDF> (last visited January 14, 2022).

¹⁴ He has not been named, but the State Attorney's Office said the man posed no threat to the public, suggesting he is already in custody.

¹⁵ Robert DuBoise, The National Registry of Exonerations, available at <https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=5807> (last visited January 16, 2022).

raised in the Motion by the Innocence Project, however the state “largely” agreed to the Motion in the state’s response.¹⁶

- *Dwayne Brown, 2020, 9th (Orange)* – Dwayne Brown’s is the first case the CIR unit joined the defense attorney in seeking to have a conviction vacated. Brown had entered a plea and was convicted in a felony cannabis case. The CIR unit determined, after “exhaustive research,” that the case “should never have been prosecuted” and that Brown had been “arrested for the wrong crime, pled to a different wrong crime, and was convicted of another wrong crime.”¹⁷
- *Leonard Cure, 2020, 17th (Broward)* – In this robbery case from 2004, the CIR unit found evidence of witness misidentification and trial defense weaknesses. After a full investigation by the CIR unit, upon review the Independent Review Panel unanimously agreed that “a complete review of the evidence presented at trial and in discovery, as well as further investigation of that evidence demonstrates that the case against Mr. Cure gives rise to a reasonable doubt as to his culpability, and that he is most likely innocent.”¹⁸ The attorney from the Innocence Project filed the motion and agreed upon the order with the court, while the state attorney’s office agreed to drop charges against Mr. Cure after the court signed the Order vacating Mr. Cure’s conviction.¹⁹
- *Tony Hopps, 2021, 13th (Hillsborough)* – After the CIR unit accepted his case for investigation and completed the investigation, the CIR unit issued its report and suggested the Innocence Project lawyers file a Rule 3.850 Motion based on newly discovered evidence. The CIR unit had not found clear and convincing evidence of Mr. Hopps’s innocence, but the state attorney’s office had determined that it could no longer stand behind the conviction.²⁰ The CIR unit found that “there was evidence not submitted at trial that calls into question the conviction. This includes issues with the time line of the robbery, the photo pack sent to the victims, and alibi witnesses that were not called at trial.”²¹ The court granted the 3.850 Motion filed by the Innocence Project, vacating Mr. Hopps’s conviction on August 23, 2021, after which the state attorney’s office dismissed the charges. Mr. Hopps spent 31 years in prison.²²
- *Dustin Duty, 2021, 4th (Duval)* – The Innocence Project of Florida and the [Miami Law Innocence Clinic](#) represented Mr. Duty in the effort to have his robbery conviction reversed. The case was ultimately reversed based on ineffective assistance of counsel, granting Mr.

¹⁶ *Id.*

¹⁷ “Man’s deportation halted after Orange-Osceola state attorney helps toss ‘illegal conviction’”, Monivette Cordero, *Orlando Sentinel*, March 5, 2020; available at

<https://www.bing.com/search?q=Man%27s+deportation+halted+March+05%2C+2020+Orlando+Sentinel&cvid=662a393816f34a5e86bcf955308e147e&aqs=edge..69i57.58524j0j4&FORM=ANAB01&PC=U531#:~:text=Orange%20...%20%2D%20Orlando%20Sentinel-.https%3A/www.orlandosentinel.com/news/crime/os%2Dne....-Mar%2006%2C%202020> (last visited January 16, 2022).

¹⁸ *State v. Cure*, Agreed Order Vacating Defendant’s Judgment and Sentence, 17th Judicial Circuit Court, Case No. 03-019405CF10A, December 11, 2020; available at [Leonard Cure Agreed Order \(filesusr.com\)](#) (last visited January 16, 2021).

¹⁹ The National Registry of Exonerations, available at <https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=5882> (last visited January 16, 2022).

²⁰ “Imprisoned 31 years, man to go free after doubts emerge in Florida robbery,” Dan Sullivan, *Tampa Bay Times*, August 23, 2021; available at <https://www.msn.com/en-us/news/crime/imprisoned-31-years-man-to-go-free-after-doubts-emerge-in-florida-robbery/ar-AAANetSC> (last visited January 16, 2022).

²¹ Tony Hopps CRU Report, 13th Judicial Circuit, July 2021; available at [b3f754_71500da9e78548568467612731c01c63.pdf \(filesusr.com\)](https://www.filesusr.com/attachment_data/file/337754/71500da9e78548568467612731c01c63.pdf) (last visited January 16, 2022).

²² The National Registry of Exonerations, Tony Hopps, available at <https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=6028> (last visited January 16, 2022).

Duty a new trial. However, the Fourth Circuit's CIR unit stepped in to dismiss the charges against Mr. Duty. He had served nearly 8 years of a twenty year sentence.²³

III. Effect of Proposed Changes:

The bill creates s. 925.13, F.S., which provides a statewide mechanism for a prosecuting attorney from the original prosecuting attorney's office to file a motion to vacate or set aside a judgment in particular cases handled by that office, if the attorney has evidence or information that the convicted person is innocent. The motion may be filed at any time with the court in which the person was convicted. That court has the jurisdiction and authority to hear, consider, and decide the matter.

After the motion is filed, the court must schedule a hearing on the matter within 90 days. If the court deems it necessary to have an evidentiary hearing, the court must appoint counsel to represent the defendant, unless he or she already has counsel. Counsel for the defendant may request a reasonable continuance beyond the 90-day time frame of the hearing to prepare. The state and the defense may present evidence at the hearing.

The court must issue written findings of fact that resolve all claims raised in the motion. The court must grant the motion of the prosecuting attorney to vacate or set aside the judgment if the court finds there is clear and convincing evidence of actual innocence.

If the motion of the prosecuting attorney to vacate or set aside the judgment in the case is denied, it shall be considered a final order. As such, the order may be appealed by either party. There must be a statement in the order denying relief that an appeal may be taken within 30 days after the order is entered. Any party may file a motion for rehearing on the matter within 15 days after service of the order denying relief. The time for filing an appeal is tolled until an order on the motion for rehearing is entered.

The prosecuting attorney shall notify the victim or the victim's family of all court dates, who each have the right to be heard at a hearing to address the motion filed.

The bill becomes effective on July 1, 2022.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

²³ Dustin Duty, National Registry of Exonerations, available at <https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=6055> (last visited January 19, 2022).

C. Trust Funds Restrictions:

None.

D. State Tax or Fee Increases:

None.

E. Other Constitutional Issues:

None identified.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill creates section 925.13 of the Florida Statutes.

IX. Additional Information:

A. Committee Substitute – Statement of Changes:

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.

By Senator Bean

4-00905A-22

20221200__

A bill to be entitled

An act relating to wrongful convictions; creating s. 925.13, F.S.; authorizing certain prosecuting attorneys to file a motion to vacate or set aside a judgment if he or she has evidence or information that a convicted person is innocent; requiring the court to schedule a hearing within a specified timeframe upon the filing of a motion to vacate or set aside a judgment; requiring the court to appoint counsel for such convicted person if he or she does not otherwise have legal counsel and if an evidentiary hearing is required; providing hearing and court procedures; authorizing the appeal of a denial of the prosecuting attorney's motion to vacate or set aside a judgment by any party; requiring an order denying relief to include a certain statement; authorizing any party to file a motion for rehearing within a specified timeframe; providing for tolling of a certain time period; requiring the prosecuting attorney to notify the victim or the victim's family of all court dates; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Section 925.13, Florida Statutes, is created to read:

925.13 Motion to vacate based upon evidence of innocence.-

(1) A prosecuting attorney from the prosecuting agency or office that sought the original conviction may file a motion to

Page 1 of 3

CODING: Words ~~stricken~~ are deletions; words underlined are additions.

4-00905A-22

20221200__

vacate or set aside the judgment at any time if he or she has evidence or information that the convicted person is innocent. The court in which the person was convicted shall have jurisdiction and authority to hear, consider, and decide the motion.

(2) Upon the filing of a motion to vacate or set aside the judgment, the court shall schedule a hearing within 90 days. If an evidentiary hearing is required, the court must appoint an attorney to represent the defendant if he or she does not otherwise have legal counsel. Defense counsel may seek a reasonable continuance beyond the 90 days if necessary to adequately prepare for the hearing. The state and defense may present evidence at the hearing. The court shall issue written findings of fact that resolve all claims raised in the motion. The court must grant the motion of the prosecuting attorney to vacate or set aside the judgment if the court finds there is clear and convincing evidence of actual innocence.

(3) (a) The denial of the prosecuting attorney's motion to vacate or set aside the judgment is a final order, and an appeal may be taken to the appropriate appellate court by any party.

(b) An order denying relief must include a statement that an appeal may be taken within 30 days after the order denying relief is entered.

(c) Any party may file a motion for rehearing within 15 days after service of the order denying relief. The time for filing an appeal is tolled until an order on the motion for rehearing has been entered.

(4) The prosecuting attorney shall notify the victim or the victim's family of all court dates, who each have the right to

Page 2 of 3

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59 be heard at a hearing to address the motion filed.

60 Section 2. This act shall take effect July 1, 2022.



The Florida Senate

Committee Agenda Request

To: Senator Jason Pizzo, Chair
Committee on Criminal Justice

Subject: Committee Agenda Request

Date: January 5, 2022

I respectfully request that **Senate Bill #1200**, relating to Wrongful Convictions, be placed on the:

- committee agenda at your earliest possible convenience.
- next committee agenda.

A handwritten signature in blue ink that reads "Aaron Bean".

Senator Aaron Bean
Florida Senate, District 4

The Florida Senate

APPEARANCE RECORD

Deliver both copies of this form to Senate professional staff conducting the meeting

1/25/2022

Meeting Date

Crim Justice

Committee

1200

Bill Number or Topic

Amendment Barcode (if applicable)

Name

Jorge Chamizo

Phone

(850) 681-0024

Address

108 South Monroe Street

Email

jorge@flapartners.com

Street

Tallahassee FL 32301

City

State

Zip

Speaking:

For

Against

Information

OR

Waive Speaking:

In Support

Against

PLEASE CHECK ONE OF THE FOLLOWING:

I am appearing without compensation or sponsorship.

I am a registered lobbyist, representing:

I am not a lobbyist, but received something of value for my appearance (travel, meals, lodging, etc.), sponsored by:

Florida Assoc of Criminal Defense Lawyers

While it is a tradition to encourage public testimony, time may not permit all persons wishing to speak to be heard at this hearing. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard. If you have questions about registering to lobby please see Fla. Stat. §11.045 and Joint Rule 1. [2020-2022 Joint Rules.pdf \(flsenate.gov\)](#)

The Florida Senate

APPEARANCE RECORD

1200

1/25/22

Meeting Date

Bill Number or Topic

Criminal Justice

Committee

Deliver both copies of this form to Senate professional staff conducting the meeting

Amendment Barcode (if applicable)

Name Phillip Sulomman

Phone

Address

Email

Street

City

State

Zip

Speaking: For Against Information

OR

Waive Speaking: In Support Against

PLEASE CHECK ONE OF THE FOLLOWING:

I am appearing without compensation or sponsorship.

I am a registered lobbyist, representing:

Americans for Prosperity

I am not a lobbyist, but received something of value for my appearance (travel, meals, lodging, etc.), sponsored by:

While it is a tradition to encourage public testimony, time may not permit all persons wishing to speak to be heard at this hearing. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard. If you have questions about registering to lobby please see Fla. Stat. §11.045 and Joint Rule 1. [2020-2022 Joint Rules.pdf \(flsenate.gov\)](#)

This form is part of the public record for this meeting.

S-001 (08/10/2021)

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Committee on Criminal Justice

BILL: SB 1204

INTRODUCER: Senator Broxson

SUBJECT: Public Records/Information or Records/Executions

DATE: January 24, 2022

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Siples	Jones	CJ	Favorable
2.	_____	_____	JU	_____
3.	_____	_____	RC	_____

I. Summary:

SB 1204 creates a public records exemption of certain persons or entities involved in executions. Specifically, the bill makes confidential and exempt information or records that identify or could reasonably lead to the identification of any person or entity that participates in, has participated in, or will participate in an execution, including those who administer, compound, dispense, distribute, maintain, manufacture, order, prepare, prescribe, provide, purchase, or supply drugs, chemicals, supplies, or equipment needed to conduct an execution.

The bill makes such exemption applicable to information and records held by the Department of Corrections before, on, or after the effective date of the bill.

This bill is subject to the Open Government Sunset Review Act and stands repealed on October 2, 2027, unless reviewed and saved from repeal through reenactment by the Legislature.

Because this bill creates a public records exemption, it will require a two-thirds vote of each house in order to pass.

This bill takes effect upon becoming a law.

II. Present Situation:

Access to Public Records - Generally

The Florida Constitution provides that the public has the right to inspect or copy records made or received in connection with official governmental business.¹ The right to inspect or copy applies to the official business of any public body, officer, or employee of the state, including all three

¹ FLA. CONST. art. I, s. 24(a).

branches of state government, local governmental entities, and any person acting on behalf of the government.²

Additional requirements and exemptions related to public records are found in various statutes and rules, depending on the branch of government involved. For instance, s. 11.0431, F.S., provides public access requirements for legislative records. Relevant exemptions are codified in s. 11.0431(2)-(3), F.S., and adopted in the rules of each house of the Legislature.³ Florida Rule of Judicial Administration 2.420 governs public access to judicial branch records.⁴ Lastly, ch. 119, F.S., known as the Public Records Act, provides requirements for public records held by executive agencies.

Executive Agency Records – The Public Records Act

The Public Records Act provides that all state, county and municipal records are open for personal inspection and copying by any person, and that providing access to public records is a duty of each agency.⁵

Section 119.011(12), F.S., defines “public records” to include:

All documents, papers, letters, maps, books, tapes, photographs, films, sound recordings, data processing software, or other material, regardless of the physical form, characteristics, or means of transmission, made or received pursuant to law or ordinance or in connections with the transaction of official business by any agency.

The Florida Supreme Court has interpreted this definition to encompass all materials made or received by an agency in connection with official business that are used to “perpetuate, communicate, or formalize knowledge of some type.”⁶

The Florida Statutes specify conditions under which public access to public records must be provided. The Public Records Act guarantees every person’s right to inspect and copy any public record at any reasonable time, under reasonable conditions, and under supervision by the custodian of the public record.⁷ A violation of the Public Records Act may result in civil or criminal liability.⁸

² *Id.*

³ See Rule 1.48, *Rules and Manual of the Florida Senate*, (2018-2020) and Rule 14.1, *Rules of the Florida House of Representatives*, Edition 2, (2018-2020).

⁴ *State v. Wooten*, 260 So. 3d 1060 (Fla. 4th DCA 2018).

⁵ Section 119.01(1), F.S. Section 119.011(2), F.S., defines “agency” as “any state, county, district, authority, or municipal officer, department, division, board, bureau, commission, or other separate unit of government created or established by law including, for the purposes of this chapter, the Commission on Ethics, the Public Service Commission, and the Office of Public Counsel, and any other public or private agency, person, partnership, corporation, or business entity acting on behalf of any public agency.”

⁶ *Shevin v. Byron, Harless, Schaffer, Reid and Assoc., Inc.*, 379 So. 2d 633, 640 (Fla. 1980).

⁷ Section 119.07(1)(a), F.S.

⁸ Section 119.10, F.S. Public records laws are found throughout the Florida Statutes, as are the penalties for violating those laws.

The Legislature may exempt public records from public access requirements by passing a general law by a two-thirds vote of both the House and the Senate.⁹ The exemption must state with specificity the public necessity justifying the exemption and must be no broader than necessary to accomplish the stated purpose of the exemption.¹⁰

General exemptions from the public records requirements are contained in the Public Records Act.¹¹ Specific exemptions often are placed in the substantive statutes relating to a particular agency or program.¹²

When creating a public records exemption, the Legislature may provide that a record is “exempt” or “confidential and exempt.” There is a difference between records the Legislature has determined to be exempt from the Public Records Act and those which the Legislature has determined to be exempt from the Public Records Act *and confidential*.¹³ Records designated as “confidential and exempt” are not subject to inspection by the public and may only be released under the circumstances defined by statute.¹⁴ Records designated as “exempt” may be released at the discretion of the records custodian under certain circumstances.¹⁵

Open Government Sunset Review Act

The provisions of s. 119.15, F.S., known as the Open Government Sunset Review Act¹⁶ (the Act), prescribe a legislative review process for newly created or substantially amended¹⁷ public records or open meetings exemptions, with specified exceptions.¹⁸ The Act requires the repeal of such exemption on October 2nd of the fifth year after creation or substantial amendment, unless the Legislature reenacts the exemption.¹⁹

The Act provides that a public records or open meetings exemption may be created or maintained only if it serves an identifiable public purpose and is no broader than is necessary.²⁰ An exemption serves an identifiable purpose if it meets one of the following purposes *and* the

⁹ FLA. CONST. art. I, s. 24(c).

¹⁰ *Id. See, e.g., Halifax Hosp. Medical Center v. News-Journal Corp.*, 724 So. 2d 567 (Fla. 1999) (holding that a public meetings exemption was unconstitutional because the statement of public necessity did not define important terms and did not justify the breadth of the exemption); *Baker County Press, Inc. v. Baker County Medical Services, Inc.*, 870 So. 2d 189 (Fla. 1st DCA 2004) (holding that a statutory provision written to bring another party within an existing public records exemption is unconstitutional without a public necessity statement).

¹¹ *See, e.g., s. 119.071(1)(a), F.S.* (exempting from public disclosure examination questions and answer sheets of examinations administered by a governmental agency for the purpose of licensure).

¹² *See, e.g., s. 213.053(2)(a), F.S.* (exempting from public disclosure information contained in tax returns received by the Department of Revenue).

¹³ *WFTV, Inc. v. The Sch. Bd. of Seminole County*, 874 So. 2d 48, 53 (Fla. 5th DCA 2004).

¹⁴ *Id.*

¹⁵ *Williams v. City of Minneola*, 575 So. 2d 683 (Fla. 5th DCA 1991).

¹⁶ Section 119.15, F.S.

¹⁷ An exemption is considered to be substantially amended if it is expanded to include more records or information or to include meetings as well as records. Section 119.15(4)(b), F.S.

¹⁸ Section 119.15(2)(a) and (b), F.S., provides that exemptions required by federal law or applicable solely to the Legislature or the State Court System are not subject to the Open Government Sunset Review Act.

¹⁹ Section 119.15(3), F.S.

²⁰ Section 119.15(6)(b), F.S.

Legislature finds that the purpose of the exemption outweighs open government policy and cannot be accomplished without the exemption:

- It allows the state or its political subdivisions to effectively and efficiently administer a governmental program, and administration would be significantly impaired without the exemption;²¹
- It protects sensitive, personal information, the release of which would be defamatory, cause unwarranted damage to the good name or reputation of the individual, or would jeopardize the individual's safety. If this public purpose is cited as the basis of an exemption, however, only personal identifying information is exempt;²² or
- It protects information of a confidential nature concerning entities, such as trade or business secrets.²³

The Act also requires specified questions to be considered during the review process.²⁴ In examining an exemption, the Act directs the Legislature to question the purpose and necessity of reenacting the exemption.

If the exemption is continued and expanded, then a public necessity statement and a two-thirds vote for passage are required.²⁵ If the exemption is continued without substantive changes or if the exemption is continued and narrowed, then a public necessity statement and a two-thirds vote for passage are *not* required. If the Legislature allows an exemption to expire, the previously exempt records will remain exempt unless otherwise provided by law.²⁶

Death Penalty

Florida is one of 27 states in which the death penalty is authorized.²⁷ Chapter 922, F.S., charges the Department of Corrections (DOC) with the responsibility of carrying out the executions of those sentenced to death. As of January 18, 2022, there are 321 prisoners on Florida's death row.²⁸

²¹ Section 119.15(6)(b)1., F.S.

²² Section 119.15(6)(b)2., F.S.

²³ Section 119.15(6)(b)3., F.S.

²⁴ Section 119.15(6)(a), F.S. The specified questions are:

- What specific records or meetings are affected by the exemption?
- Whom does the exemption uniquely affect, as opposed to the general public?
- What is the identifiable public purpose or goal of the exemption?
- Can the information contained in the records or discussed in the meeting be readily obtained by alternative means? If so, how?
- Is the record or meeting protected by another exemption?
- Are there multiple exemptions for the same type of record or meeting that it would be appropriate to merge?

²⁵ See generally s. 119.15, F.S.

²⁶ Section 119.15(7), F.S.

²⁷ Death Penalty Information Center, *Facts about the Death Penalty*, (updated Jan. 3, 2022), available at <https://documents.deathpenaltyinfo.org/pdf/FactSheet.pdf> (last visited January 18, 2022). The other states that authorize the death penalty are Alabama, Arizona, Arkansas, California, Georgia, Idaho, Indiana, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, Nevada, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, and Wyoming. The U.S. Department of Justice and U.S. military are also authorized to impose the death penalty.

²⁸ Department of Corrections, *Death Row Roster*, available at <http://www.dc.state.fl.us/OffenderSearch/deathrowroster.aspx> (last visited January 18, 2022).

Section 922.105(1), F.S., requires that all death sentences be executed by lethal injection, unless the person sentenced to death affirmatively requests to be executed by electrocution. However, if electrocution or lethal injection is held to be unconstitutional by the Florida Supreme Court or a U.S. Court of Appeals that has jurisdiction over Florida, any person sentenced to death must be executed by any constitutional method of execution.²⁹

Confidentiality of Information

Current law makes information which identifies an executioner, or any person prescribing, preparing, compounding, dispensing, or administering a lethal injection confidential and exempt from public disclosure.³⁰ However, it does not exclude information regarding the other components of the supply chain for obtaining the necessary drugs, chemicals, supplies, or equipment to conduct an execution, such as the manufacturer, distributor, or supplier. Historically, once the DOC's source of drugs used for carrying out executions is publicly known, it is no longer able to procure drugs from that source.³¹ In such cases, the DOC may not be able to obtain the necessary supplies to carry out an execution as required under state law.

III. Effect of Proposed Changes:

The bill creates a public records exemption of certain persons or entities involved in executions. Specifically, the bill makes confidential and exempt information or records that identify or could reasonably lead to the identification of any person or entity that participates in, has participated in, or will participate in an execution, including those who administer, compound, dispense, distribute, maintain, manufacture, order, prepare, prescribe, provide, purchase, or supply drugs, chemicals, supplies, or equipment needed to conduct an execution.

The bill makes the exemption applicable to any such information held by the DOC before, on, or after the effective date of the bill.

This bill is subject to the Open Government Sunset Review Act and stands repealed on October 27, 2021, unless reviewed and saved from repeal through reenactment by the Legislature.

The bill provides a public necessity statement as required by Article I, s. 24(c) of the State Constitution. The public necessity statement provides that:

The Legislature finds that it is a public necessity that information or records that identify or could reasonably lead to the identification of those persons or entities that participate in an execution be made confidential and exempt from s. 119.07(1), Florida Statutes, and s. 24(a), Article I of the State Constitution. The disclosure of information or records that identify or that could reasonably lead to the identification of those persons

²⁹ Section 922.105(3), F.S.

³⁰ Section 945.10(1)(g), F.S.

³¹ Department of Corrections, *2022 Agency Legislative Bill Analysis for SB 1204*, (Dec. 14, 2021) (on file with the Senate Committee on Criminal Justice).

or entities that participate in an execution could jeopardize the safety of such persons or entities by exposing them to potential harassment, intimidation, or harm and could also thwart the ability of the Department of Corrections to obtain the necessary personnel, drugs, chemicals, supplies, or equipment needed to carry out executions. Therefore, the Legislature finds that it is a public necessity that this information be kept confidential and exempt from public disclosure.

The bill is effective upon becoming a law.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

Vote Requirement

Article I, s. 24(c) of the State Constitution requires a two-thirds vote of the members present and voting for final passage of a bill creating or expanding an exemption to the public records requirements. This bill enacts a new exemption for information or records that identify or could reasonably lead to the identification of any person or entity that participates in, has participated in, or will participate in an execution; thus, the bill requires a two-thirds vote to be enacted.

Public Necessity Statement

Article I, s. 24(c) of the State Constitution requires a bill creating or expanding an exemption to the public records requirements to state with specificity the public necessity justifying the exemption. Section 2 of the bill contains a statement of public necessity for the exemption.

Breadth of Exemption

Article I, s. 24(c) of the State Constitution requires an exemption to the public records requirements to be no broader than necessary to accomplish the stated purpose of the law. The purpose of the law is to protect the identification of the persons and entities that participate in an execution. The exemption does not appear to be broader than necessary to accomplish the purpose of the law.

C. Trust Funds Restrictions:

None.

D. State Tax or Fee Increases:

None.

E. Other Constitutional Issues:

None identified.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

The bill creates a new public records exemption that is partially duplicative of the existing public record exemption in s. 945.10(g), F.S., which provides that information that identifies an executioner or any person prescribing, preparing, compounding, dispensing, or administering a lethal injection is exempt from public disclosure.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends section 945.10 of the Florida Statutes.

IX. Additional Information:

A. Committee Substitute – Statement of Changes:

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.

By Senator Broxson

1-00595A-22

20221204__

A bill to be entitled

An act relating to public records; amending s. 945.10, F.S.; providing an exemption from public records requirements for information or records that identify or could reasonably lead to the identification of any person or entity that participates in an execution; providing for retroactive application; providing for future legislative review and repeal of the exemption; providing a statement of public necessity; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Paragraph (j) is added to subsection (1) of section 945.10, Florida Statutes, to read:

945.10 Confidential information.—

(1) Except as otherwise provided by law or in this section, the following records and information held by the Department of Corrections are confidential and exempt from the provisions of s. 119.07(1) and s. 24(a), Art. I of the State Constitution:

(j)1. Information or records that identify or could reasonably lead to the identification of any person or entity that participates in, has participated in, or will participate in an execution, including persons or entities administering, compounding, dispensing, distributing, maintaining, manufacturing, ordering, preparing, prescribing, providing, purchasing, or supplying drugs, chemicals, supplies, or equipment necessary to conduct an execution in compliance with chapter 922.

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2. The exemption in subparagraph 1. applies to information and records held by the department before, on, or after the effective date of the exemption.

3. This paragraph is subject to the Open Government Sunset Review Act in accordance with s. 119.15 and shall stand repealed on October 2, 2027, unless reviewed and saved from repeal through reenactment by the Legislature.

Section 2. The Legislature finds that it is a public necessity that information or records that identify or could reasonably lead to the identification of those persons or entities that participate in an execution be made confidential and exempt from s. 119.07(1), Florida Statutes, and s. 24(a), Article I of the State Constitution. The disclosure of information or records that identify or that could reasonably lead to the identification of those persons or entities that participate in an execution could jeopardize the safety of such persons or entities by exposing them to potential harassment, intimidation, or harm and could also thwart the ability of the Department of Corrections to obtain the necessary personnel, drugs, chemicals, supplies, or equipment needed to carry out executions. Therefore, the Legislature finds that it is a public necessity that this information be kept confidential and exempt from public disclosure.

Section 3. This act shall take effect upon becoming a law.

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CODING: Words ~~stricken~~ are deletions; words underlined are additions.



2022 AGENCY LEGISLATIVE BILL ANALYSIS

AGENCY: Department of Corrections

<u>BILL INFORMATION</u>	
BILL NUMBER:	SB 1204
BILL TITLE:	Public Records/Information or Records/Executions
BILL SPONSOR:	Senator Broxson
EFFECTIVE DATE:	<u>Upon becoming a law</u>

<u>COMMITTEES OF REFERENCE</u>
1)
2)
3)
4)
5)

<u>CURRENT COMMITTEE</u>

<u>SIMILAR BILLS</u>	
BILL NUMBER:	
SPONSOR:	

<u>PREVIOUS LEGISLATION</u>	
BILL NUMBER:	
SPONSOR:	
YEAR:	
LAST ACTION:	

<u>IDENTICAL BILLS</u>	
BILL NUMBER:	HB 873
SPONSOR:	Representative Maney

<u>Is this bill part of an agency package?</u>
Yes

<u>BILL ANALYSIS INFORMATION</u>	
DATE OF ANALYSIS:	December 14, 2021
LEAD AGENCY ANALYST:	Lance Neff, Philip Fowler
ADDITIONAL ANALYST(S):	
LEGAL ANALYST:	Ryan Orbe and Kathryn Horst
FISCAL ANALYST:	Sharon McNeal

POLICY ANALYSIS

1. EXECUTIVE SUMMARY

The bill creates s. 945.10(1)(j), F.S., to bolster the Florida Department of Corrections’ (FDC or Department) ability to carry out its statutory duties with respect to executions. The bill ensures that information or records that identify or could reasonably lead to the identification of any person or entity that participates in an execution are provided a public records exemption to ensure the Department is able to carry out its statutory duties under Chapter 922, F.S.

2. SUBSTANTIVE BILL ANALYSIS

1. PRESENT SITUATION:

Currently, s. 945.10(1)(g), F.S., provides exemption language for the sources of the drugs the Department uses for lethal injection. FDC contends that “preparing [or] compounding...a lethal injection drug” applies to manufacturers and retailers, but the proposed amendments will clarify and solidify the exemption should FDC’s reliance upon the exemption be challenged in court under Chapter 119, Florida Statutes. The Northern District of Florida has found that “it is apparent that disclosure has the potential to thwart the government’s ability to carry out executions.” First Amendment Coalition v. Charles L. Ryan, Case No. 4:16-mc-00025-RH-CAS (N.D.F.L. Oct. 24, 2016).

Currently, under s. 922.105(1), F.S., “a death sentence shall be executed by lethal injection, unless the person sentenced to death affirmatively elects to be executed by electrocution.” While s. 922.105(3), F.S., addresses what is to be done if one method is deemed unconstitutional, Florida law does not address what is to be done if FDC does not have the means to carry out lethal injection. Historically, once FDC’s source of protocol drugs is publicly known, the Department is no longer able to purchase drugs from that source, leading to a potential inability to obtain drugs used in lethal injection and therefore an inability to carry out its statutory mandate.

2. EFFECT OF THE BILL:

Section 1 creates s. 945.10(1)(j), F.S., to enact language to clarify that the identity of individuals and entities involved in the execution process or who manufacture or sell the drugs the Department purchases for lethal injection are exempt from disclosure in response to public record requests. The bill will provide for the continuity of purchasing agreements, allowing the Department to fulfill its statutory duty of execution under Chapter 922, F.S., and specifically s. 922.11, F.S. Section 1 also specifies that the exemption applies retroactively as well as prospectively and contains a repeal of the exemption to be effective on October 2, 2027, unless the exemption is reinstated by the Legislature.

Section 2 of the bill contains a public necessity statement detailing that the information or records that identify or could reasonably lead to the identification of those persons or entities that participate in an execution be made confidential and exempt from s. 119.07(1), F.S., and s. 24(a), Article I of the State Constitution. The findings also state that disclosure of information or records that identify or that could reasonably lead to the identification of those persons or entities that participate in an execution could jeopardize the safety of such persons or entities by exposing them to potential harassment, intimidation, or harm and could also thwart the ability of the Department of Corrections to obtain the necessary personnel, drugs, chemicals, supplies, or equipment needed to carry out executions.

Section 3 of the bill provides that the act shall take effect upon becoming a law.

3. DOES THE BILL DIRECT OR ALLOW THE AGENCY/BOARD/COMMISSION/DEPARTMENT TO DEVELOP, ADOPT, OR ELIMINATE RULES, REGULATIONS, POLICIES, OR PROCEDURES? Y N

If yes, explain:	
Is the change consistent with the agency’s core mission?	Y <input type="checkbox"/> N <input type="checkbox"/>
Rule(s) impacted (provide references to F.A.C., etc.):	

4. WHAT IS THE POSITION OF AFFECTED CITIZENS OR STAKEHOLDER GROUPS?

Proponents and summary of position:	
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Opponents and summary of position:	
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5. ARE THERE ANY REPORTS OR STUDIES REQUIRED BY THIS BILL? Y N

If yes, provide a description:	
Date Due:	
Bill Section Number(s):	

6. ARE THERE ANY NEW GUBERNATORIAL APPOINTMENTS OR CHANGES TO EXISTING BOARDS, TASK FORCES, COUNCILS, COMMISSIONS, ETC. REQUIRED BY THIS BILL? Y N

Board:	
Board Purpose:	
Who Appoints:	
Changes:	
Bill Section Number(s):	

FISCAL ANALYSIS

1. DOES THE BILL HAVE A FISCAL IMPACT TO LOCAL GOVERNMENT? Y N

Revenues:	
Expenditures:	
Does the legislation increase local taxes or fees? If yes, explain.	
If yes, does the legislation provide for a local referendum or local governing body public vote prior to implementation of the tax or fee increase?	

2. DOES THE BILL HAVE A FISCAL IMPACT TO STATE GOVERNMENT? Y N

Revenues:	
Expenditures:	
Does the legislation contain a State Government appropriation?	

If yes, was this appropriated last year?	
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3. DOES THE BILL HAVE A FISCAL IMPACT TO THE PRIVATE SECTOR? Y N

Revenues:	
Expenditures:	
Other:	

4. DOES THE BILL INCREASE OR DECREASE TAXES, FEES, OR FINES? Y N

If yes, explain impact.	
Bill Section Number:	

TECHNOLOGY IMPACT

1. DOES THE BILL IMPACT THE AGENCY'S TECHNOLOGY SYSTEMS (I.E. IT SUPPORT, LICENSING SOFTWARE, DATA STORAGE, ETC.)? Y N

If yes, describe the anticipated impact to the agency including any fiscal impact.	
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FEDERAL IMPACT

1. DOES THE BILL HAVE A FEDERAL IMPACT (I.E. FEDERAL COMPLIANCE, FEDERAL FUNDING, FEDERAL AGENCY INVOLVEMENT, ETC.)? Y N

If yes, describe the anticipated impact including any fiscal impact.	
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ADDITIONAL COMMENTS

N/A

LEGAL - GENERAL COUNSEL'S OFFICE REVIEW

Issues/concerns/comments:	Enactment of the proposal will bolster FDC's ability to carry out its statutory mandates as described above.
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The Florida Senate

Committee Agenda Request

To: Senator Jason Pizzo, Chair
Committee on Criminal Justice

Subject: Committee Agenda Request

Date: January 10, 2022

I respectfully request that **Senate Bill #1204**, relating to Public Records/Information or Records/Execution, be placed on the:

- committee agenda at your earliest possible convenience.
- next committee agenda.

A handwritten signature in cursive script, appearing to read "Doug Broxson".

Senator Doug Broxson
Florida Senate, District 1

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Committee on Criminal Justice

BILL: CS/SB 1534

INTRODUCER: Criminal Justice Committee and Senator Boyd and others

SUBJECT: Retail Theft

DATE: January 25, 2022

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Erickson	Jones	CJ	Fav/CS
2.			ACJ	
3.			AP	

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/SB 1534 amends s. 812.015, F.S., the retail theft statute, to create new third degree felony and second degree felony retail theft crimes based on multiple retail thefts occurring in a limited time period in different merchant locations. Specifically, the bill amends the statute to provide that a person commits retail theft, a third degree felony, if the person individually, or in concert with one or more other persons, commits five or more retail thefts within a 30-day period and in committing such thefts obtains or uses 10 or more items of merchandise, and the number of items stolen during each theft is aggregated within the 30-day period to determine the total number of items stolen, regardless of the value of such merchandise, and two or more of the thefts occur at different physical merchant locations.

The bill also amends the statute to provide that a person commits a second degree felony if the person individually, or in concert with one or more other persons, commits five or more retail thefts within a 30-day period and in committing such thefts obtains or uses 20 or more items of merchandise, and the number of items stolen during each theft is aggregated within the 30-day period to determine the total number of items stolen, regardless of the value of such merchandise, and two or more of the thefts occur at a different physical retail merchant location.

The bill also amends s. 921.0022, F.S., the offense severity level ranking chart of the Criminal Punishment Code, to rank the new third degree felony retail theft offense as a level 5 offense and rank the new second degree felony retail theft offense as a level 6 offense.

The Legislature's Office of Economic and Demographic Research (EDR) preliminarily estimates that the bill will have a "positive indeterminate" prison bed impact (an unquantifiable increase in prison beds). See Section V. Fiscal Impact Statement.

The bill takes effect on October 1, 2022.

II. Present Situation:

Organized Retail Crime and "Boosting"

Organized retail crime (or ORC theft) is "a premeditated burglary that involves multiple offenders who operate in different specified roles or positions. These crime rings often hit multiple stores in one run, collecting a car full of stolen goods that are sold or 'returned' for store credit or even cash, depending on the return policy. Oftentimes, these items are sold via online marketplaces, which makes it nearly impossible to trace the criminal activity back to the seller."¹

"The ... most common form of organized retail crime is referred to as *boosting*." "Boosting" is "the basic act of walking into a store and stealing item(s) without being caught. This can be done in any number of ways, from pocketing smaller items to simply walking out the front door with a cart full of big-ticket merchandise and enough confidence in your step that nobody questions you."²

According to the Florida Attorney General's Office, there are many challenges to prosecuting boosting under existing theft laws which generally require proof of the value of the property stolen.

There are limited statutes which law enforcement and prosecutors can charge boosters under. The traditional theft statute, s. 812.014, the organized retail theft statute, s. 812.015, and the scheme to defraud statute, s. 817.034, all require evidence of value.

In order to prove value, the law enforcement officer and prosecutor must know and prove the exact items stolen. While this level of proof is clear when someone is detained and found with the merchandise, when there are limited items stolen and clear view, or when merchandise is later recovered, such proof is exceedingly difficult to meet when the merchandise leaves the store.

If there is not a clear camera view of the exact items stolen, a prosecutor can only include the lowest value item within the area of the item stolen. Stores keep items of largely varying value within arm's reach of other items of similar type. A multiple hundred dollar item can be kept right next to an item worth less than \$20.00.

Using the item described above, if a defendant steals five \$200 items (totaling \$1,000) they could be charged with only stealing \$100 of merchandise if the item is not clearly

¹ Storm Suttter, *Organized Retail Crime Methods and How to Prevent Them* (Sep. 28, 2021), LiveView Technologies, available at <https://www.lvt.com/company/about-us> (last visited on Jan. 20, 2022).

² *Id.*

visible on video. In both situations, it is undisputed that five items were stolen; the exact item stolen is what would be contested.

The investigations into boosting activity can take upwards of a year or longer to conduct. First, retail loss prevention must watch the boosting activity and identify the exact items stolen. Law enforcement must then review the video to ensure the items are detailed by retail loss prevention correctly and complete an affidavit. A prosecutor must then review the videos and the affidavit to make sure the prosecutor has a good faith basis to file charges. This is a timely process. During this investigative process, the boosting activity continues across the State.

Large scale boosters can enter many stores within a small period of time and boost many items during each theft. Reviewing the video files to check for items stolen can take many hours at each step of the process. Each item needs to be readily apparent from the video.

Some retailers have the ability to verify inventory logs to check for missing merchandise, to prove the items stolen. However, in order to successfully prove the items stolen with this method, there must be evidence from the point of the first inventory to the point of the next inventory of legitimate sales, restocking, and/or proving no other persons stole during that time. Depending on the time between inventory checks, this could be multiple days of video to review by the loss prevention, then law enforcement, then the prosecutor.³

Organized Retail Crime –National Trends

The National Retail Federation (NRF) reports that “[o]rganized retail crime now costs retailers an average of \$700,000 per \$1 billion in sales, and three-fourths of retailers saw an increase in ORC in 2020....”⁴

According to the *National Retail Security Survey 2021*, a NRF survey of retail loss prevention professionals that covers national retail security issues, including external retail crime, organized retail crime is a growing threat. The survey reports: “About 69% of retailers said they had seen an increase in ORC activity over the past year. They cited reasons such as COVID-19, policing, changes to sentencing guidelines and the growth of online marketplaces for the increase in ORC activity.”⁵ Further, “[r]etailers report these gangs are more aggressive and violent than in years past.”⁶

³ Summary of boosting issue and legislation provided to staff of the Senate Committee on Criminal Justice on Jan. 18, 2022 (on file with the Senate Committee on Criminal Justice).

⁴ Craig Guillot, *Organized retail crime remains a growing threat* (Nov. 18, 2021), National Retail Federation, available at <https://nrf.com/blog/organized-retail-crime-remains-growing-threat> (last visited on Jan. 20, 2022).

⁵ *National Retail Security Survey 2021*, National Retail Federation, at p. 10, available at <https://cdn.nrf.com/sites/default/files/2021-08/2021%20National%20Retail%20Security%20Survey%20updated.pdf> (last visited on Jan. 20, 2022).

⁶ *Id.*

Florida Organized Retail Crime Exchange (FORCE)

On December 2, 2021, Florida Attorney General Ashley Moody announced the creation of the Florida Organized Retail Crime Exchange (FORCE), which consists of a task force and an interactive statewide database.⁷ The task force will be composed of law enforcement personnel, prosecutors, and retailers⁸ who “will meet regularly to discuss trends, share criminal intelligence and coordinate investigations.”⁹ The statewide database, which will be operated by the Attorney General’s Office and the Florida Retail Federation, will “spot trends, identify suspects and take down massive organized retail theft rings.”¹⁰ Law enforcement and retailers that complete specialized training will have access to it.¹¹

Attorney General Moody also reported that since taking office in 2019, statewide prosecutors have “filed nearly 60 cases involving more than 250 individuals suspected of organized retail theft or crimes related to organized retail theft.”¹²

Criminal Punishment Code

The Criminal Punishment Code¹³ (Code) is Florida’s primary sentencing policy. Noncapital felonies sentenced under the Code receive an offense severity level ranking (Levels 1-10).¹⁴ Points are assigned and accrue based upon the offense severity level ranking assigned to the primary offense, additional offenses, and prior offenses. Sentence points escalate as the severity level escalates. Points may also be added or multiplied for other factors such as victim injury or the commission of certain offenses. The lowest permissible sentence is any nonstate prison sanction in which total sentence points equal or are less than 44 points, unless the court determines that a prison sentence is appropriate. If total sentence points exceed 44 points, the lowest permissible sentence in prison months is calculated by subtracting 28 points from the total sentence points and decreasing the remaining total by 25 percent.¹⁵ Absent mitigation,¹⁶ the permissible sentencing range under the Code is generally the lowest permissible sentence scored up to and including the maximum penalty provided under s. 775.082, F.S.¹⁷

⁷ News Release, *VIDEO: Attorney General Moody Launches FORCE to Protect Floridians Against Retail Theft Crime Sprees Plaguing Cities in Other States* (Dec. 2, 2021), Attorney General’s Office (on file with the Senate Committee on Criminal Justice).

⁸ *Id.*

⁹ Pat Raia, *Database aims to thwart retail theft rings before they organize here* (Dec. 5, 2021), Hernando Sun, available at <https://www.hernandosun.com/2021/12/05/database-aims-to-thwart-retail-theft-rings-before-they-organize-here/> (last visited on Jan. 20, 2022).

¹⁰ See footnote 9, *supra*.

¹¹ *Id.*

¹² *Id.*

¹³ Sections 921.002-921.0027, F.S. See chs. 97-194 and 98-204, L.O.F. The Code is effective for offenses committed on or after October 1, 1998.

¹⁴ Offenses are either ranked in the offense severity level ranking chart in s. 921.0022, F.S., or are ranked by default based on a ranking assigned to the felony degree of the offense as provided in s. 921.0023, F.S.

¹⁵ Section 921.0024, F.S. Unless otherwise noted, information on the Code is from this source.

¹⁶ The court may “mitigate” or “depart downward” from the scored lowest permissible sentence, if the court finds a mitigating circumstance. Section 921.0026, F.S., provides a list of mitigating circumstances.

¹⁷ If the scored lowest permissible sentence exceeds the maximum penalty in s. 775.082, F.S., the sentence required by the Code must be imposed. If total sentence points are greater than or equal to 363 points, the court may sentence the offender to life imprisonment. Section 921.0024(2), F.S.

Theft Statute (s. 812.014, F.S.)

Section 812.014(1), F.S., provides that a person commits “theft” if he or she knowingly obtains or uses, or endeavors to obtain or use, the property of another with intent to, either temporarily or permanently:

- Deprive the other person of a right to the property or a benefit from the property; or
- Appropriate the property to his or her own use or to the use of any person not entitled to the use of the property.

The statute punishes “grand theft” and “petit theft.”¹⁸ Grand theft penalties, which are more severe than petit theft penalties, may be triggered by theft of an item listed in the statute, such as a fire extinguisher, regardless of the value of that listed item.¹⁹ However, more typically, grand theft is theft of property valued at \$750 or more. The degree and punishment of grand theft escalates based on the value of the stolen property. If the property stolen is valued at:

- \$750 or more, but less than \$5,000, it is grand theft of the third degree and a Level 2 third degree felony;²⁰
- \$5,000 or more, but less than \$10,000, it is grand theft of the third degree and a Level 3 third degree felony;²¹
- \$10,000 or more, but less than \$20,000, it is grand theft of the third degree and a Level 4 third degree felony;²²
- \$20,000 or more, but less than \$100,000, it is grand theft of the second degree and a Level 6 second degree felony;²³ and
- \$100,000 or more, it is grand theft of the first degree and a Level 7 first degree felony.²⁴

Additionally, s. 812.014(2)(d), F.S., provides that theft of property valued at \$100 or more, but less than \$750, is grand theft of the third degree, a Level 2 third degree felony,²⁵ if the property was taken from a dwelling or its unenclosed curtilage.

Petit theft is generally theft of property valued at less than \$750 or property without a specific monetary value that is not listed in s. 812.014(2), F.S. Except as provided in s. 812.014(2)(d),

¹⁸ Grand theft also includes: grand theft in which a motor vehicle is used as an instrumentality in committing the theft (s. 812.014(2)(a)3.a., F.S.); theft of a semitrailer deployed by a law enforcement officer; and theft of cargo, emergency medical equipment, and law enforcement equipment in a specified property value range (s. 812.014(2)(a)1. and 2., (2)(b)2., 3., and 4., F.S.). Further, penalties for grand theft are enhanced if committed after a declaration of an emergency and facilitated by the emergency and during a riot or an aggravated riot (s. 812.014(2)(b) and (c), F.S.).

¹⁹ See s. 812.014(2)(c)4.-13., F.S.

²⁰ Sections 812.014(2)(c)1. and 921.0022(3)(b), F.S. A third degree felony is generally punishable by not more than 5 years in state prison and a fine not exceeding \$5,000. Sections 775.082 and 775.083, F.S. *But see* ss. 775.082(10) and 921.00241, F.S. (prison diversion).

²¹ Sections 812.014(2)(c)2. and 921.0022(3)(c), F.S.

²² Sections 812.014(2)(c)3. and 921.0022(3)(d), F.S.

²³ Sections 812.014(2)(b)1. and 921.0022(3)(f), F.S. A second degree felony is punishable by not more than 15 years in state prison and a fine not exceeding \$10,000. Sections 775.082 and 775.083, F.S.

²⁴ Sections 812.014(2)(a)1. and 921.0022(3)(g), F.S. A first degree felony is generally punishable by not more than 30 years in state prison and a fine not exceeding \$10,000. When specifically provided by statute, a first degree felony may be punished by imprisonment for a term of years not exceeding life imprisonment. Sections 775.082 and 775.083, F.S.

²⁵ Section 921.0022(3)(b), F.S.

F.S., if the property stolen is valued at \$100 or more, but less than \$750, the offender commits petit theft of the first degree, which is a first degree misdemeanor.²⁶ Theft of any property not specified in s. 812.014(2), F.S., is petit theft of the second degree, which is a second degree misdemeanor.²⁷ However, a person who commits petit theft and who has previously been convicted of any theft commits a first degree misdemeanor²⁸ or a Level 1 third degree felony if there are 2 or more previous theft convictions.²⁹

A person commits a Level 4 second degree felony if that person individually, or in concert with one or more other persons, coordinates the activities of one or more persons in committing theft under s. 812.014, F.S., where the stolen property has a value in excess of \$3,000.³⁰

Retail Theft Statute (s. 812.015, F.S.)

While theft is generally punished in s. 812.014, F.S., and thefts from retailers can be punished under that statute, s. 812.015, F.S., is specifically directed at punishing “retail theft,”³¹ which the statute defines as “the taking possession of or carrying away of merchandise,³² property, money, or negotiable documents; altering or removing a label, universal product code, or price tag; transferring merchandise from one container to another; or removing a shopping cart, with intent to deprive the merchant³³ of possession, use, benefit, or full retail value.”³⁴

Section 812.015(8), F.S., provides that it is a third degree felony to commit retail theft, if the property stolen is valued at \$750 or more, and the person:

- Individually commits retail theft, or in concert with one or more other persons, coordinates the activities of one or more individuals in committing the offense, which may occur through multiple acts of retail theft, in which the amount of each individual theft is aggregated within a 30-day period to determine the value of the property stolen;
- Conspires with another person to commit retail theft with the intent to sell the stolen property for monetary or other gain, and subsequently takes or causes such property to be placed in

²⁶ Section 812.014(2)(e), F.S. A first degree misdemeanor is punishable by not more than one year in a county jail and a fine not exceeding \$1,000. Sections 775.082 and 775.083, F.S.

²⁷ Section 812.014(3)(a), F.S. A second degree misdemeanor is punishable by not more than 60 days in a county jail and a fine not exceeding \$500. Sections 775.082 and 775.083, F.S.

²⁸ Section 812.014(3)(b), F.S.

²⁹ Section 812.014(3)(c) and 921.0022(3)(a), F.S.

³⁰ Sections 812.014(6) and 921.0022(3)(b), F.S.

³¹ In addition to punishing retail theft, the statute does the following: requires specified fines or public service for a second or subsequent conviction for petit theft from a merchant, farmer, or transit agency (s. 812.015(2), F.S.); authorizes a merchant and others to take an offender into custody and detain the offender when there is probable cause (s. 812.015(3), F.S.); authorizes arrest without a warrant in specified circumstances (s. 812.015(4), F.S.); provides a liability shield for taking a person into custody or arresting a person in accordance with requirements of the statute (s. 812.015(5), F.S.); punishes resisting a law enforcement officer and others recovering property in specified circumstances (s. 812.015(6), F.S.); punishes possession or use of any antisholifting or inventory control device countermeasure (s. 812.015(7), F.S.); and requires the Office of Program Policy Analysis and Government Accountability to perform a study every five years to determine the appropriateness of the monetary threshold amounts included in the statute (s. 812.015(11), F.S.). None of these provisions are addressed in the bill, and therefore, they are not discussed further in this analysis.

³² “Merchandise” means “any personal property, capable of manual delivery, displayed, held, or offered for retail sale by a merchant.” Section 812.015(1)(a), F.S.

³³ “Merchant” means “an owner or operator, or the agent, consignee, employee, lessee, or officer of an owner or operator, of any premises or apparatus used for retail purchase or sale of any merchandise.” Section 812.015(1)(b), F.S.

³⁴ Section 812.015(1)(d), F.S.

the control of another person in exchange for consideration, in which the stolen property taken or placed within a 30-day period is aggregated to determine the value of the stolen property;

- Individually, or in concert with one or more other persons, commits theft from more than one location within a 30-day period, in which the amount of each individual theft is aggregated to determine the value of the property stolen;
- Acts in concert with one or more other individuals within one or more establishments to distract the merchant, merchant's employee, or law enforcement officer in order to carry out the offense, or acts in other ways to coordinate efforts to carry out the offense; or
- Commits the offense through the purchase of merchandise in a package or box that contains merchandise other than, or in addition to, the merchandise purported to be contained in the package or box.

All of the retail theft offenses in s. 812.015(8), F.S, are Level 5 third degree felonies,³⁵ except for the conspiracy offense, which is a Level 3 third degree felony.³⁶

Section 812.015(9), F.S., provides that it is a second degree felony if the person:

- Violates s. 812.015(8), F.S., and has previously been convicted of a violation of this subsection;
- Individually, or in concert with one or more other persons, coordinates the activities of one or more persons in committing the offense of retail theft, in which the amount of each individual theft within a 30-day period is aggregated to determine the value of the stolen property and such value is in excess of \$3,000; or
- Conspires with another person to commit retail theft with the intent to sell the stolen property for monetary or other gain, and subsequently takes or causes such property to be placed in control of another person in exchange for consideration, in which the stolen property taken or placed within a 30-day period is aggregated to have a value in excess of \$3,000.

All of the retail theft offenses in s. 812.015(9), F.S, are Level 6 second degree felonies,³⁷ except for the conspiracy offense, which is unranked in the Code chart, and therefore defaults to Level 4 pursuant to s. 921.0023(2), F.S.

Section 812.015(10), F.S., provides that if a person commits retail theft in more than one judicial circuit within a 30-day period, the value of the stolen property resulting from the thefts in each judicial circuit may be aggregated, and the person must be prosecuted by the Office of the Statewide Prosecutor in accordance with s. 16.56, F.S.

III. Effect of Proposed Changes:

The bill amends s. 812.015, F.S., the retail theft statute, to create new third degree felony and second degree felony retail theft crimes based on multiple retail thefts occurring in a limited time period in different merchant locations. Specifically, the bill amends the statute to provide that a person commits retail theft, a third degree felony, if the person individually, or in concert with

³⁵ Section 921.0022(3)(e), F.S.

³⁶ Section 921.0022(3)(c), F.S.

³⁷ Section 921.0022(3)(g), F.S.

one or more other persons, commits five or more retail thefts within a 30-day period and in committing such thefts obtains or uses 10 or more items of merchandise, and the number of items stolen during each theft is aggregated within the 30-day period to determine the total number of items stolen, regardless of the value of such merchandise, and two or more of the thefts occur at different physical merchant locations.

The bill also amends the statute to provide that a person commits a second degree felony if the person individually, or in concert with one or more other persons, commits five or more retail thefts within a 30-day period and in committing such thefts obtains or uses 20 or more items of merchandise, and the number of items stolen during each theft is aggregated within the 30-day period to determine the total number of items stolen, regardless of the value of such merchandise, and two or more of the thefts occur at a different physical retail merchant location.

The bill also amends s. 812.015, F.S., to:

- Specify that a second degree felony retail theft violation includes not only a current third degree felony retail theft violation coupled with a prior third degree felony retail theft violation but a current third degree felony retail theft violation coupled with a prior second degree felony retail theft violation. This change is consistent with the approach to enhance punishment for repeat retail theft.
- Restructure the retail theft offense so that it is clearer that this element is an element of each specific retail theft act described in the statute. This a technical change and not a substantive change since property value is an element of each specified act and the amendment of the statute does not in any way change the property value threshold (\$750).

The bill also amends s. 921.0022, F.S., the offense severity level ranking chart of the Code, to rank the new third degree felony retail theft offense as a level 5 offense and rank the new second degree felony retail theft offense as a level 6 offense.

The bill takes effect on October 1, 2022.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

The bill does not appear to require cities and counties to expend funds or limit their authority to raise revenue or receive state-shared revenues as specified by Article VII, s. 18, of the Florida Constitution.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. State Tax or Fee Increases:

None.

E. Other Constitutional Issues:

None identified.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

To the extent the new retail theft crimes reduces retail theft, especially large retail theft operations, the bill would reduce loss of inventory with a cost savings to retailers, which may be substantial.

C. Government Sector Impact:

The Criminal Justice Impact Conference, which provides the final, official estimate of prison bed impact, if any, of legislation has not yet reviewed the bill. However, the EDR preliminarily estimates that bill will have a “positive indeterminate” prison bed impact (an unquantifiable increase in prison beds). Additionally, the EDR provided the following information regarding its estimate:

Existing retail theft felonies require that stolen property is worth \$750 or more (over a thirty day period), whereas these new felonies only require a specific number of items stolen (over a thirty day period), with at least two thefts occurring at different physical merchant locations. Retail theft is currently defined as “taking possession of or carrying away of merchandise, property, money, or negotiable documents; altering or removing a label, universal product code, or price tag; transferring merchandise from one container to another; or removing a shopping cart, with intent to deprive the merchant of possession, use, benefit, or full retail value.”

Per [Department of Corrections], in FY 18-19, there was 40 new commitments for retail theft as it is currently defined. There were 23 new commitments in FY 19-20 and 22 new commitments in FY 20-21. It is not known how many of these offenders committed offenses defined under this new language, nor is it known how many additional offenders there will be that have committed offenses as defined under this language with property valued under the \$750 threshold.³⁸

³⁸ *SB 1534 – Retail Theft (Identical HB 1511)*, Office of Economic and Demographic Research (on file with Senate Committee on Criminal Justice).

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends the following sections of the Florida Statutes: 812.015 and 921.0022.

IX. Additional Information:

- A. **Committee Substitute – Statement of Substantial Changes:**
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS by Criminal Justice on January 25, 2022:

The committee substitute removes a provision that excludes from these new retail theft crimes created by the bill a person's theft of one or more food items with the intent to consume such items for the sustenance of himself or herself or another person under his or her care.

- B. **Amendments:**

None.



241712

LEGISLATIVE ACTION

Senate	.	House
Comm: RCS	.	
01/25/2022	.	
	.	
	.	
	.	

The Committee on Criminal Justice (Boyd) recommended the following:

Senate Amendment (with title amendment)

Delete lines 59 - 94
and insert:
physical merchant locations.

(9) A person commits a felony of the second degree,
punishable as provided in s. 775.082, s. 775.083, or s. 775.084,
if the person:

(a) Violates subsection (8) and has previously been
convicted of a violation of subsection (8) or of this



241712

11 subsection;

12 (b) Individually, or in concert with one or more other
13 persons, coordinates the activities of one or more persons in
14 committing the offense of retail theft, in which the amount of
15 each individual theft within a 30-day period is aggregated to
16 determine the value of the stolen property and such value is in
17 excess of \$3,000; ~~or~~

18 (c) Conspires with another person to commit retail theft
19 with the intent to sell the stolen property for monetary or
20 other gain, and subsequently takes or causes such property to be
21 placed in control of another person in exchange for
22 consideration, in which the stolen property taken or placed
23 within a 30-day period is aggregated to have a value in excess
24 of \$3,000; or

25 (d) Individually, or in concert with one or more other
26 persons, commits five or more retail thefts within a 30-day
27 period and in committing such thefts obtains or uses 20 or more
28 items of merchandise, and the number of items stolen during each
29 theft is aggregated within the 30-day period to determine the
30 total number of items stolen, regardless of the value of such
31 merchandise, and two or more of the thefts occur at a different
32 physical retail merchant location.

33
34 ===== T I T L E A M E N D M E N T =====

35 And the title is amended as follows:

36 Delete lines 4 - 5

37 and insert:

38 locations within a specified timeframe; providing
39 criminal penalties; amending s.

By Senator Boyd

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A bill to be entitled

An act relating to retail theft; amending s. 812.015, F.S.; prohibiting certain retail theft at multiple locations within a specified timeframe; providing exceptions; providing criminal penalties; amending s. 921.0022, F.S.; ranking offenses for purposes of the offense severity ranking chart of the Criminal Punishment Code; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Subsections (8) and (9) of section 812.015, Florida Statutes, are amended to read:

812.015 Retail and farm theft; transit fare evasion; mandatory fine; alternative punishment; detention and arrest; exemption from liability for false arrest; resisting arrest; penalties.—

(8) Except as provided in subsection (9), a person who commits retail theft commits a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084, ~~if the property stolen is valued at \$750 or more, and the~~ person:

(a) Individually ~~commits retail theft~~, or in concert with one or more other persons, coordinates the activities of one or more individuals in committing the offense, which may occur through multiple acts of retail theft, in which the amount of each individual theft is aggregated within a 30-day period to determine the value of the property stolen and such value is \$750 or more;

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CODING: Words ~~stricken~~ are deletions; words underlined are additions.

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(b) Conspires with another person to commit retail theft with the intent to sell the stolen property for monetary or other gain, and subsequently takes or causes such property to be placed in the control of another person in exchange for consideration, in which the stolen property taken or placed within a 30-day period is aggregated to determine the value of the stolen property and such value is \$750 or more;

(c) Individually, or in concert with one or more other persons, commits theft from more than one location within a 30-day period, in which the amount of each individual theft is aggregated to determine the value of the property stolen and such value is \$750 or more;

(d) Acts in concert with one or more other individuals within one or more establishments to distract the merchant, merchant's employee, or law enforcement officer in order to carry out the offense, or acts in other ways to coordinate efforts to carry out the offense and such value is \$750 or more;

~~or~~
(e) Commits the offense through the purchase of merchandise in a package or box that contains merchandise other than, or in addition to, the merchandise purported to be contained in the package or box and such value is \$750 or more; or

(f) Individually, or in concert with one or more other persons, commits five or more retail thefts within a 30-day period and in committing such thefts obtains or uses 10 or more items of merchandise, and the number of items stolen during each theft is aggregated within the 30-day period to determine the total number of items stolen, regardless of the value of such merchandise, and two or more of the thefts occur at different

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59 physical merchant locations. A person's theft of one or more
 60 food items with the intent to consume such items for the
 61 sustenance of himself or herself or another person under his or
 62 her care is not a theft violation for purposes of this
 63 paragraph.

64 (9) A person commits a felony of the second degree,
 65 punishable as provided in s. 775.082, s. 775.083, or s. 775.084,
 66 if the person:

67 (a) Violates subsection (8) and has previously been
 68 convicted of a violation of subsection (8) or of this
 69 subsection;

70 (b) Individually, or in concert with one or more other
 71 persons, coordinates the activities of one or more persons in
 72 committing the offense of retail theft, in which the amount of
 73 each individual theft within a 30-day period is aggregated to
 74 determine the value of the stolen property and such value is in
 75 excess of \$3,000; ~~or~~

76 (c) Conspires with another person to commit retail theft
 77 with the intent to sell the stolen property for monetary or
 78 other gain, and subsequently takes or causes such property to be
 79 placed in control of another person in exchange for
 80 consideration, in which the stolen property taken or placed
 81 within a 30-day period is aggregated to have a value in excess
 82 of \$3,000; or

83 (d) Individually, or in concert with one or more other
 84 persons, commits five or more retail thefts within a 30-day
 85 period and in committing such thefts obtains or uses 20 or more
 86 items of merchandise, and the number of items stolen during each
 87 theft is aggregated within the 30-day period to determine the

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88 total number of items stolen, regardless of the value of such
 89 merchandise, and two or more of the thefts occur at a different
 90 physical retail merchant location. A person's theft of one or
 91 more food items with the intent to consume such items for the
 92 sustenance of himself or herself or another person under his or
 93 her care is not a theft violation for purposes of this
 94 paragraph.

95 Section 2. Paragraphs (e) and (f) of subsection (3) of
 96 section 921.0022, Florida Statutes, are amended to read:

97 921.0022 Criminal Punishment Code; offense severity ranking
 98 chart.-

99 (3) OFFENSE SEVERITY RANKING CHART
 100 (e) LEVEL 5

Florida Statute	Felony Degree	Description
316.027(2)(a)	3rd	Accidents involving personal injuries other than serious bodily injury, failure to stop; leaving scene.
316.1935(4)(a)	2nd	Aggravated fleeing or eluding.
316.80(2)	2nd	Unlawful conveyance of fuel; obtaining fuel fraudulently.
322.34(6)	3rd	Careless operation of motor vehicle with suspended license,

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resulting in death or serious
bodily injury.

106

327.30(5)

3rd

Vessel accidents involving
personal injury; leaving scene.

107

379.365(2)(c)1.

3rd

Violation of rules relating to:
willful molestation of stone
crab traps, lines, or buoys;
illegal bartering, trading, or
sale, conspiring or aiding in
such barter, trade, or sale, or
supplying, agreeing to supply,
aiding in supplying, or giving
away stone crab trap tags or
certificates; making, altering,
forging, counterfeiting, or
reproducing stone crab trap
tags; possession of forged,
counterfeit, or imitation stone
crab trap tags; and engaging in
the commercial harvest of stone
crabs while license is
suspended or revoked.

108

379.367(4)

3rd

Willful molestation of a
commercial harvester's spiny
lobster trap, line, or buoy.

109

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379.407(5)(b)3. 3rd Possession of 100 or more
undersized spiny lobsters.

110

381.0041(11)(b)

3rd

Donate blood, plasma, or organs
knowing HIV positive.

111

440.10(1)(g)

2nd

Failure to obtain workers'
compensation coverage.

112

440.105(5)

2nd

Unlawful solicitation for the
purpose of making workers'
compensation claims.

113

440.381(2)

3rd

Submission of false,
misleading, or incomplete
information with the purpose of
avoiding or reducing workers'
compensation premiums.

114

624.401(4)(b)2.

2nd

Transacting insurance without a
certificate or authority;
premium collected \$20,000 or
more but less than \$100,000.

115

626.902(1)(c)

2nd

Representing an unauthorized
insurer; repeat offender.

116

790.01(2)

3rd

Carrying a concealed firearm.

117

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	790.162	2nd	Threat to throw or discharge destructive device.
118	790.163(1)	2nd	False report of bomb, explosive, weapon of mass destruction, or use of firearms in violent manner.
119	790.221(1)	2nd	Possession of short-barreled shotgun or machine gun.
120	790.23	2nd	Felons in possession of firearms, ammunition, or electronic weapons or devices.
121	796.05(1)	2nd	Live on earnings of a prostitute; 1st offense.
122	800.04(6)(c)	3rd	Lewd or lascivious conduct; offender less than 18 years of age.
123	800.04(7)(b)	2nd	Lewd or lascivious exhibition; offender 18 years of age or older.
124	806.111(1)	3rd	Possess, manufacture, or dispense fire bomb with intent to damage any structure or

	21-01295C-22		20221534__
			property.
125	812.0145(2)(b)	2nd	Theft from person 65 years of age or older; \$10,000 or more but less than \$50,000.
126	812.015	3rd	Retail theft; property stolen is valued at \$750 or more and one or more specified acts.
	(8)(a) & (c)-(e)		
127	<u>812.015(8)(f)</u>	<u>3rd</u>	<u>Retail theft; multiple thefts within specified period.</u>
128	812.019(1)	2nd	Stolen property; dealing in or trafficking in.
129	812.081(3)	2nd	Trafficking in trade secrets.
130	812.131(2)(b)	3rd	Robbery by sudden snatching.
131	812.16(2)	3rd	Owning, operating, or conducting a chop shop.
132	817.034(4)(a)2.	2nd	Communications fraud, value \$20,000 to \$50,000.
133	817.234(11)(b)	2nd	Insurance fraud; property value \$20,000 or more but less than \$100,000.

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134	817.2341(1), (2) (a) & (3) (a)	3rd	Filing false financial statements, making false entries of material fact or false statements regarding property values relating to the solvency of an insuring entity.
135	817.568(2) (b)	2nd	Fraudulent use of personal identification information; value of benefit, services received, payment avoided, or amount of injury or fraud, \$5,000 or more or use of personal identification information of 10 or more persons.
136	817.611(2) (a)	2nd	Traffic in or possess 5 to 14 counterfeit credit cards or related documents.
137	817.625(2) (b)	2nd	Second or subsequent fraudulent use of scanning device, skimming device, or reencoder.
138	825.1025(4)	3rd	Lewd or lascivious exhibition in the presence of an elderly person or disabled adult.

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139	827.071(4)	2nd	Possess with intent to promote any photographic material, motion picture, etc., which includes sexual conduct by a child.
140	827.071(5)	3rd	Possess, control, or intentionally view any photographic material, motion picture, etc., which includes sexual conduct by a child.
141	828.12(2)	3rd	Tortures any animal with intent to inflict intense pain, serious physical injury, or death.
142	839.13(2) (b)	2nd	Falsifying records of an individual in the care and custody of a state agency involving great bodily harm or death.
143	843.01	3rd	Resist officer with violence to person; resist arrest with violence.
144	847.0135(5) (b)	2nd	Lewd or lascivious exhibition

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 using computer; offender 18
 years or older.

145 847.0137 3rd Transmission of pornography by
 (2) & (3) electronic device or equipment.

146 847.0138 3rd Transmission of material
 (2) & (3) harmful to minors to a minor by
 electronic device or equipment.

147 874.05(1)(b) 2nd Encouraging or recruiting
 another to join a criminal
 gang; second or subsequent
 offense.

148 874.05(2)(a) 2nd Encouraging or recruiting
 person under 13 years of age to
 join a criminal gang.

149 893.13(1)(a)1. 2nd Sell, manufacture, or deliver
 cocaine (or other s.
 893.03(1)(a), (1)(b), (1)(d),
 (2)(a), (2)(b), or (2)(c)5.
 drugs).

150 893.13(1)(c)2. 2nd Sell, manufacture, or deliver
 cannabis (or other s.
 893.03(1)(c), (2)(c)1.,
 (2)(c)2., (2)(c)3., (2)(c)6.,

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 (2)(c)7., (2)(c)8., (2)(c)9.,
 (2)(c)10., (3), or (4) drugs)
 within 1,000 feet of a child
 care facility, school, or
 state, county, or municipal
 park or publicly owned
 recreational facility or
 community center.

151 893.13(1)(d)1. 1st Sell, manufacture, or deliver
 cocaine (or other s.
 893.03(1)(a), (1)(b), (1)(d),
 (2)(a), (2)(b), or (2)(c)5.
 drugs) within 1,000 feet of
 university.

152 893.13(1)(e)2. 2nd Sell, manufacture, or deliver
 cannabis or other drug
 prohibited under s.
 893.03(1)(c), (2)(c)1.,
 (2)(c)2., (2)(c)3., (2)(c)6.,
 (2)(c)7., (2)(c)8., (2)(c)9.,
 (2)(c)10., (3), or (4) within
 1,000 feet of property used for
 religious services or a
 specified business site.

153 893.13(1)(f)1. 1st Sell, manufacture, or deliver
 cocaine (or other s.

Florida Statute	Felony Degree	Description
21-01295C-22		893.03(1) (a), (1) (b), (1) (d), or (2) (a), (2) (b), or (2) (c) 5. drugs) within 1,000 feet of public housing facility.
893.13(4) (b)	2nd	Use or hire of minor; deliver to minor other controlled substance.
893.1351(1)	3rd	Ownership, lease, or rental for trafficking in or manufacturing of controlled substance.
(f) LEVEL 6		
316.027(2) (b)	2nd	Leaving the scene of a crash involving serious bodily injury.
316.193(2) (b)	3rd	Felony DUI, 4th or subsequent conviction.
400.9935(4) (c)	2nd	Operating a clinic, or offering services requiring licensure, without a license.

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162	499.0051(2)	2nd	Knowing forgery of transaction history, transaction information, or transaction statement.
163	499.0051(3)	2nd	Knowing purchase or receipt of prescription drug from unauthorized person.
164	499.0051(4)	2nd	Knowing sale or transfer of prescription drug to unauthorized person.
165	775.0875(1)	3rd	Taking firearm from law enforcement officer.
166	784.021(1) (a)	3rd	Aggravated assault; deadly weapon without intent to kill.
167	784.021(1) (b)	3rd	Aggravated assault; intent to commit felony.
168			

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	784.041	3rd	Felony battery; domestic battery by strangulation.
169			
	784.048(3)	3rd	Aggravated stalking; credible threat.
170			
	784.048(5)	3rd	Aggravated stalking of person under 16.
171			
	784.07(2)(c)	2nd	Aggravated assault on law enforcement officer.
172			
	784.074(1)(b)	2nd	Aggravated assault on sexually violent predators facility staff.
173			
	784.08(2)(b)	2nd	Aggravated assault on a person 65 years of age or older.
174			
	784.081(2)	2nd	Aggravated assault on specified official or employee.
175			
	784.082(2)	2nd	Aggravated assault by detained person on

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			visitor or other detainee.
176			
	784.083(2)	2nd	Aggravated assault on code inspector.
177			
	787.02(2)	3rd	False imprisonment; restraining with purpose other than those in s. 787.01.
178			
	790.115(2)(d)	2nd	Discharging firearm or weapon on school property.
179			
	790.161(2)	2nd	Make, possess, or throw destructive device with intent to do bodily harm or damage property.
180			
	790.164(1)	2nd	False report concerning bomb, explosive, weapon of mass destruction, act of arson or violence to state property, or use of firearms in violent manner.

181	21-01295C-22	20221534__	
	790.19	2nd	Shooting or throwing deadly missiles into dwellings, vessels, or vehicles.
182	794.011(8)(a)	3rd	Solicitation of minor to participate in sexual activity by custodial adult.
183	794.05(1)	2nd	Unlawful sexual activity with specified minor.
184	800.04(5)(d)	3rd	Lewd or lascivious molestation; victim 12 years of age or older but less than 16 years of age; offender less than 18 years.
185	800.04(6)(b)	2nd	Lewd or lascivious conduct; offender 18 years of age or older.
186	806.031(2)	2nd	Arson resulting in great bodily harm to firefighter or any

	21-01295C-22	20221534__	other person.
187	810.02(3)(c)	2nd	Burglary of occupied structure; unarmed; no assault or battery.
188	810.145(8)(b)	2nd	Video voyeurism; certain minor victims; 2nd or subsequent offense.
189	812.014(2)(b)1.	2nd	Property stolen \$20,000 or more, but less than \$100,000, grand theft in 2nd degree.
190	812.014(6)	2nd	Theft; property stolen \$3,000 or more; coordination of others.
191	812.015(9)(a)	2nd	Retail theft; property stolen \$750 or more; second or subsequent conviction.
192	812.015(9)(b)	2nd	Retail theft; aggregated property

	21-01295C-22		20221534__	stolen within 30 days is \$3,000 or more; coordination of others.
193	<u>812.015(9)(d)</u>	<u>2nd</u>		<u>Retail theft; multiple thefts within specified period.</u>
194	812.13(2)(c)	2nd		Robbery, no firearm or other weapon (strong- arm robbery).
195	817.4821(5)	2nd		Possess cloning paraphernalia with intent to create cloned cellular telephones.
196	817.49(2)(b)2.	2nd		Willful making of a false report of a crime resulting in death.
197	817.505(4)(b)	2nd		Patient brokering; 10 or more patients.
198	825.102(1)	3rd		Abuse of an elderly person or disabled

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199	825.102(3)(c)	3rd		Neglect of an elderly person or disabled adult.
200	825.1025(3)	3rd		Lewd or lascivious molestation of an elderly person or disabled adult.
201	825.103(3)(c)	3rd		Exploiting an elderly person or disabled adult and property is valued at less than \$10,000.
202	827.03(2)(c)	3rd		Abuse of a child.
203	827.03(2)(d)	3rd		Neglect of a child.
204	827.071(2) & (3)	2nd		Use or induce a child in a sexual performance, or promote or direct such performance.
205	836.05	2nd		Threats; extortion.
206				

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836.10	2nd	Written or electronic threats to kill, do bodily injury, or conduct a mass shooting or an act of terrorism.	
843.12	3rd	Aids or assists person to escape.	
847.011	3rd	Distributing, offering to distribute, or possessing with intent to distribute obscene materials depicting minors.	
847.012	3rd	Knowingly using a minor in the production of materials harmful to minors.	
847.0135(2)	3rd	Facilitates sexual conduct of or with a minor or the visual depiction of such conduct.	

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914.23	2nd	Retaliation against a witness, victim, or informant, with bodily injury.	
944.35(3)(a)2.	3rd	Committing malicious battery upon or inflicting cruel or inhuman treatment on an inmate or offender on community supervision, resulting in great bodily harm.	
944.40	2nd	Escapes.	
944.46	3rd	Harboring, concealing, aiding escaped prisoners.	
944.47(1)(a)5.	2nd	Introduction of contraband (firearm, weapon, or explosive) into correctional facility.	
951.22(1)(i)	3rd	Firearm or weapon introduced into county detention facility.	

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217

218

Section 3. This act shall take effect October 1, 2022.

Present situation:

- There are limited statutes which law enforcement and prosecutors can charge boosters under. The traditional theft statute, § 812.014, the organized retail theft statute, § 812.015, and the scheme to defraud statute, § 817.034, all require evidence of value.
- In order to prove value, the law enforcement officer and prosecutor must know and prove the exact items stolen. While this level of proof is clear when someone is detained and found with the merchandise, when there are limited items stolen and clear view, or when merchandise is later recovered, such proof is exceedingly difficult to meet when the merchandise leaves the store.
- If there is not a clear camera view of the exact items stolen, a prosecutor can only include the lowest value item within the area of the item stolen. Stores keep items of largely varying value within arm's reach of other items of similar type. A multiple hundred dollar item can be kept right next to an item worth less than \$20.00.
- Using the item described above, if a defendant steals five \$200 items (totaling \$1,000) they could be charged with only stealing \$100 of merchandise if the item is not clearly visible on video. In both situations, it is undisputed that five items were stolen; the exact item stolen is what would be contested.
- The investigations into boosting activity can take upwards of a year or longer to conduct. First, retail loss prevention must watch the boosting activity and identify the exact items stolen. Law enforcement must then review the video to ensure the items are detailed by retail loss prevention correctly and complete an affidavit. A prosecutor must then review the videos and the affidavit to make sure the prosecutor has a good faith basis to file charges. This is a timely process. During this investigative process, the boosting activity continues across the State.
- Large scale boosters can enter many stores within a small period of time and boost many items during each theft. Reviewing the video files to check for items stolen can take many hours at each step of the process. Each item needs to be readily apparent from the video.
- Some retailers have the ability to verify inventory logs to check for missing merchandise, to prove the items stolen. However, in order to successfully prove the items stolen with this method, there must be evidence from the point of the first inventory to the point of the next inventory of legitimate sales, restocking, and/or proving no other persons stole during that time. Depending on the time between inventory checks, this could be multiple days of video to review by the loss prevention, then law enforcement, then the prosecutor.

Effect of proposed situation:

- SB 1534, would make changes to Section 812.015, Florida Statutes to define and add penalties for “organized retail theft” based on feedback from prosecutors about additional tools to prosecute this growing crime in Florida.
- Focused on criminal activity of “boosters” who steal multiple items, from multiple locations, in short period of time
- Adds two sections to the retail theft statute, a second and third degree felony
- The core of each section is the same:
 - a) commits 5 or more thefts, b) from two or more different physical merchant locations, c) within 30 days, and
 - d) steals 10 or more items of merchandise during such thefts, Third degree felony
 - d) steals 20 or more items of merchandise during such thefts, Second degree felony
- Each section specifically excludes theft of food items with the intent to consume such items as sustenance for the defendant or someone under the defendant’s care – this is an affirmative defense, not an element
- A person stealing food could still be charged and convicted of petit theft under 812.014, Florida Statutes. Moreover, a person who steals more than \$750 in food could still be charged and convicted a third-degree felony under the existing provisions in the retail theft statute.
- Removes value from the proof required to prove retail theft in this circumstance
- Avoids time consuming dissection of security camera video footage to tally up amounts to meet dollar thresholds in these circumstances
- Will allow investigators to review and file cases for warrants quicker
- Prosecutors still have discretion to file under traditional theft statute for additional penalties if proof of value is high enough for additional charges
- Allows for total number of items to be aggregated across thefts within a 30-day period

Attorney General Ashley Moody News Release

December 2, 2021
Contact: Kylie Mason
Phone: (850) 245-0150

VIDEO: Attorney General Moody Launches FORCE to Protect Floridians Against Retail Theft Crime Sprees Plaguing Cities in Other States



TALLAHASSEE, Fla.—Attorney General Ashley Moody is fighting back against organized retail theft as [70% of store owners nationwide report an increase in crime](#) over the past year. Most of the high-profile, smash-and-grab cases are taking place outside of Florida in cities like [San Francisco, where several multi-day crime sprees disrupted holiday shopping](#). To prevent lawlessness in Florida and protect retailers and shoppers, Attorney General Moody today launched the Florida Organized Retail Crime Exchange, a first-of-its-kind, statewide task force and a new interactive database to help spot trends, identify suspects and take down massive, organized retail theft rings. The database is designed to bridge the gaps between retailers, law enforcement and prosecutors by allowing shareable, searchable information on incidents of theft statewide.

Attorney General Ashley Moody said, “We are seeing lawlessness and out-of-control mobs preying on businesses and consumers in major cities outside of Florida, and we will not allow these crime sprees to harm Floridians or our retailers. While we have done a good job of catching and prosecuting major retail theft rings in Florida, the threat is growing, and we must evolve with it.

“As Attorney General, I am always searching for new and innovative ways to combat crime and assist law enforcement in bringing criminals to justice. I am excited to launch the Florida Organized Retail Crime Exchange—a statewide task force and an interactive database bridging together law enforcement, prosecutors, and retailers in an effort to share information on retail crime throughout the state and stop these criminals before they cause more harm.”

Polk County Sheriff Grady Judd said, “Organized Retail Theft is a huge problem in Florida and across the nation. Our family members, friends, and fellow citizens are being ripped off when they shop—they are being ripped off by thieves every time we make a purchase. How? The organized retail criminal is driving prices higher by systematically and strategically taking advantage of our open and trusting society. I applaud Attorney General Ashley Moody for

creating this statewide task force dedicated to investigating and prosecuting Organized Retail Crime. This task force will allow law enforcement and retailers to easily work together and efficiently share information and resources so that we can root out and arrest these thieves, and send them to prison where they belong.”

Florida Retail Federation President and CEO Scott Shalley said, "We are honored to collaborate with Attorney General Ashley Moody and her team on the creation of this ORC task force. Organized retail crime continues to pose a serious threat to retailers, with a significant increase in activity over the past year. FORCE will play a key role in facilitating the collaboration between retail and law enforcement to protect Florida retailers, prevent crime and hold criminals accountable."

The Attorney General’s Office and Florida Retail Federation will operate the database, the TREUTH Florida Organized Retail Crime Exchange, which is available by invitation to retailers and law enforcement agencies that complete specialized training. Through the T-FORCE database, retailers will have the ability to upload data about recent retail theft occurrences. Data, such as items stolen, suspect description, method of operation and vehicle identification organized in T-FORCE, will make it easier to identify a nexus among seemingly single-incident thefts and could lead to organizational charges and increased penalties. Once information is uploaded, other retailers and law enforcement agencies will have access to the information, providing a greater ability to link related crimes and perpetrators.

Through T-FORCE, information about trending retail theft is available to participating retailers and law enforcement agencies across the state. Many organized retail crime rings operate on multi-city hits—targeting similar retailers across broad geographical locations. With T-FORCE, retailers are able to immediately upload information to the database, alerting other businesses with similar merchandise items to the incident and providing suspect and vehicle descriptions. On top of alerting other retailers to active crime rings, uploading information will help law enforcement better connect the dots between criminal theft operations and even identify potential upcoming targeted locations.

Ultimately, Attorney General Moody’s Office of Statewide Prosecution hopes the implementation of T-FORCE will limit duplication of resources from multiple investigations across the state. This will allow prosecutors to bring stronger cases and increase penalties for leaders of organized retail theft rings, as well as stop the occurrence of multiple investigations across the state. By connecting cases, law enforcement agencies will have the ability to consolidate investigations. This will allow prosecutors to bring stronger cases and stiffer penalties to members of organized theft rings.

Attorney General Moody's launch of the FORCE task force is made up of law enforcement, prosecutors and retailers to target organized retail theft and to use the data from the secure online portal. The task force will meet regularly to discuss trends, share criminal intelligence and coordinate investigations—working together to stop organized retail theft in Florida.

According to the National Retail Federation, organized retail theft costs businesses in Florida and across the United States [an estimated \\$30 billion every year](#). Since taking office in 2019, Attorney General Moody’s OSP has filed nearly 60 cases involving more than 250 individuals suspected of organized retail theft or crimes related to organized retail theft. FORCE will help bolster these ongoing efforts.

SB 1534 – Retail Theft (Identical HB 1511)

This bill amends s. 812.015(8), F.S., adding a **Level 5, 3rd degree felony** under the following language: “Individually, or in concert with one or more other persons, commits five or more retail thefts within a 30-day period and in committing such thefts obtains or uses 10 or more items of merchandise, and the number of items stolen during each theft is aggregated within the 30-day period to determine the total number of items stolen, regardless of the value of such merchandise, and two or more of the thefts occur at different physical merchant locations. A person’s theft of one or more food items with the intent to consume such items for the sustenance of himself or herself or another person under his or her care is not a theft violation for purposes of this paragraph.” This bill also amends s. 812.015(9), F.S., adding a **Level 6, 2nd degree felony** under similar language, with the exception being that the threshold to be met is 20 or more items of merchandise. Finally, this bill amends the language under s. 812.015(9)(a), F.S. where violating s. 812.015(8), F.S. after a prior conviction under subsection (8) results in a Level 6, 2nd degree felony, adding that a prior conviction under subsection (9) would also result in the elevated felony when violating subsection (8).

Existing retail theft felonies require that stolen property is worth \$750 or more (over a thirty day period), whereas these new felonies only require a specific number of items stolen (over a thirty day period), with at least two thefts occurring at different physical merchant locations. Retail theft is currently defined as “taking possession of or carrying away of merchandise, property, money, or negotiable documents; altering or removing a label, universal product code, or price tag; transferring merchandise from one container to another; or removing a shopping cart, with intent to deprive the merchant of possession, use, benefit, or full retail value.”

Per DOC, in FY 18-19, there was 40 new commitments for retail theft as it is currently defined. There were 23 new commitments in FY 19-20 and 22 new commitments in FY 20-21. It is not known how many of these offenders committed offenses defined under this new language, nor is it known how many additional offenders there will be that have committed offenses as defined under this language with property valued under the \$750 threshold.

EDR PROPOSED ESTIMATE: Positive Indeterminate

Requested by: Senate



THE FLORIDA SENATE

Tallahassee, Florida 32399-1100

SENATOR JIM BOYD
21st District

COMMITTEES:

Banking and Insurance, *Chair*
Agriculture
Appropriations Subcommittee on Agriculture,
Environment, and General Government
Appropriations Subcommittee on Transportation,
Tourism, and Economic Development
Judiciary
Rules

JOINT COMMITTEE:

Joint Legislative Auditing Committee

January 12, 2022

Senator Jason Pizzo
404 South Monroe Street
510 Knott Building
Tallahassee, FL 32399

Dear Chairman Pizzo:

I respectfully request Senate Bill 1534: Retail Theft, be scheduled for a hearing in the Committee on Criminal Justice at your earliest convenience.

If I may be of assistance to you on this or any other matter, please do not hesitate to contact me.

Thank you for your consideration of this matter.

Best regards,

A handwritten signature in blue ink that reads "Jim Boyd".

Jim Boyd

cc: Lauren Jones
Sue Arnold

REPLY TO:

- 717 Manatee Avenue West, Bradenton, Florida 34205 (941) 742-6445
- 312 Senate Building, 404 South Monroe Street, Tallahassee, Florida 32399-1100 (850) 487-5021

Senate's Website: www.flsenate.gov

WILTON SIMPSON
President of the Senate

AARON BEAN
President Pro Tempore



THE FLORIDA SENATE

Tallahassee, Florida 32399-1100

SENATOR JIM BOYD
21st District

COMMITTEES:

Banking and Insurance, *Chair*
Agriculture
Appropriations Subcommittee on Agriculture,
Environment, and General Government
Appropriations Subcommittee on Transportation,
Tourism, and Economic Development
Judiciary
Rules

JOINT COMMITTEE:

Joint Legislative Auditing Committee

January 24, 2022

Senator Jason Pizzo
510 Knott Building
404 South Monroe Street
Tallahassee, FL 32399-1100

Dear Chairman Pizzo:

I am writing to advise you that Sen. Hooper has graciously agreed to present SB 1534: Retail Theft at the Committee on Criminal Justice meeting scheduled for tomorrow, Tuesday, January 25, 2022.

I am off campus due to illness. I appreciate your consideration in this matter.

Sincerely,

A handwritten signature in blue ink that reads "Jim Boyd".

Jim Boyd

cc: Lauren Jones
Sue Arnold

REPLY TO:

☐ 717 Manatee Avenue West, Bradenton, Florida 34205 (941) 742-6445
☐ 312 Senate Building, 404 South Monroe Street, Tallahassee, Florida 32399-1100 (850) 487-5021

Senate's Website: www.flsenate.gov

WILTON SIMPSON
President of the Senate

AARON BEAN
President Pro Tempore

January 25, 2022

Meeting Date

Senate Criminal Justice

Committee

Name Jennifer Cook Pritt

Phone 850-219-3631

Address 2636 Mitcham Drive

Email jpritt@fpca.com

Street

Tallahassee

FL

32308

City

State

Zip

Reset Form

Speaking: For Against Information OR Waive Speaking: In Support Against

PLEASE CHECK ONE OF THE FOLLOWING:

I am appearing without compensation or sponsorship.

I am a registered lobbyist, representing:

Florida Police Chiefs Association

I am not a lobbyist, but received something of value for my appearance (travel, meals, lodging, etc.), sponsored by:

While it is a tradition to encourage public testimony, time may not permit all persons wishing to speak to be heard at this hearing. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard. If you have questions about registering to lobby please see Fla. Stat. §11.045 and Joint Rule 1. [2020-2022 Joint Rules.pdf \(flsenate.gov\)](#)

This form is part of the public record for this meeting.

S-001 (08/10/2021)

The Florida Senate
APPEARANCE RECORD

Deliver both copies of this form to
Senate professional staff conducting the meeting

SB 1534

Bill Number or Topic

241712

Amendment Barcode (if applicable)

1/25/22

APPEARANCE RECORD

SB 1534

Meeting Date

Bill Number or Topic

criminal justice

Deliver both copies of this form to
Senate professional staff conducting the meeting

Committee

Amendment Barcode (if applicable)

Name Libby Guzzo

Phone 850-245-0155

Address 400 S. Monroe street

Email Libby.Guzzo@myfloridalegal.com

Street

Tallahassee

FL

32399

City

State

Zip

Speaking: For Against Information **OR** Waive Speaking: In Support Against

PLEASE CHECK ONE OF THE FOLLOWING:

I am appearing without compensation or sponsorship.

I am a registered lobbyist, representing:

Office of Attorney General

I am not a lobbyist, but received something of value for my appearance (travel, meals, lodging, etc.), sponsored by:

While it is a tradition to encourage public testimony, time may not permit all persons wishing to speak to be heard at this hearing. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard. If you have questions about registering to lobby please see Fla. Stat. §11.045 and Joint Rule 1. [2020-2022 Joint Rules.pdf \(flsenate.gov\)](#)

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The Florida Senate

APPEARANCE RECORD

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SB 1534

Bill Number or Topic

1/25/22

Meeting Date

Criminal Justice

Committee

Amendment Barcode (if applicable)

Name Jack Campbell

Phone 850-606-6012

Address Florida Prosecuting Attorneys/State Attorneys

Street

Tallahassee, FL

City

State

Zip

Speaking: For Against Information OR Waive Speaking: In Support Against

PLEASE CHECK ONE OF THE FOLLOWING:

I am appearing without compensation or sponsorship.

I am a registered lobbyist, representing:

I am not a lobbyist, but received something of value for my appearance (travel, meals, lodging, etc.), sponsored by:

While it is a tradition to encourage public testimony, time may not permit all persons wishing to speak to be heard at this hearing. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard. If you have questions about registering to lobby please see Fla. Stat. §11.045 and Joint Rule 1. [2020-2022 Joint Rules.pdf \(flsenate.gov\)](#)

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S-001 (08/10/2021)

The Florida Senate

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1-25-22

Meeting Date

1534

Bill Number or Topic

Criminal Justice

Committee

Amendment Barcode (if applicable)

Name Rob Johnson

Phone 850-491-1430

Address 110 E. Jefferson St.

Email Rob@themaeyernickgroup.com

Street

Tallahassee FL 32308

City

State

Zip

Speaking: For Against Information OR Waive Speaking: In Support Against

PLEASE CHECK ONE OF THE FOLLOWING:

I am appearing without compensation or sponsorship.

I am a registered lobbyist, representing: The Home Depot

I am not a lobbyist, but received something of value for my appearance (travel, meals, lodging, etc.), sponsored by:

While it is a tradition to encourage public testimony, time may not permit all persons wishing to speak to be heard at this hearing. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard. If you have questions about registering to lobby please see Fla. Stat. §11.045 and Joint Rule 1. [2020-2022 Joint Rules.pdf \(flsenate.gov\)](#)

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S-001 (08/10/2021)

APPEARANCE RECORD

1534

1-25-2022

Meeting Date

Bill Number or Topic

Criminal Justice

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Senate professional staff conducting the meeting

Committee

Amendment Barcode (if applicable)

Name Tim Parson

Phone 850-910-2678

Address 113 E. College Ave.
Street

Email tim@libertypartnersfl.com

Tallahassee FL 32302
City State Zip

Speaking: For Against Information

OR

Waive Speaking: In Support Against

PLEASE CHECK ONE OF THE FOLLOWING:

I am appearing without compensation or sponsorship.

I am a registered lobbyist, representing:

Florida Sheriffs Association

I am not a lobbyist, but received something of value for my appearance (travel, meals, lodging, etc.), sponsored by:

While it is a tradition to encourage public testimony, time may not permit all persons wishing to speak to be heard at this hearing. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard. If you have questions about registering to lobby please see Fla. Stat. 511.045 and Joint Rule 1. [2020-2022 Joint Rules.pdf \(flsenote.gov\)](#)

The Florida Senate

APPEARANCE RECORD

1/25/22

Meeting Date

1534

Bill Number or Topic

Deliver both copies of this form to Senate professional staff conducting the meeting

Committee

Amendment Barcode (if applicable)

Name Angie Hatfield

Phone 863-409-3332

Address IF this bill essentially turns

Email

Retit Theft into habitual & overburdens our system

Speaking: For Against Information

OR

Waive Speaking: In Support Against

PLEASE CHECK ONE OF THE FOLLOWING:

I am appearing without compensation or sponsorship.

I am a registered lobbyist, representing:

I am not a lobbyist, but received something of value for my appearance (travel, meals, lodging, etc.), sponsored by:

While it is a tradition to encourage public testimony, time may not permit all persons wishing to speak to be heard at this hearing. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard. If you have questions about registering to lobby please see Fla. Stat. §11.045 and Joint Rule 1. [2020-2022 Joint Rules.pdf \(flisenate.gov\)](#)

This form is part of the public record for this meeting.

S-001 (08/10/2021)

The Florida Senate

APPEARANCE RECORD

Deliver both copies of this form to Senate professional staff conducting the meeting

Jan. 25, 2022 Meeting Date
Criminal Justice Committee

1534 Bill Number or Topic
Amendment Barcode (if applicable)

Name GRACE Lovett Phone 850-222-4082

Address 227 S. Adams St. Email Grace@frf.org
Tallahassee FL 32301
City State Zip

Speaking: For Against Information OR Waive Speaking: In Support Against

PLEASE CHECK ONE OF THE FOLLOWING:

I am appearing without compensation or sponsorship.

I am a registered lobbyist, representing:
Florida Retail Federation

I am not a lobbyist, but received something of value for my appearance (travel, meals, lodging, etc.), sponsored by:

While it is a tradition to encourage public testimony, time may not permit all persons wishing to speak to be heard at this hearing. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard. If you have questions about registering to lobby please see Fla. Stat. §11.045 and Joint Rule 1. [2020-2022 Joint Rules.pdf \(flsenate.gov\)](#)

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Committee on Criminal Justice

BILL: CS/SB 1736

INTRODUCER: Criminal Justice Committee and Senator Hooper

SUBJECT: Records of Physical Examinations of Officers

DATE: January 26, 2022

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Erickson	Jones	CJ	Fav/CS
2.			GO	
3.			RC	

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/SB 1736 amends s. 943.13(6), F.S., to require the employing agency of a law enforcement officer, correctional officer, or correctional probation officer to maintain records of the officer's pre-employment physical examination for at least 5 years after the officer's separation from that agency. If an employing agency fails to maintain the records of the physical examination for the 5-year period after the officer's separation, it is presumed that the officer has met the requirement of that subsection that the officer successfully passed a pre-employment physical examination that failed to reveal any evidence of tuberculosis, heart disease, or hypertension. The absence of any finding of such disease in the pre-employment examination is a crucial prerequisite to the workers' compensation presumption that an officer with such disease acquired it accidentally and in the line of duty. *Therefore, retention of the physical examination record is essential evidence to establish a compensable occupational disease.*

The previously-described presumption of compensability also applies to firefighters. The bill amends s. 112.18, F.S., to specify that the medical examination required for firefighter certification pursuant to s. 633.412(5), F.S., may serve as a physical examination upon entering service for a firefighter if the employer did not retain or conduct a physical examination upon entering service.

Finally, s. 112.18, F.S., mistakenly omits in two places in the statute reference to correctional officers and correctional probation officers in regard to the presumption of compensability, even

though the statute and s. 943.13(6), F.S., specifically provide that the presumption of compensability applies to these officers. The bill corrects these reference omissions.

The retention of these records should not have any fiscal impact on state and local government. The impact of the change on workers' compensation claims is indeterminate. See Section V. Fiscal Impact Statement.

The bill is effective July 1, 2022.

II. Present Situation:

Physical Examination Requirement for Employment or Appointment as a Law Enforcement, Correctional, or Probation Officer

Section 943.13, F.S., provides minimum qualifications for employment or appointment as a full-time, part-time, or auxiliary law enforcement, correctional officer, or correctional probation officer. Among the qualifications is a requirement to pass a physical examination.¹

Physical Examination Requirement for Certification as a Firefighter

Section 633.412, F.S., provides qualifications for certification as a firefighter. Among the qualifications is a requirement to be in good physical condition as determined by a medical examination.² The medical professional must certify that the applicant is medically fit to engage in firefighting training and does not have any pre-existing or current condition, illness, injury, or deficiency.³ There does not appear to be a provision for firefighters comparable to s. 943.13(6), F.S., which requires a pre-employment physical examination.

Workers' Compensation – Presumption of Compensability

In regards to a workers' compensation claim relating to an occupational disease, the term "occupational disease" means only a disease which is due to causes and conditions which are characteristic of and peculiar to a particular trade, occupation, process, or employment, and to exclude all ordinary diseases of life to which the general public is exposed, unless the incidence of the disease is substantially higher in the particular trade, occupation, process, or employment than for the general public. It is also a disease for which there are epidemiological studies showing that exposure to the specific substance involved, at the levels to which the employee was exposed, may cause the precise disease sustained by the employee.⁴

Section 112.18(1)(a), F.S., provides that any condition or impairment of health of any firefighter, law enforcement officer, correctional officer, or correctional probation officer caused by

¹ Section 943.13(6), F.S.

² Section 633.412(5), F.S.

³ Rule 69A-37.037 ("Firefighter Training Course Medical Examination"), F.A.C., available at https://www.flrules.org/gateway/notice_Files.asp?ID=21630435 (last visited on Jan. 19, 2022) and Form DFS-K3-1022 ("Medical Examination to Determine Fitness for Firefighter Training, Bureau of Fire Standards and Training"), Division of State Fire Marshal, Department of Financial Services, available at https://www.myfloridacfo.com/division/sfm/bfst/DFS-K4-1022_Medical_Jan2018.pdf (last visited on Jan. 19, 2022).

⁴ Section 440.151(2), F.S.

tuberculosis, heart disease, or hypertension resulting in total or partial disability or death is presumed to have been accidental and suffered in the line of duty unless the contrary be shown by competent evidence.

However, a crucial prerequisite to this statutory presumption is that the firefighter or officer successfully passed a physical examination upon entering into any such service that failed to reveal any evidence of tuberculosis, heart disease, or hypertension. This prerequisite is provided in s. 112.18(1)(a), F.S., and is relevant to any firefighter, law enforcement officer, correctional officer, or correctional probation officer. A similar provision relevant only to law enforcement officers, correctional officers, and correctional probation officers is found in s. 943.13(6), F.S.

If the examination fails to reveal evidence of such disease, the firefighter or officer must present evidence of suffering from such disease but doesn't have to present evidence of causation that is typically required to demonstrate that an occupational disease is compensable.⁵ The evidentiary burden then shifts to the employer to show by clear and convincing evidence that the disease was caused by a non-work-related event or exposure.⁶

The Pre-Employment Physical is Crucial Evidence for the Compensability Presumption

As provided in s. 112.18(1)(a), F.S., to be eligible to use the presumption of compensability, a firefighter or officer must have successfully passed a physical examination upon entering into service, which examination failed to reveal any evidence of any tuberculosis, heart disease, or hypertension. This physical examination is crucial evidence in a dispute over workers' compensation benefits.

When the parties cannot produce a record of a pre-employment physical, the firefighter or officer cannot use the presumption to establish a compensable occupational disease. For example, in testimony before the House Banking and Insurance Committee, staff of the Florida State Fraternal Order of Police noted they had a workers compensation issue because an agency hired a third party vendor to handle medical records and that vendor purged the records system for anyone who was hired prior to 1998. One officer impacted by this purge suffered from post-traumatic stress disorder due to a violent public incident.⁷

Eligibility for the Workers' Compensation Presumption

In a disputed workers' compensation determination, the legal presumption does not apply if a law enforcement, correctional, or correctional probation officer:

- Departed in a material fashion from the prescribed course of treatment of his or her personal physician and the departure is demonstrated to have resulted in a significant aggravation of

⁵ *McDonald v. City of Jacksonville*, 286 So.3d 792, 795 (Fla. 1st DCA 2019), relying primarily on *Walters v. State, DOC, Div. of Risk Management*, 100 So.3d 1173 (Fla. 1st DCA 2012) (rehearing denied), review denied by *Florida Dept. of Corrections v. Walters*, 108 So. 3d 654 (Fla. 2013).

⁶ *Butler v. City of Jacksonville*, 980 So.2d 1250, 1251-1252 (Fla. 1st DCA 2008).

⁷ Public testimony of Lisa Henning, representing the Florida State Fraternal Order of Police, before the House Insurance & Banking Subcommittee hearing on HB 453 (2022), Jan. 19, 2022. This testimony is available at <https://thefloridachannel.org/videos/1-19-22-house-insurance-banking-subcommittee/> (last visited on Jan. 21, 2022).

the tuberculosis, heart disease, or hypertension resulting in disability or increasing the disability or need for medical treatment; or

- Was previously compensated pursuant to s. 112.18, F.S., and ch. 440, F.S. (workers' compensation) for tuberculosis, heart disease, or hypertension and thereafter sustains and reports a new compensable workers' compensation claim under s. 112.18, F.S., and ch. 440, F.S., and the officer has departed in a material fashion from the prescribed course of treatment of an authorized physician for the preexisting workers' compensation claim and the departure is demonstrated to have resulted in a significant aggravation of the tuberculosis, heart disease, or hypertension resulting in disability or increasing the disability or need for medical treatment.⁸

To be eligible for workers' compensation benefits, a law enforcement officer, correctional officer, or correctional probation officer must make a claim for benefits prior to or within 180 days of leaving the employment of the employing agency.⁹

Firefighters are not subject to the exclusion for prior treatment or compensation and are not covered by the claim-filing deadline that lets a law enforcement officer, correctional officer, or correctional probation officer file a claim up to 180 days after leaving employment. A firefighter suffering from tuberculosis, heart disease, or hypertension must advise his or her employer of the injury within 90 days of the initial manifestation of the disease or 90 days after the firefighter obtains a medical opinion that the injury (occupational disease) is due to the nature of the firefighter's employment.¹⁰

Records Retention

According to the records retention schedule for state and local government agencies published by the Florida Department of State, reports of job-related medical examinations must be retained by the Florida Retirement System (FRS) for 25 years after a participating employee separates from government employment.¹¹

Local governments that do not participate in the FRS must maintain reports of job-related medical examinations for 50 years after a participating employee separates from government employment.¹²

State agencies that employ people through the Other Personnel Services system, as interns, or on a voluntary basis must maintain reports of job-related medical examinations for three years after the employee separates from government employment.¹³

⁸ Section 112.18(1)(b)(1), F.S.

⁹ Section 112.18(1)(b)(4), F.S.

¹⁰ Sections 440.151(6) and 440.185(1), F.S.

¹¹ Florida Department of State, Division of Library and Information Services, *General Records Schedule GS1-SL for State and Local Government Agencies*, p. 31, available at <https://dos.myflorida.com/media/703328/gsl-sl-2020.pdf> (last visited on Jan. 19, 2022).

¹² *Id.* at 32.

¹³ *Id.*

III. Effect of Proposed Changes:

The bill amends s. 943.13(6), F.S., to require the employing agency of a law enforcement officer, correctional officer, or correctional probation officer to maintain records of the officer's pre-employment physical examination for at least 5 years after the officer's separation from that agency. If an employing agency fails to maintain the records of the physical examination for the 5-year period after the officer's separation, it is presumed that the officer has met the requirement of that subsection that the officer successfully passed a pre-employment physical examination that failed to reveal any evidence of tuberculosis, heart disease, or hypertension. The absence of any finding of such disease in the pre-employment examination is a crucial prerequisite to the workers' compensation presumption that an officer with such disease acquired it accidentally and in the line of duty. *Therefore, retention of the physical examination record is essential evidence to establish a compensable occupational disease.*¹⁴

The previously-described presumption of compensability also applies to firefighters. The bill amends s. 112.18, F.S., to specify that the medical examination required for firefighter certification pursuant to s. 633.412(5), F.S., may serve as a physical examination upon entering service for a firefighter if the employer did not retain or conduct a physical examination upon entering service.

Finally, s. 112.18, F.S., mistakenly omits in two places in the statute reference to correctional officers and correctional probation officers in regard to the presumption of compensability, even though the statute and s. 943.13(6), F.S., specifically provide that the presumption of compensability applies to these officers. The bill corrects these reference omissions.

The bill takes effect July 1, 2022.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. State Tax or Fee Increases:

None.

¹⁴ This record retention provision does not apply to firefighters. Medical examination records required for firefighter certification are retained by the Department of Financial Services.

E. Other Constitutional Issues:

None identified.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

The record retention requirement of the bill does not impose additional duties on government employers, because state and local government agencies are already subject to record retention requirements that exceed the five-year benchmark established in this bill. (See discussion of records retention schedule, *supra*.)

The impact of the change on workers' compensation claims is indeterminate.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends sections 112.18 and 943.13 of the Florida Statutes.

IX. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS by Criminal Justice on January 25, 2022:

The committee substitute:

- Provides that a medical examination required for firefighter certification pursuant to s. 633.412(5), F.S., may serve as a physical examination upon entering service for a firefighter if the employer did not retain or conduct a physical examination upon entering service; and
- Corrects the omission of references to correctional officers and correctional probational officers in regard to a presumption of compensability (in workers' compensation law) that applies to these officers.

B. Amendments:

None.

This Senate Bill Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.



555638

LEGISLATIVE ACTION

Senate	.	House
Comm: RCS	.	
01/25/2022	.	
	.	
	.	
	.	

The Committee on Criminal Justice (Hooper) recommended the following:

Senate Amendment (with title amendment)

Before line 13

insert:

Section 1. Paragraph (a) of subsection (1) of section 112.18, Florida Statutes, is amended to read:

112.18 Firefighters and law enforcement or correctional officers; special provisions relative to disability.—

(1) (a) Any condition or impairment of health of any Florida state, municipal, county, port authority, special tax district,



555638

11 or fire control district firefighter or any law enforcement
12 officer, correctional officer, or correctional probation officer
13 as defined in s. 943.10(1), (2), or (3) caused by tuberculosis,
14 heart disease, or hypertension resulting in total or partial
15 disability or death shall be presumed to have been accidental
16 and to have been suffered in the line of duty unless the
17 contrary be shown by competent evidence. However, any such
18 firefighter, ~~or~~ law enforcement officer, correctional officer,
19 or correctional probation officer must have successfully passed
20 a physical examination upon entering into any such service as a
21 firefighter, ~~or~~ law enforcement officer, correctional officer,
22 or correctional probation officer, which examination failed to
23 reveal any evidence of any such condition. The medical
24 examination required by s. 633.412(5) may serve as a physical
25 examination upon entering service for a firefighter if the
26 employer did not retain or conduct a physical examination upon
27 entering service. Such presumption does not apply to benefits
28 payable under or granted in a policy of life insurance or
29 disability insurance, unless the insurer and insured have
30 negotiated for such additional benefits to be included in the
31 policy contract.

32
33 ===== T I T L E A M E N D M E N T =====

34 And the title is amended as follows:

35 Delete lines 2 - 3

36 and insert:

37 An act relating to records of physical examinations;
38 amending s. 112.18, F.S.; authorizing a specified
39 medical examination to serve as a certain required



555638

40 physical examination for firefighters; amending s.
41 943.13, F.S.; requiring an

By Senator Hooper

16-01154-22

20221736__

A bill to be entitled

An act relating to records of physical examinations of officers; amending s. 943.13, F.S.; requiring an employing agency to maintain records of employee physical examinations for a specified period of time after employee separation from the agency; creating a presumption that applies to employees whose records are not maintained for that period of time; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Subsection (6) of section 943.13, Florida Statutes, is amended to read:

943.13 Officers' minimum qualifications for employment or appointment.—On or after October 1, 1984, any person employed or appointed as a full-time, part-time, or auxiliary law enforcement officer or correctional officer; on or after October 1, 1986, any person employed as a full-time, part-time, or auxiliary correctional probation officer; and on or after October 1, 1986, any person employed as a full-time, part-time, or auxiliary correctional officer by a private entity under contract to the Department of Corrections, to a county commission, or to the Department of Management Services shall:

(6) Have passed a physical examination by a licensed physician, physician assistant, or licensed advanced practice registered nurse, based on specifications established by the commission. In order to be eligible for the presumption set forth in s. 112.18 while employed with an employing agency, a

Page 1 of 2

CODING: Words ~~stricken~~ are deletions; words underlined are additions.

16-01154-22

20221736__

law enforcement officer, correctional officer, or correctional probation officer must have successfully passed the physical examination required by this subsection upon entering into service as a law enforcement officer, correctional officer, or correctional probation officer with the employing agency, which examination must have failed to reveal any evidence of tuberculosis, heart disease, or hypertension. A law enforcement officer, correctional officer, or correctional probation officer may not use a physical examination from a former employing agency for purposes of claiming the presumption set forth in s. 112.18 against the current employing agency. An employing agency shall maintain records of the physical examination required under this subsection for at least 5 years after the employee's separation from that agency. If an employing agency fails to maintain such records for the required period of time, it is presumed that the law enforcement officer, correctional officer, or correctional probation officer satisfied the requirement of this subsection of having passed a physical examination.

Section 2. This act shall take effect July 1, 2022.

Page 2 of 2

CODING: Words ~~stricken~~ are deletions; words underlined are additions.



The Florida Senate

Committee Agenda Request

To: Senator Jason Pizzo, Chair
Committee on Criminal Justice

Subject: Committee Agenda Request

Date: January 12, 2022

I respectfully request that **Senate Bill # 1736**, relating to Records of Physical Examinations of Officers, be placed on the:

- committee agenda at your earliest possible convenience.
- next committee agenda.

A handwritten signature in black ink, appearing to read "Ed Hooper", written over a horizontal line.

Senator Ed Hooper
Florida Senate, District 16

1/25/22

The Florida Senate APPEARANCE RECORD

1736

Meeting Date
Criminal Justice

Deliver both copies of this form to
Senate professional staff conducting the meeting

Bill Number or Topic
555638

Committee
Rocco Salvatori

Amendment Barcode (if applicable)

Name
343 W Madison St

Phone
850-224-7333

Address
Tallahassee FL 32301

Email
rocco@fpfp.org

Reset Form

Speaking: For Against Information **OR** Waive Speaking: In Support Against

PLEASE CHECK ONE OF THE FOLLOWING:

I am appearing without compensation or sponsorship.

I am a registered lobbyist, representing:

I am not a lobbyist, but received something of value for my appearance (travel, meals, lodging, etc.), sponsored by:

While it is a tradition to encourage public testimony, time may not permit all persons wishing to speak to be heard at this hearing. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard. If you have questions about registering to lobby please see Fla. Stat. §11.045 and Joint Rule 1. [2020-2022 Joint Rules.pdf \(flsenate.gov\)](#)

This form is part of the public record for this meeting.

S-001 (08/10/2021)

The Florida Senate

APPEARANCE RECORD

Deliver both copies of this form to Senate professional staff conducting the meeting

1/25/22

Meeting Date

1736

Bill Number or Topic

Criminal Justice

Committee

Amendment Barcode (if applicable)

Name

Lisa Henning

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City

FL

State

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Zip

Speaking:

For

Against

Information

OR

Waive Speaking:

In Support

Against

PLEASE CHECK ONE OF THE FOLLOWING:

I am appearing without compensation or sponsorship.

I am a registered lobbyist, representing:

Fraternal Order of Police

I am not a lobbyist, but received something of value for my appearance (travel, meals, lodging, etc.), sponsored by:

While it is a tradition to encourage public testimony, time may not permit all persons wishing to speak to be heard at this hearing. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard. If you have questions about registering to lobby please see Fla. Stat. §11.045 and Joint Rule 1. [2020-2022 Joint Rules.pdf \(flsenate.gov\)](#)

This form is part of the public record for this meeting.

S-001 (08/10/2021)

The Florida Senate

APPEARANCE RECORD

SB 1736

11/25/2022

Meeting Date

Bill Number or Topic

Criminal Justice

Committee

Deliver both copies of this form to Senate professional staff conducting the meeting

Amendment Barcode (if applicable)

Name GARY BRADFORD

Phone 800-733-3722

Address 300 E. Brevard St

Email GBRADFORD1958@yahoo.com

Street

Tallahassee

FL

32302

City

State

Zip

Speaking: For Against Information

OR

Waive Speaking: In Support Against

PLEASE CHECK ONE OF THE FOLLOWING:

I am appearing without compensation or sponsorship.

I am a registered lobbyist, representing:

FL. PBA

I am not a lobbyist, but received something of value for my appearance (travel, meals, lodging, etc.), sponsored by:

While it is a tradition to encourage public testimony, time may not permit all persons wishing to speak to be heard at this hearing. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard. If you have questions about registering to lobby please see Fla. Stat. §11.045 and Joint Rule 1. [2020-2022 Joint Rules.pdf \(flisenate.gov\)](#)

This form is part of the public record for this meeting.

S-001 (08/10/2021)

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Committee on Criminal Justice

BILL: CS/SB 1798

INTRODUCER: Criminal Justice Committee and Senator Book

SUBJECT: Sexually Explicit Material

DATE: January 26, 2022

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Stokes	Jones	CJ	Fav/CS
2.			CF	
3.			AP	

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/SB 1798 creates s. 836.13, F.S., to provide criminal and civil penalties for persons who promote certain altered sexual depictions. Colloquially known as “deep fakes,” these images often depict individuals engaging in sexual behavior that they did not engage in.

Specifically, this bill provides that a person commits a third degree felony, when he or she willfully and maliciously promotes any altered sexual depiction of an identifiable person, without the consent of the identifiable person, and who knows or reasonably should have known that such visual depiction was an altered sexual depiction.

The bill also creates criminal and civil penalties relating to the unlawful obtaining, possessing, or promoting of sexually explicit images. A person commits a third degree felony when he or she:

- Knowingly and unlawfully obtains a sexually explicit image of an identifiable person with intent to promote such image.
- Willfully possesses with the intent to promote for the purpose of pecuniary or any type of financial gain a sexually explicit image of an identifiable person without that person’s consent.

A person commits a second degree felony when he or she willfully promotes for the purpose of pecuniary or any type of financial gain a sexually explicit image of an identifiable person without that person’s consent.

Additionally, the felony offenses created in this bill are ranked in the offense severity ranking chart of the Criminal Punishment Code.

The bill, throughout the Florida Statutes, replaces the term “child pornography,” with “child sexual abuse material.” The bill expands this term to include any image that has been created, altered, adapted, or modified by electronic, mechanical, or other means, to portray an identifiable minor engaged in sexual conduct.

The bill further amends s. 827.071, F.S., to replace the phrase “any sexual conduct by a child,” with the term “child sexual abuse material.” The term “child sexual abuse material,” includes images depicting any sexual conduct by a child.

The bill amends s. 775.0847, F.S., to replace the term “movie” with “motion picture, film, video, or computer-generated motion picture, film, or video,” for purposes of enhancing specified offenses relating to child sexual abuse material or obscenity.

The bill increases the minimum monetary damages from \$5,000 to \$10,000 that a victim of sexual cyberharassment may receive as a result of a civil action.

The bill provides that a law enforcement officer may arrest without a warrant any person who he or she has probable cause to believe possesses a child-like sex doll.

Additionally, the bill provides conforming cross-references.

The bill may have a positive indeterminate fiscal impact (unquantifiable increase in prison beds and jail beds) on the Department of Corrections and local jails. See Section V. Fiscal Impact Statement.

The bill is effective October 1, 2022.

II. Present Situation:

With technology advancing at a rapid rate, states and the federal government are attempting to craft laws to address issues arising as a result of such technology. Many of these issues relate to the creation or dissemination of sexually explicit material including, nonconsensual pornography of adults, sexually explicit deep fake images of adults, and morphed child pornography.

Deep Fakes

Deep fakes are realistic images or videos that are created using artificial intelligence (AI) and often depict a real person saying something they did not say, or engaging in a behavior they did not engage in. The use of AI to generate a deep fake image is causing concern because the results are increasingly realistic, rapidly created, and inexpensively made. Software to create such images is often free and publicly available.¹

¹ In Focus, Congressional Research Service, *Deep Fakes and National Security*, June 8, 2021, available at <https://crsreports.congress.gov/product/pdf/IF/IF11333> (last visited January 17, 2022).

While there may be beneficial uses, deep fake technology may also pose a harm to individuals. Deep fakes may be used to spread false information, or used to embarrass, humiliate, exploit, or sabotage others.²

Legislation in Other States

Several states provide criminal or civil liability for creating or distributing deep fake images. The states that have enacted laws relating to deep fake images include: Virginia,³ Hawaii,⁴ California,⁵ and Texas.⁶

Currently, no states completely ban the creation or distribution of all deep fakes. A complete ban of such images would likely run afoul of constitutional protections under the First Amendment. However, certain categories of speech, including defamation, fraud, true threats, and the imminent-and likely incitement of violence, do not receive protections under the First amendment.⁷ Some deep fakes will likely fall into one of those categories and therefore may be regulated.⁸

The potential for harm stemming from deep fake images is often explored in the context of nonconsensual deep fake pornography. “The core issue of nonconsensual pornography is consent, and deep fake pornography adds an additional layer because the individual depicted did not actually engage in the sexual behavior [he or she] is depicted as doing.”⁹

Nonconsensual Pornography

Many states, including Florida, ban nonconsensual pornography, otherwise known as “revenge porn.” Such bans have been consistently upheld by the courts.¹⁰ The courts have found a compelling state interest in protecting individuals from the nonconsensual dissemination of private sexual images. “Those who are unwillingly exposed to their friends, family, bosses, co-workers, teachers, fellow students, or random strangers on the internet are often deeply and permanently scarred by the experience.”¹¹

Section 784.049, F.S., provides that sexual cyberharassment means to publish to an Internet website or disseminate through electronic means to another person a sexually explicit image of a person that contains or conveys the personal identification information of the depicted person without the depicted person’s consent, contrary to the depicted person’s reasonable expectation

² California Law Review, *Deep Fakes: A Looming Challenge for Privacy, Democracy, and National Security*, Bobby Chesney and Danielle Citron, 2019 Vol. 107:1753, p. 1771-74, (on file with Senate Criminal Justice Committee).

³ Section 18.2-386.2., V.A.C.

⁴ Section 711-1110.9., H.R.S.

⁵ Section 1708.86., C.C.C.

⁶ Section 255.004, V.T.C.A.

⁷ *United States v. Alvarez*, 567 U.S. 709 (2012).

⁸ California Law Review, *Deep Fakes: A Looming Challenge for Privacy, Democracy, and National Security*, Bobby Chesney and Danielle Citron, 2019 Vol. 107:1753, p. 1791, (on file with Senate Criminal Justice Committee).

⁹ Northwestern University Law Review, *Deepfake Privacy: Attitudes and Regulation*, Mathew B. Kugler and Carly Pace, 2021 Vol 116:611, p. 624-25, (on file with Senate Criminal Justice Committee).

¹⁰ See *Minnesota v. Casillas*, 952 N.W. 2d 629, 642 (Minnesota 2020); *Vermont v. VanBuren*, 210 Vt. 293 (Vermont 2019); *Illinois v. Austin*, 2019 IL 123910, (Illinois 2019).

¹¹ *Minnesota v. Casillas*, 952 N.W. 2d 629, 642 (Minnesota 2020).

that the image would remain private, for no legitimate purpose, with the intent of causing substantial emotional distress to the depicted person.

It is a first degree misdemeanor¹² to willfully and maliciously sexually cyberharass another person. A second or subsequent violation is a third degree felony.¹³ In addition to criminal penalties, an aggrieved person may initiate a civil action to obtain injunctive relief, a minimum of \$5,000 in monetary damages, and reasonable attorney fees and costs.¹⁴

There is currently no state law prohibiting the unlawful procuring, or possession of a sexually explicit image with the intent of selling or disseminating such image. Such crimes in Florida may only be charged under current theft¹⁵ laws if applicable.

Child Pornography

Generally, the First Amendment does not protect child pornography. In *New York v. Ferber*,¹⁶ the Supreme Court of the United States recognized that states have a compelling interest in safeguarding the physical and psychological well-being of minors and in preventing their sexual exploitation and abuse. The Court noted that it was “unlikely that visual depictions of children . . . lewdly exhibiting their genitals would often constitute an important and necessary part of a literary performance or scientific or educational work.”¹⁷

The use of AI has also been used to create child pornography, sometimes referred to as “morphing.” The Federal Government prohibits such images, however, the Supreme Court of the United States has found that the child or minor depicted in the image must be a real minor for such bans to pass constitutional muster.¹⁸ Under these principles, states have constitutionally been able to criminalize the possession, distribution, etc., of child pornography. However, the constitutionality of criminalizing such acts is less clear when the images at issue are morphed pornography.

Child Pornography Prevention Action of 1996

In 1996, Congress passed the Child Pornography Prevention Action of 1996 (CPPA),¹⁹ which created a definition of “child pornography.” This criminalized, for the first time, acts relating to

¹² A first degree misdemeanor is punishable by up to a year in county jail and a fine not exceeding \$1,000. Sections 775.082 and 775.083, F.S.

¹³ Section 784.049(3), F.S. A third degree felony is punishable by up to five years imprisonment and up to a \$5,000 fine. Sections 775.082 and 775.083, F.S.

¹⁴ Section 784.049(5), F.S.

¹⁵ See ch. 812, F.S.

¹⁶ *New York v. Ferber*, 458 U.S. 747 (1982).

¹⁷ *Id.* at 763.

¹⁸ See *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002).

¹⁹ Pub. L. No. 104-208, s. 121.

morphed child pornography. Under the CPPA, “child pornography” was defined as:

- (8) Any visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture, whether made or produced by electronic, mechanical, or other means, of sexually explicit conduct,²⁰ where:
- (A) The production of such visual depiction involves the use of a minor engaging in sexually explicit conduct;
 - (B) Such visual depiction is, or appears to be, of a minor engaging in sexually explicit conduct (i.e., *virtual child pornography – created without using an actual child*);
 - (C) Such visual depiction has been created, adapted, or modified to appear that an identifiable minor²¹ is engaging in sexually explicit conduct (i.e., *morphed child pornography*); or
 - (D) Such visual depiction is advertised, promoted, presented, described, or distributed in such a manner that conveys the impression that the material is or contains a visual depiction of a minor engaging in sexually explicit conduct.²²

In 2002, the United States Supreme Court decided *Ashcroft v. Free Speech Coalition*,²³ a case in which a California trade association for the adult-entertainment industry challenged section 2256(8)(B) of the CPPA as unconstitutionally overbroad. As noted above, section 2256(8)(B) made it a crime to possess or distribute images depicting a child or what appears to be a child, engaging in sexually explicit conduct (i.e., virtual child pornography).²⁴

The Court held that the “speech” criminalized in the challenged provision of the CPPA violated the First Amendment because it extended the federal prohibition against child pornography to sexually explicit images that appeared to depict minors but were produced without using any real children.²⁵ The Court decided that by prohibiting child pornography that did not depict an actual child, section 2256(8)(B) of the CPPA “abridged the freedom to engage in a substantial amount of lawful speech” and was therefore overbroad and unconstitutional.²⁶

The *Ashcroft* decision did not specifically address the constitutionality of 18 U.S.C. 2256(8)(C) (prohibiting *morphed* child pornography), it did note, in dictum, that “[a]lthough morphed images may fall within the definition of virtual child pornography, they implicate the interests of real children. . . .”²⁷ Courts have taken this dictum to suggest that the *Ashcroft* court would have deemed morphed child pornography as not protected by the First Amendment.²⁸

²⁰ The term “sexually explicit conduct” was defined as actual or simulated sexual intercourse (including genital-genital, oral-genital, anal-genital, or oral-anal) whether between persons of the same or opposite sex; bestiality; masturbation; sadistic or masochistic abuse; or lascivious exhibition of the genitals or pubic area of any person. 18 U.S.C. s. 2256(2) (1996 ed.).

²¹ The term “identifiable minor” was defined as a person who is recognizable as an actual person by the person’s face, likeness, or other distinguishing characteristic, such as a unique birthmark or other recognizable feature, and: who was a minor at the time the visual depiction was created, adapted, or modified; or whose image as a minor was used in creating, adapting, or modifying the visual depiction. The term was not be construed to require proof of the actual identity of the identifiable minor. 18 U.S.C. s. 2556(9) (1996 ed.).

²² 18 U.S.C. s. 2556(8) (1996 ed.).

²³ 535 U.S. 234 (2002).

²⁴ 18 U.S.C. s. 2556(8) (1996 ed.).

²⁵ *Ashcroft*, 535 U.S. at 256.

²⁶ *Id.*

²⁷ *Id.* at 242.

²⁸ *McFadden v. Alabama*, 67 So. 3d 169, 181-182 (Ala. Crim. App. 2010).

Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act (Protect Act)

Congress attempted to remedy the constitutional issues raised in *Ashcroft* by passing the “Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act” (Protect Act) in 2003.²⁹ The Protect Act, in part, narrowed the definition of “virtual” child pornography in section (8)(B) of the CPPA to include virtual or computer-generated images that are “indistinguishable from” images of actual minors engaging in sexually explicit conduct.³⁰

Notably, the definition of “morphed” child pornography contained in section 2256(8)(C) remained unchanged between the CPPA and the Protect Act.

Case Law since the Passage of the Protect Act

To date, the federal statutes relating to morphed child pornography have been upheld.³¹ In *United States v. Bach*,³² the defendant was convicted of possessing morphed child pornography. The image at issue showed a young nude boy sitting in a tree, grinning, with his pelvis tilted upward, his legs opened wide, and a full erection.³³ The photograph of a well-known child entertainer’s head had been “skillfully inserted onto the photograph of the nude boy so that the resulting image appeared to be a nude picture of [the child entertainer] sitting in the tree.”³⁴

The defendant appealed arguing that his conviction was invalid because the definition of morphed child pornography violated the First Amendment. The United States Court of Appeals for the Eighth Circuit disagreed, holding that morphed child pornography “implicate the interests of a real child,” and creates a lasting record of an identifiable minor child seemingly engaged in sexually explicit activity.³⁵ The court noted that there may be instances when the “application of s. 2256(8)(C) violates the First Amendment, this is not such a case. This image involves the type of harm which can constitutionally be prosecuted under [*Ashcroft*] and *Ferber*.”³⁶

In *United States v. Anderson*, the defendant was charged with distribution of morphed child pornography relating to an image in which the face of a minor female was superimposed over the face of an adult female engaging in sex with an adult male.³⁷ The defendant moved to dismiss the charge, arguing that the definition of morphed child pornography was unconstitutionally overbroad.³⁸ The court noted that the image at issue was different from the one in *Bach* in that “no minor was sexually abused.”³⁹ However, the court held that because such images falsely

²⁹ Pub. L. No. 108-21.

³⁰ 18 U.S.C. s. 2256(8)(B).

³¹ See *United States v. Ramos*, 685 F. 3d 120, 134 (2d Cir. 2012), cert. denied, 133 S.Ct. 567 (2012); see also *Doe v. Boland*, 630 F. 3d 491, 497 (6th Cir. 2011).

³² *United States v. Bach*, 400 F. 3d 622 (8th Cir. 2005).

³³ *Id.* at 625.

³⁴ *Id.*

³⁵ *Id.* at 632.

³⁶ *Id.* See also *United States v. Hotaling*, 634 F. 3d 725 (2d Cir. 2008), cert. denied, 132 S.Ct. 843 (2011) (citing *Bach*, the Court held that “child pornography created by digitally altering sexually explicit photographs of adults to display the face of a child is not protected expressive speech under the First Amendment”).

³⁷ 759 F. 3d 891 (8th Cir. 2014).

³⁸ *Id.*

³⁹ *Id.* at 895.

portray identifiable children engaging in sexual activity, such images implicate the government's compelling interest in protecting minors. Using this reasoning, the court held that the definition of morphed child pornography was constitutional.⁴⁰

Florida Child Pornography Laws

Child pornography is defined, as *any* image depicting a minor⁴¹ engaged in sexual conduct.⁴²

⁴³Florida law currently contains a variety of statutes that prohibit acts relating to child pornography. Currently, these statutes are found in two different chapters, ch. 827, F.S., relating to the abuse of children, and ch. 847, F.S., relating to obscenity.

In recent years, individuals have started using AI to create child pornography, e.g., images depicting sexually explicit conduct in which an actual child's head has been superimposed onto an adult's body.⁴⁴ Florida's child pornography laws do not include morphed pornography.

In 2010, Florida's Second DCA held that images that depicted the heads and faces of two children, ages 11 and 12, which were cut and pasted onto images of a 19 year old woman lewdly exhibiting her genitals did not constitute child pornography.⁴⁵ The court closely examined the definition of "sexual conduct," and determined that it requires images to include actual lewd exhibition of the genitals *by a child*.⁴⁶

The court also noted that the images depicted *simulated* lewd exhibition of the genitals by a child. The state argued that s. 827.071(5), F.S., proscribed such images because they were photographs or representations "which ... *in part* ... include ... sexual conduct by a child."⁴⁷ The court disagreed and found that the Legislature specifically excluded *simulated* lewd exhibition from the definition of "sexual conduct." Specifically, the court stated, "[i]f the legislature had intended to proscribe the possession of composite images that simulate lewd and lascivious exhibition of the genitals, it could have included a provision doing so. In fact, child pornography has been defined in the federal statutes to specifically include composite images. . . ."⁴⁸

⁴⁰ *Id.* at 896.

⁴¹ Section 847.001(8), F.S., provides that "minor" means any person under the age of 18 years.

⁴² "Sexual conduct" means actual or simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, or sadomasochistic abuse; actual lewd exhibition of the genitals; actual physical contact with a person's clothed or unclothed genitals, pubic area, buttocks, or, if such person is a female, breast with the intent to arouse or gratify the sexual desire of either party; or any act or conduct which constitutes sexual battery or simulates that sexual battery is being or will be committed. A mother's breastfeeding of her baby does not under any circumstance constitute "sexual conduct." Section 847.001(16), F.S.

⁴³ Section 847.001(3), F.S.

⁴⁴ *Computer Generated Child Pornography: A Legal Alternative?* Seattle University Law Review, Vol. 22:643, 1998, available at <https://digitalcommons.law.seattleu.edu/cgi/viewcontent.cgi?article=1585&context=sulr> (last visited January 19, 2022).

⁴⁵ *Stelmack v. State*, 58 So. 3d 874 (Fla. 2d DCA 2010).

⁴⁶ *Id.* at 877

⁴⁷ *Id.* (emphasis in original).

⁴⁸ *Id.* at 876.

Section 827.071, F.S., specifies the criminal offenses for the production of child pornography and the possession and promotion of child pornography. It is a second degree felony⁴⁹ for a person:

- Knowing the character and content thereof, to employ, authorize, or induce a child to engage in a sexual performance.⁵⁰
- Who is a parent, legal guardian or custodian to consent for a child to participate in a sexual performance.⁵¹
- Knowing the character and content, to produce, direct, or promote⁵² any performance which includes sexual conduct by a child.⁵³
- To possess with the intent to promote any photograph, motion picture, exhibition, show, representation, or other presentation which, in whole or in part, includes any sexual conduct by a child.⁵⁴

It is a third degree felony for a person to knowingly possess, control, or intentionally view a photograph, motion picture, exhibition, show, representation, image, data, computer depiction, or other presentation, which, in whole or in part, he or she knows to include any sexual conduct by a child.⁵⁵

Section 847.0137, F.S., specifies that any person who knew or reasonably should have known that he or she was transmitting^{56, 57} child pornography to another person commits a third degree felony.

Child Sexual Abuse Material

There has been a recent push to replace the term “child pornography” with “child sexual abuse material.” The Florida Department of Law Enforcement is one such entity that has requested this change.⁵⁸ Proponents of this change argue that the term “child pornography” should be avoided because:

⁴⁹ A second degree felony is punishable by up to 15 years imprisonment and up to a \$10,000 fine. Sections 775.082 and 775.083, F.S.

⁵⁰ Section 827.071(1)(c), F.S., provides “performance” means any play, motion picture, photograph, or dance or any other visual representation exhibited before an audience.

⁵¹ Section 827.071(2), F.S.

⁵² Section 827.071(1)(d), F.S., provides “promote” means to procure, manufacture, issue, sell, give, provide, lend, mail, deliver, transfer, transmute, publish, distribute, circulate, disseminate, present, exhibit, or advertise or to offer to agree to do the same.

⁵³ Section 827.071(3), F.S.

⁵⁴ Possession of three or more copies of such photographs, etc., is prima facie evidence of intent to promote.

⁵⁵ The statute also specifies that the possession, control, or intentional viewing of each such photograph, etc., is a separate offense. If such photograph, etc., includes sexual conduct by more than one child, then each child in each photograph, etc., that is knowingly possessed, controlled, or intentionally viewed is a separate offense.

⁵⁶ Section 847.0137(1)(b), F.S., provides “transmit” means the act of sending and causing to be delivered any image, information, or data from one or more persons or places to one or more other persons or places over or through any medium, including the Internet, by use of any electronic equipment or device.

⁵⁷ *Smith v. Florida*, 204 So. 3d 18, 19 (Fla. 2016), held that “the use of a file sharing program, where the originator affirmatively grants the receiver access to child pornography placed by the originator in files accessible through the file sharing program, constitutes the transmission of child pornography under the plain meaning of s. 847.0137, F.S.”

⁵⁸ Florida Department of Law Enforcement, *2022 Bill Analysis for SB 1798*, January 19, 2022 (on file with Senate Criminal Justice Committee).

- It fails to describe the true nature of the material and undermines the seriousness of the abuse from the child’s perspective;
- Pornography is a term primarily used to describe material depicting consensual sexual acts between adults distributed for the purpose of sexual pleasure. Using the term in this context risks normalizing, trivializing, and legitimizing the sexual abuse and exploitation of children; and
- Child pornography implies consent, and a child cannot legally give consent.⁵⁹

Child-like Sex Dolls

In 2019, Florida enacted laws relating to the possession and distribution of child-like sex dolls. Section 847.011(5)(a), F.S., provides that it is a third degree felony for a first offense, and a second degree felony for a second or subsequent offense for a person to knowingly:

- Sell, lend, give away, distribute, transmit, show, or transmute;
- Offer to sell, lend, give away, distribute, transmit, show, or transmute;
- Have in his or her possession, custody, or control with the intent to sell, lend, give away, distribute, transmit, show, or transmute; or
- Advertise in any manner an obscene, child-like sex doll.⁶⁰

It is a first degree misdemeanor for a first offense, and a third degree felony for a second or subsequent offense for a person to knowingly have in his or her possession, custody, or control an obscene, child-like sex doll.⁶¹

Criminal Punishment Code and Offense Severity Ranking

The Criminal Punishment Code⁶² is Florida’s primary sentencing policy. Noncapital felonies sentenced under the Code receive an offense severity level ranking (levels 1-10). Points are assigned and accrue based upon the severity level ranking assigned to the primary offense, additional offenses, and prior offenses. Sentence points escalate as the severity level escalates.

Offenses are either ranked in the offense severity level ranking chart in s. 921.0022, F.S., or are ranked by default based on a ranking assigned to the felony degree of the offense as provided in s. 921.0023, F.S. Currently, a felony of the third degree is ranked as a level 1 offense, and a second degree felony is ranked as a level 4 offense.⁶³

III. Effect of Proposed Changes:

This bill addresses issues that have emerged as a result of rapidly advancing technology. Specifically, it creates new crimes relating to the creation, dissemination, and taking of certain images which are sexually explicit. Additionally, the bill amends current laws dealing with

⁵⁹ INHOPE, *What is Child Sexual Abuse Material?* (2022) available at <https://www.inhope.org/EN/articles/child-sexual-abuse-material?locale=en> (last visited January 25, 2022).

⁶⁰ Section 847.011(5)(a), F.S.

⁶¹ Section 847.011(5)(b), F.S.

⁶² Sections 921.002-921.0027, F.S. See chs. 97-194 and 98-204, L.O.F. The Code is effective for offenses committed on or after October 1, 1998.

⁶³ Section 921.0023(1) and (2), F.S.

sexually explicit material, including expanding the definition of and changing the term “child pornography.”

Unlawful Promotion of Sexually Explicit Material

This bill creates two new sections of criminal law addressing the promotion, obtaining, and possessing of certain sexually explicit material. The bill defines the following terms relating to these new crimes:

- “Altered sexual depiction” means any visual depiction that, as a result of any type of digital, electronic, mechanical, or other modification, alteration, or adaptation, depicts a realistic version of an identifiable person: with the nude body parts of another person as the nude body parts of the identifiable person; with computer-generated nude body parts as the nude body parts of the identifiable person; or engaging in sexual conduct in which the identifiable person did not engage.
- “Identifiable person” means a person who is recognizable as an actual person by the person’s face, likeness, or other distinguishing characteristic, such as a unique birthmark, or other recognizable feature.
- “Nude body parts” means human male or female genitals, pubic area, or buttocks with less than fully opaque covering; or the female breast with less than fully opaque covering any portion thereof below the top of the nipple; or the depiction of covered male genitals in a discernibly turgid state. The term does not under any circumstances include a mother breastfeeding her baby.
- “Promote” means to procure, manufacture, issue, sell, give, provide, lend, mail, deliver, transfer, transmit, transmute, publish, distribute, circulate, disseminate, present, exhibit, send, post, share, or advertise or to offer or agree to do the same.
- “Sexually explicit image” means any image⁶⁴ depicting nudity⁶⁵ or depicting a person engaging in sexual conduct.
- “Visual depiction” includes, but is not limited to, a photograph, picture, image, motion picture, film, video, or representation, regardless of whether such photograph, picture, image, motion picture, film, video, or representation was made, modified, altered, adapted, or produced by digital, electronic, mechanical, or other means.

The bill addresses deep fake images by providing a person commits a third degree felony, when he or she willfully and maliciously promotes any altered sexual depiction of an identifiable person, without the consent of the identifiable person, and who knows or reasonably should have known that such visual depiction was an altered sexual depiction.

The presence of a disclaimer within an altered sexual depiction which notifies a viewer that the person or persons depicted did not consent to or participate in the creation or promotion of the material, or that the person or persons depicted did not actually perform the actions portrayed, is not a defense and does not relieve a person of criminal liability.

⁶⁴ “Image” includes, but is not limited to, any photograph, picture, motion picture, film, video, or representation.

⁶⁵ “Nudity” means the showing of the human male or female genitals, pubic area, or buttocks with less than a fully opaque covering; or the showing of the female breast with less than a fully opaque covering of any portion thereof below the top of the nipple; or the depiction of covered male genitals in a discernibly turgid state. A mother’s breastfeeding of her baby does not under any circumstance constitute “nudity,” irrespective of whether or not the nipple is covered during or incidental to feeding. Section 847.001(9), F.S.

The bill criminalizes the unlawful obtaining, possessing, or promoting of sexually explicit images. A person commits a third degree felony when he or she:

- Knowingly and unlawfully obtains a sexually explicit image of an identifiable person with intent to promote such image.
- Willfully possesses with the intent to promote for the purpose of pecuniary or any type of financial gain a sexually explicit image of an identifiable person without that person's consent.

The bill provides a higher penalty, a second degree felony, when he or she willfully promotes for the purpose of pecuniary or any type of financial gain a sexually explicit image of an identifiable person without that person's consent. An exception is provided for sexually explicit images involving voluntary exposure in a public or commercial setting.

Additionally, every act, thing or transaction prohibited in these offenses constitutes a separate offense. The bill also specifies that a violation is committed within this state if any conduct that is an element of the offense, or any harm to the depicted individual resulting from the offense, occurs in this state.

The bill creates a civil cause of action so that an aggrieved person may receive injunctive relief; monetary damages of \$10,000 or actual damages, whichever is greater; and reasonable attorney fees and costs.

The criminal and civil penalties created for these crimes do not apply to:

- A provider of an interactive computer service, of an information service, or of a communications service which provides the transmission, storage, or caching of electronic communications or messages of others; another related telecommunications or commercial mobile radio service; or content provided by another person;
- A law enforcement officer, or any local, state, federal, or military law enforcement agency that disseminates a sexually explicit image in connection with the performances of his or her duties;
- A person reporting unlawful activity; or
- A person participating in a hearing, trial, or other legal proceeding.

Additionally, the felony offenses created in this bill are ranked in the offense severity ranking chart of the Criminal Punishment Code. The third degree felony offense of promoting an altered sexual depiction created in s. 836.13, F.S., is ranked as a level 3 offense. The third degree felony offenses of obtaining a sexually explicit image or possession of a sexually explicit image with intent to promote created in s. 836.14, F.S., are ranked as a level 4 offense. The second degree felony offense of promoting a sexually explicit image created in s. 836.14, F.S., is ranked as a level 5 offense.

Sexual Cyberharassment

The bill amends s. 784.049, F.S., relating to sexual cyberharassment, to increase the minimum monetary damages from \$5,000 to \$10,000 that a victim may receive as a result of a civil action.

Child Sexual Abuse Material and Obscenity

The bill amends ss. 39.0138, 92.56, 92.561, 435.07, 775.0847, 827.071, 847.001, 847.0137, 847.0139, 847.002, 960.03, and 960.197, F.S., to replace the term “child pornography,” with “child sexual abuse material.” Additionally, the bill further amends ss. 775.0847, 827.071, and 847.001, F.S., to expand this term to include any image that has been created, altered, adapted, or modified by electronic, mechanical, or other means, to portray an identifiable minor engaged in sexual conduct.

The bill provides that “identifiable minor” means a person:

- Who was a minor at the time the image was created, adapted, or modified, or whose image as a minor was used in the creating, adapting, or modifying of the image; and
- Who is recognizable as an actual person by the person’s face, likeness, or other distinguishing characteristic, such as a unique birthmark, or other recognizable feature.

This term may not be construed to require proof of the actual identity of the identifiable minor.

The bill further amends s. 827.071, F.S., to replace the phrase “any sexual conduct by a child,” with the term “child sexual abuse material.” The term “child sexual abuse material,” includes images depicting any sexual conduct by a child.

The bill amends s. 775.0847, F.S., to replace the term “movie” with “motion picture, film, video, or computer-generated motion picture, film, or video,” for purposes of enhancing specified offenses relating to child sexual abuse material or obscenity.

Additionally, the bill expands or adds multiple terms relating to child sexual abuse material or obscenity throughout the Florida Statutes. Specifically the bill:

- Amends the terms “minor” and “child” in ss. 775.0847 and 847.001, F.S., to provide that “minor” or “child” means any person, whose identity is known or unknown, younger than 18 years of age. The bill adds that definition of “minor” or “child” to s. 827.071, F.S.
- Amends s. 827.071, F.S., to expand the definition of “promote” and includes the new expanded definition of “promote,” to s. 847.001, F.S. The bill provides “promote” means to procure, manufacture, issue, sell, give, provide, lend, mail, deliver, transfer, *transmit*, transmute, publish, distribute, circulate, disseminate, present, exhibit, *send, post, share*, or advertise or to offer or agree to do the same.
- Expands the definition of “sexual conduct,” in ss. 775.0847, 827.071, and 847.001, F.S., to include *simulated* lewd exhibition of the genitals.

Child-like Sex Dolls

The bill amends s. 847.011(5), F.S., relating to the possession of obscene, child-like sex dolls, to provide that a law enforcement officer may arrest without a warrant any person who he or she has probable cause to believe possesses a child-like sex doll.

Additionally, the bill provides conforming cross-references.

The bill is effective October 1, 2022.

IV. Constitutional Issues:**A. Municipality/County Mandates Restrictions:**

This bill appears to be exempt from the requirements of Article VII, Section 18 of the Florida Constitution because it is a criminal law.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. State Tax or Fee Increases:

None.

E. Other Constitutional Issues:

None identified.

V. Fiscal Impact Statement:**A. Tax/Fee Issues:**

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

This bill likely has a positive indeterminate fiscal impact (unquantifiable increase in prison beds and jail beds) on the Department of Corrections and local jails due to the increased number of prison and jail beds needed for persons convicted of the crimes created in the bill.

The bill creates a third degree felony for promoting an altered sexual depiction. The bill also creates s. 836.14, F.S., to create two third degree felony offenses and one second degree felony offense.

Additionally, the bill expands the definition of child sexual abuse material. Due to this expansion, more people may be arrested and convicted under existing crimes for behavior that is not prohibited under current law, but is prohibited under the bill.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends the following sections of the Florida Statutes: 775.0847, 784.049, 827.071, 847.001, 847.011, 847.0137, 921.0022, 960.03, 288.1254, and 847.0141.

This bill creates the following sections of the Florida Statutes: 836.13 and 836.14.

This bill makes conforming technical changes to the following sections of the Florida Statutes: 39.0138, 92.56, 92.561, 288.1254, 435.07, 456.074, 847.002, 847.01357, 847.0139, 847.0141, 948.06, and 960.197, F.S.

IX. Additional Information:

- A. **Committee Substitute – Statement of Substantial Changes:**
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS by Criminal Justice on January 25, 2022:

The committee substitute:

- Creates the third degree felony of *promotion of an altered sexual depiction*, and two third degree felonies and one second degree felony for *unlawfully obtaining, possessing, or promoting a sexually explicit image* which replaces, and targets the same conduct as the crime created in the original bill.
- Increases the amount of monetary damages a victim of sexual cyberharassment may receive in a civil action, from \$5,000 to \$10,000.
- Renames the crime of “child pornography” to “child sexual abuse material” and expands the definition to include any image that has been created, altered, adapted, or modified by electronic, mechanical, or other means, to portray an identifiable minor engaged in sexual conduct.
- Provides a definition of “identifiable minor,” that is consistent with the definition under federal law.
- Removes the previous definition of “digitization,” that was provided in the bill.
- Replaces the term “movie” with “motion picture, film, video, or computer-generated motion picture, film, or video,” for purposes of enhancing specified offenses relating to child pornography or obscenity.
- Includes an exception to the warrant requirement if the officer has probable cause to believe a person possesses an obscene, child-like sex doll.

B. Amendments:

None.

This Senate Bill Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.



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LEGISLATIVE ACTION

Senate	.	House
Comm: RCS	.	
01/25/2022	.	
	.	
	.	
	.	

The Committee on Criminal Justice (Book) recommended the following:

Senate Amendment (with title amendment)

Delete everything after the enacting clause and insert:

Section 1. Section 775.0847, Florida Statutes, is amended to read:

775.0847 Possession or promotion of certain child sexual abuse material ~~images of child pornography~~; reclassification.—

(1) For purposes of this section:

(a) "Child" or "minor" means any person, whose identity is



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11 known or unknown, younger ~~less~~ than 18 years of age.

12 (b) "Child sexual abuse material" ~~"Child pornography"~~

13 means:

14 1. Any image depicting a minor engaged in sexual conduct;
15 or

16 2. Any image that has been created, altered, adapted, or
17 modified by electronic, mechanical, or other means, to portray
18 an identifiable minor engaged in sexual conduct.

19 (c) "Identifiable minor" means a person:

20 1. Who was a minor at the time the image was created,
21 adapted, or modified, or whose image as a minor was used in the
22 creating, adapting, or modifying of the image; and

23 2. Who is recognizable as an actual person by the person's
24 face, likeness, or other distinguishing characteristic, such as
25 a unique birthmark, or other recognizable feature.

26
27 The term may not be construed to require proof of the actual
28 identity of the identifiable minor.

29 (d) ~~(e)~~ "Sadomasochistic abuse" means flagellation or
30 torture by or upon a person or the condition of being fettered,
31 bound, or otherwise physically restrained, for the purpose of
32 deriving sexual satisfaction, or satisfaction brought about as a
33 result of sadistic violence, from inflicting harm on another or
34 receiving such harm oneself.

35 (e) ~~(d)~~ "Sexual battery" means oral, anal, or vaginal
36 penetration by, or union with, the sexual organ of another or
37 the anal or vaginal penetration of another by any other object;
38 however, sexual battery does not include an act done for a bona
39 fide medical purpose.



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40 (f)~~(e)~~ "Sexual bestiality" means any sexual act, actual or
41 simulated, between a person and an animal involving the sex
42 organ of the one and the mouth, anus, or vagina of the other.

43 (g)~~(f)~~ "Sexual conduct" means actual or simulated sexual
44 intercourse, deviate sexual intercourse, sexual bestiality,
45 masturbation, or sadomasochistic abuse; actual or simulated lewd
46 exhibition of the genitals; actual physical contact with a
47 person's clothed or unclothed genitals, pubic area, buttocks,
48 or, if such person is a female, breast with the intent to arouse
49 or gratify the sexual desire of either party; or any act or
50 conduct which constitutes sexual battery or simulates that
51 sexual battery is being or will be committed. A mother's
52 breastfeeding of her baby does not under any circumstance
53 constitute "sexual conduct."

54 (2) A violation of s. 827.071, s. 847.0135, s. 847.0137, or
55 s. 847.0138 shall be reclassified to the next higher degree as
56 provided in subsection (3) if:

57 (a) The offender possesses 10 or more images of any form of
58 child sexual abuse material ~~child pornography~~ regardless of
59 content; and

60 (b) The content of at least one image contains one or more
61 of the following:

- 62 1. A child who is younger than the age of 5.
- 63 2. Sadomasochistic abuse involving a child.
- 64 3. Sexual battery involving a child.
- 65 4. Sexual bestiality involving a child.

66 5. Any motion picture, film, video, or computer-generated
67 motion picture, film, or video ~~movie~~ involving a child,
68 regardless of length and regardless of whether the motion



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69 picture, film, video, or computer-generated motion picture,
70 film, or video ~~movie~~ contains sound.

71 (3) (a) In the case of a felony of the third degree, the
72 offense is reclassified to a felony of the second degree.

73 (b) In the case of a felony of the second degree, the
74 offense is reclassified to a felony of the first degree.

75

76 For purposes of sentencing under chapter 921 and determining
77 incentive gain-time eligibility under chapter 944, a felony
78 offense that is reclassified under this section is ranked one
79 level above the ranking under s. 921.0022 or s. 921.0023 of the
80 offense committed.

81 Section 2. Paragraph (b) of subsection (5) of section
82 784.049, Florida Statutes, is amended to read:

83 784.049 Sexual cyberharassment.—

84 (5) An aggrieved person may initiate a civil action against
85 a person who violates this section to obtain all appropriate
86 relief in order to prevent or remedy a violation of this
87 section, including the following:

88 (b) Monetary damages to include \$10,000 ~~\$5,000~~ or actual
89 damages incurred as a result of a violation of this section,
90 whichever is greater.

91 Section 3. Section 827.071, Florida Statutes, is amended to
92 read:

93 827.071 Sexual performance by a child; child sexual abuse
94 material; penalties.—

95 (1) As used in this section, the following definitions
96 shall apply:

97 (a) "Child" or "minor" means any person, whose identity is



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98 known or unknown, younger than 18 years of age.

99 (b) "Child sexual abuse material" means:

100 1. Any image depicting a minor engaged in sexual conduct;

101 or

102 2. Any image that has been created, altered, adapted, or
103 modified by electronic, mechanical, or other means, to portray
104 an identifiable minor engaged in sexual conduct.

105 (c) ~~(a)~~ "Deviate sexual intercourse" means sexual conduct
106 between persons not married to each other consisting of contact
107 between the penis and the anus, the mouth and the penis, or the
108 mouth and the vulva.

109 (d) "Identifiable minor" means a person:

110 1. Who was a minor at the time the image was created,
111 adapted, or modified, or whose image as a minor was used in the
112 creating, adapting, or modifying of the image; and

113 2. Who is recognizable as an actual person by the person's
114 face, likeness, or other distinguishing characteristic, such as
115 a unique birthmark, or other recognizable feature.

116
117 The term may not be construed to require proof of the actual
118 identity of the identifiable minor.

119 (e) ~~(b)~~ "Intentionally view" means to deliberately,
120 purposefully, and voluntarily view. Proof of intentional viewing
121 requires establishing more than a single image, motion picture,
122 exhibition, show, image, data, computer depiction,
123 representation, or other presentation over any period of time.

124 (f) ~~(c)~~ "Performance" means any play, motion picture,
125 photograph, or dance or any other visual representation
126 exhibited before an audience.



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127 (g)~~(d)~~ "Promote" means to procure, manufacture, issue,
128 sell, give, provide, lend, mail, deliver, transfer, transmit,
129 transmute, publish, distribute, circulate, disseminate, present,
130 exhibit, send, post, share, or advertise or to offer or agree to
131 do the same.

132 (h)~~(e)~~ "Sadomasochistic abuse" means flagellation or
133 torture by or upon a person, or the condition of being fettered,
134 bound, or otherwise physically restrained, for the purpose of
135 deriving sexual satisfaction from inflicting harm on another or
136 receiving such harm oneself.

137 (i)~~(f)~~ "Sexual battery" means oral, anal, or vaginal
138 penetration by, or union with, the sexual organ of another or
139 the anal or vaginal penetration of another by any other object;
140 however, "sexual battery" does not include an act done for a
141 bona fide medical purpose.

142 (j)~~(g)~~ "Sexual bestiality" means any sexual act between a
143 person and an animal involving the sex organ of the one and the
144 mouth, anus, or vagina of the other.

145 (k)~~(h)~~ "Sexual conduct" means actual or simulated sexual
146 intercourse, deviate sexual intercourse, sexual bestiality,
147 masturbation, or sadomasochistic abuse; actual or simulated lewd
148 exhibition of the genitals; actual physical contact with a
149 person's clothed or unclothed genitals, pubic area, buttocks,
150 or, if such person is a female, breast, with the intent to
151 arouse or gratify the sexual desire of either party; or any act
152 or conduct which constitutes sexual battery or simulates that
153 sexual battery is being or will be committed. A mother's
154 breastfeeding of her baby does not under any circumstance
155 constitute "sexual conduct."



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156 (1) ~~(i)~~ "Sexual performance" means any performance or part
157 thereof which includes sexual conduct by a child ~~of less than 18~~
158 ~~years of age.~~

159 (m) ~~(j)~~ "Simulated" means the explicit depiction of conduct
160 set forth in paragraph (k) ~~(h)~~ which creates the appearance of
161 such conduct and which exhibits any uncovered portion of the
162 breasts, genitals, or buttocks.

163 (2) A person is guilty of the use of a child in a sexual
164 performance if, knowing the character and content thereof, he or
165 she employs, authorizes, or induces a child ~~less than 18 years~~
166 ~~of age~~ to engage in a sexual performance or, being a parent,
167 legal guardian, or custodian of such child, consents to the
168 participation by such child in a sexual performance. A person
169 who ~~Whoever~~ violates this subsection commits ~~is guilty of~~ a
170 felony of the second degree, punishable as provided in s.
171 775.082, s. 775.083, or s. 775.084.

172 (3) A person is guilty of promoting a sexual performance by
173 a child when, knowing the character and content thereof, he or
174 she produces, directs, or promotes any performance which
175 includes sexual conduct by a child ~~less than 18 years of age.~~ A
176 person who ~~Whoever~~ violates this subsection commits ~~is guilty of~~
177 a felony of the second degree, punishable as provided in s.
178 775.082, s. 775.083, or s. 775.084.

179 (4) It is unlawful for any person to possess with the
180 intent to promote any photograph, motion picture, exhibition,
181 show, representation, or other presentation which, in whole or
182 in part, includes child sexual abuse material ~~any sexual conduct~~
183 ~~by a child.~~ The possession of three or more copies of such
184 photograph, motion picture, representation, or presentation is



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185 prima facie evidence of an intent to promote. A person who
186 ~~Whoever~~ violates this subsection commits ~~is guilty of~~ a felony
187 of the second degree, punishable as provided in s. 775.082, s.
188 775.083, or s. 775.084.

189 (5) (a) It is unlawful for any person to knowingly possess,
190 control, or intentionally view a photograph, motion picture,
191 exhibition, show, representation, image, data, computer
192 depiction, or other presentation which, in whole or in part, he
193 or she knows to include child sexual abuse material ~~any sexual~~
194 ~~conduct by a child~~. The possession, control, or intentional
195 viewing of each such photograph, motion picture, exhibition,
196 show, image, data, computer depiction, representation, or
197 presentation is a separate offense. If such photograph, motion
198 picture, exhibition, show, representation, image, data, computer
199 depiction, or other presentation includes child sexual abuse
200 material depicting ~~sexual conduct by~~ more than one child, then
201 each such child in each such photograph, motion picture,
202 exhibition, show, representation, image, data, computer
203 depiction, or other presentation that is knowingly possessed,
204 controlled, or intentionally viewed is a separate offense. A
205 person who violates this paragraph ~~subsection~~ commits a felony
206 of the third degree, punishable as provided in s. 775.082, s.
207 775.083, or s. 775.084.

208 (b) Paragraph (a) ~~This subsection~~ does not apply to any
209 material possessed, controlled, or intentionally viewed as part
210 of a law enforcement investigation.

211 (6) Prosecution of a ~~any~~ person for an offense under this
212 section does ~~shall~~ not prohibit prosecution of that person in
213 this state for a violation of any other law of this state,



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214 including a law providing for greater penalties than prescribed
215 in this section or any other crime punishing the sexual
216 performance or the sexual exploitation of children.

217 Section 4. Section 836.13, Florida Statutes, is created to
218 read:

219 836.13 Promotion of an altered sexual depiction; prohibited
220 acts; penalties; applicability.-

221 (1) As used in this section, the term:

222 (a) "Altered sexual depiction" means any visual depiction
223 that, as a result of any type of digital, electronic,
224 mechanical, or other modification, alteration, or adaptation,
225 depicts a realistic version of an identifiable person:

226 1. With the nude body parts of another person as the nude
227 body parts of the identifiable person;

228 2. With computer-generated nude body parts as the nude body
229 parts of the identifiable person; or

230 3. Engaging in sexual conduct as defined in s. 847.001 in
231 which the identifiable person did not engage.

232 (b) "Identifiable person" means a person who is
233 recognizable as an actual person by the person's face, likeness,
234 or other distinguishing characteristic, such as a unique
235 birthmark, or other recognizable feature.

236 (c) "Nude body parts" means the human male or female
237 genitals, pubic area, or buttocks with less than fully opaque
238 covering; or the female breast with less than a fully opaque
239 covering of any portion thereof below the top of the nipple; or
240 the depiction of covered male genitals in a discernibly turgid
241 state. The term does not under any circumstances include a
242 mother breastfeeding her baby.



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243 (d) "Promote" means to procure, manufacture, issue, sell,
244 give, provide, lend, mail, deliver, transfer, transmit,
245 transmute, publish, distribute, circulate, disseminate, present,
246 exhibit, send, post, share, or advertise or to offer or agree to
247 do the same.

248 (e) "Visual depiction" includes, but is not limited to, a
249 photograph, picture, image, motion picture, film, video, or
250 representation, regardless of whether such photograph, picture,
251 image, motion picture, film, video, or representation was made,
252 modified, altered, adapted, or produced by digital, electronic,
253 mechanical, or other means.

254 (2) (a) A person who willfully and maliciously creates and
255 promotes any altered sexual depiction of an identifiable person,
256 without the consent of the identifiable person, commits a felony
257 of the third degree, punishable as provided in s. 775.082, s.
258 775.083, or s. 775.084.

259 (b) A person who willfully and maliciously promotes any
260 altered sexual depiction of an identifiable person, without the
261 consent of the identifiable person, and who knows or reasonably
262 should have known that such visual depiction was an altered
263 sexual depiction, commits a felony of the third degree,
264 punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

265 (3) Every act, thing, or transaction prohibited by this
266 section constitutes a separate offense and is punishable as
267 such.

268 (4) The presence of a disclaimer within an altered sexual
269 depiction which notifies a viewer that the person or persons
270 depicted did not consent to or participate in the creation or
271 promotion of the material, or that the person or persons



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272 depicted did not actually perform the actions portrayed, is not
273 a defense and does not relieve a person of criminal liability
274 under this section.

275 (5) An aggrieved person may initiate a civil action against
276 a person who violates subsection (2) to obtain appropriate
277 relief in order to prevent or remedy a violation of subsection
278 (2), including all of the following:

279 (a) Injunctive relief.

280 (b) Monetary damages up to and including \$10,000 or actual
281 damages incurred as a result of a violation of subsection (2),
282 whichever is greater.

283 (c) Reasonable attorney fees and costs.

284 (6) The criminal and civil penalties of this section do not
285 apply to:

286 (a) A provider of an interactive computer service as
287 defined in 47 U.S.C. s. 230(f), of an information service as
288 defined in 47 U.S.C. s. 153, or of a communications service as
289 defined in s. 202.11 which provides the transmission, storage,
290 or caching of electronic communications or messages of others;
291 another related telecommunications or commercial mobile radio
292 service; or content provided by another person;

293 (b) A law enforcement officer, as defined in s. 943.10, or
294 any local, state, federal, or military law enforcement agency
295 that promotes an altered sexual depiction in connection with the
296 performance of his or her duties as a law enforcement officer or
297 the duties of the law enforcement agency;

298 (c) A person reporting unlawful activity; or

299 (d) A person participating in a hearing, trial, or other
300 legal proceeding.



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301 (7) A violation of this section is committed within this
302 state if any conduct that is an element of the offense, or any
303 harm to the depicted person resulting from the offense, occurs
304 within this state.

305 Section 5. Section 836.14, Florida Statutes, is created to
306 read:

307 836.14 Unlawfully obtaining, possessing, or promoting a
308 sexually explicit image.—

309 (1) As used in this section, the term:

310 (a) "Identifiable person" has the same meaning as in s.
311 836.13.

312 (b) "Promote" has the same meaning as in s. 836.13.

313 (c) "Sexually explicit image" means any image depicting
314 nudity as defined in s. 847.001 or a person engaging in sexual
315 conduct as defined in s. 847.001.

316 (2) A person who knowingly and unlawfully obtains a
317 sexually explicit image of an identifiable person with the
318 intent to promote such image commits a felony of the third
319 degree, punishable as provided in s. 775.082, s. 775.083, or s.
320 775.084.

321 (3) A person who willfully possesses with the intent to
322 promote for the purpose of pecuniary or any other type of
323 financial gain a sexually explicit image of an identifiable
324 person without that person's consent commits a felony of the
325 third degree, punishable as provided in s. 775.082, s. 775.083,
326 or s. 775.084.

327 (4) A person who willfully promotes for the purpose of
328 pecuniary or any other financial gain a sexually explicit image
329 of an identifiable person without that person's consent commits



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330 a felony of the second degree, punishable as provided in s.
331 775.082, s. 775.083, or s. 775.084.

332 (5) Every act, thing, or transaction prohibited by this
333 section constitutes a separate offense and is punishable as
334 such.

335 (6) An aggrieved person may initiate a civil action against
336 a person who violates this section to obtain all appropriate
337 relief in order to prevent or remedy a violation of this
338 section, including the following:

339 (a) Injunctive relief.

340 (b) Monetary damages to include \$10,000 or actual damages
341 incurred as a result of a violation of this section, whichever
342 is greater.

343 (c) Reasonable attorney fees and costs.

344 (7) The criminal and civil penalties of this section do not
345 apply to:

346 (a) A provider of an interactive computer service as
347 defined in 47 U.S.C. s. 230(f), of an information service as
348 defined in 47 U.S.C. s. 153, or of a communications service as
349 defined in s. 202.11 which provides the transmission, storage,
350 or caching of electronic communications or messages of others;
351 another related telecommunications or commercial mobile radio
352 service; or content provided by another person;

353 (b) A law enforcement officer, as defined in s. 943.10, or
354 any local, state, federal, or military law enforcement agency
355 that disseminates a sexually explicit image in connection with
356 the performance of his or her duties as a law enforcement
357 officer or the duties of the law enforcement agency;

358 (c) A person reporting unlawful activity;



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359 (d) A person participating in a hearing, trial, or other
360 legal proceeding; or

361 (e) Sexually explicit images involving voluntary exposure
362 in a public or commercial setting.

363 (8) A violation of this section is committed within this
364 state if any conduct that is an element of the offense, or any
365 harm to the depicted individual resulting from the offense,
366 occurs within this state.

367 Section 6. Present subsections (7) through (11) and (12)
368 through (20) of section 847.001, Florida Statutes, are
369 redesignated as subsections (8) through (12) and (14) through
370 (22), respectively, new subsections (7) and (13) are added to
371 that section, and subsection (3) and present subsections (8),
372 (16), and (19) of that section are amended, to read:

373 847.001 Definitions.—As used in this chapter, the term:

374 (3) "Child sexual abuse material" ~~"Child pornography"~~
375 means:

376 (a) Any image depicting a minor engaged in sexual conduct;
377 or

378 (b) Any image that has been created, altered, adapted, or
379 modified by electronic, mechanical, or other means, to portray
380 an identifiable minor engaged in sexual conduct.

381 (7) "Identifiable minor" means a person:

382 (a) Who was a minor at the time the image was created,
383 adapted, or modified, or whose image as a minor was used in the
384 creating, adapting, or modifying of the image; and

385 (b) Who is recognizable as an actual person by the person's
386 face, likeness, or other distinguishing characteristic, such as
387 a unique birthmark, or other recognizable feature.



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The term may not be construed to require proof of the actual identity of the identifiable minor.

(9)(8) "Minor" or "child" means any person, whose identity is known or unknown, younger than under the age of 18 years of age.

(13) "Promote" means to procure, manufacture, issue, sell, give, provide, lend, mail, deliver, transfer, transmit, transmute, publish, distribute, circulate, disseminate, present, exhibit, send, post, share, or advertise or to offer or agree to do the same.

(18)(16) "Sexual conduct" means actual or simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, or sadomasochistic abuse; actual or simulated lewd exhibition of the genitals; actual physical contact with a person's clothed or unclothed genitals, pubic area, buttocks, or, if such person is a female, breast with the intent to arouse or gratify the sexual desire of either party; or any act or conduct which constitutes sexual battery or simulates that sexual battery is being or will be committed. A mother's breastfeeding of her baby does not under any circumstance constitute "sexual conduct."

(21)(19) "Simulated" means the explicit depiction of conduct described in subsection (18) (16) which creates the appearance of such conduct and which exhibits any uncovered portion of the breasts, genitals, or buttocks.

Section 7. Subsection (5) of section 847.011, Florida Statutes, is amended to read:

847.011 Prohibition of certain acts in connection with



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417 obscene, lewd, etc., materials; penalty.-

418 (5) (a) 1. A person may not knowingly sell, lend, give away,
419 distribute, transmit, show, or transmute; offer to sell, lend,
420 give away, distribute, transmit, show, or transmute; have in his
421 or her possession, custody, or control with the intent to sell,
422 lend, give away, distribute, transmit, show, or transmute; or
423 advertise in any manner an obscene, child-like sex doll.

424 2.a. Except as provided in sub-subparagraph b., a person
425 who violates this paragraph commits a felony of the third
426 degree, punishable as provided in s. 775.082, s. 775.083, or s.
427 775.084.

428 b. A person who is convicted of violating this paragraph a
429 second or subsequent time commits a felony of the second degree,
430 punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

431 (b) 1. Except as provided in subparagraph 2., a person who
432 knowingly has in his or her possession, custody, or control an
433 obscene, child-like sex doll commits a misdemeanor of the first
434 degree, punishable as provided in s. 775.082 or s. 775.083.

435 2. A person who is convicted of violating this paragraph a
436 second or subsequent time commits a felony of the third degree,
437 punishable as provided in s. 775.082 or s. 775.083.

438 (c) 1. A law enforcement officer may arrest without a
439 warrant any person who he or she has probable cause to believe
440 has violated paragraph (b).

441 2. Upon proper affidavits being made, a search warrant may
442 be issued to further investigate a violation of paragraph (b),
443 including to search a private dwelling.

444 Section 8. Subsections (1) through (4) of section 847.0137,
445 Florida Statutes, are amended to read:



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446 847.0137 Transmission of pornography by electronic device
447 or equipment prohibited; penalties.—

448 (1) As used in this section, the term ~~For purposes of this~~
449 ~~section:~~

450 ~~(a) "Minor" means any person less than 18 years of age.~~

451 ~~(b) "transmit" means the act of sending and causing to be~~
452 delivered, including the act of providing access for receiving
453 and causing to be delivered, any image, information, or data
454 ~~from one or more persons or places to one or more other persons~~
455 ~~or places~~ over or through any medium, including the Internet or
456 an interconnected network, by use of any electronic equipment or
457 other device.

458 (2) Notwithstanding ss. 847.012 and 847.0133, any person in
459 this state who knew or reasonably should have known that he or
460 she was transmitting child sexual abuse material ~~child~~
461 ~~pornography,~~ as defined in s. 847.001, to another person in this
462 state or in another jurisdiction commits a felony of the third
463 degree, punishable as provided in s. 775.082, s. 775.083, or s.
464 775.084.

465 (3) Notwithstanding ss. 847.012 and 847.0133, any person in
466 any jurisdiction other than this state who knew or reasonably
467 should have known that he or she was transmitting child sexual
468 abuse material ~~child pornography,~~ as defined in s. 847.001, to
469 any person in this state commits a felony of the third degree,
470 punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

471 (4) This section shall not be construed to prohibit
472 prosecution of a person in this state or another jurisdiction
473 for a violation of any law of this state, including a law
474 providing for greater penalties than prescribed in this section,



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475 for the transmission of child sexual abuse material ~~child~~
476 ~~pornography~~, as defined in s. 847.001, to any person in this
477 state.

478
479 The provisions of this section do not apply to subscription-
480 based transmissions such as list servers.

481 Section 9. Paragraphs (c), (d), and (e) of subsection (3)
482 of section 921.0022, Florida Statutes, are amended to read:

483 921.0022 Criminal Punishment Code; offense severity ranking
484 chart.—

485 (3) OFFENSE SEVERITY RANKING CHART

486 (c) LEVEL 3

Florida Statute	Felony Degree	Description
488 119.10(2)(b)	3rd	Unlawful use of confidential information from police reports.
489 316.066 (3)(b)-(d)	3rd	Unlawfully obtaining or using confidential crash reports.
490 316.193(2)(b)	3rd	Felony DUI, 3rd conviction.
491 316.1935(2)	3rd	Fleeing or attempting to elude law enforcement



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492			officer in patrol vehicle with siren and lights activated.
493	319.30 (4)	3rd	Possession by junkyard of motor vehicle with identification number plate removed.
494	319.33 (1) (a)	3rd	Alter or forge any certificate of title to a motor vehicle or mobile home.
495	319.33 (1) (c)	3rd	Procure or pass title on stolen vehicle.
496	319.33 (4)	3rd	With intent to defraud, possess, sell, etc., a blank, forged, or unlawfully obtained title or registration.
497	327.35 (2) (b)	3rd	Felony BUI.
	328.05 (2)	3rd	Possess, sell, or counterfeit fictitious, stolen, or fraudulent titles or bills of sale of



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498

328.07(4)

3rd

vessels.

Manufacture, exchange, or possess vessel with counterfeit or wrong ID number.

499

376.302(5)

3rd

Fraud related to reimbursement for cleanup expenses under the Inland Protection Trust Fund.

500

379.2431
(1)(e)5.

3rd

Taking, disturbing, mutilating, destroying, causing to be destroyed, transferring, selling, offering to sell, molesting, or harassing marine turtles, marine turtle eggs, or marine turtle nests in violation of the Marine Turtle Protection Act.

501

379.2431
(1)(e)6.

3rd

Possessing any marine turtle species or hatchling, or parts thereof, or the nest of any marine turtle species



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502

379.2431
(1) (e) 7.

3rd

described in the Marine
Turtle Protection Act.

Soliciting to commit or
conspiring to commit a
violation of the Marine
Turtle Protection Act.

503

400.9935 (4) (a)
or (b)

3rd

Operating a clinic, or
offering services
requiring licensure,
without a license.

504

400.9935 (4) (e)

3rd

Filing a false license
application or other
required information or
failing to report
information.

505

440.1051 (3)

3rd

False report of workers'
compensation fraud or
retaliation for making
such a report.

506

501.001 (2) (b)

2nd

Tampers with a consumer
product or the container
using materially
false/misleading
information.



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507	624.401 (4) (a)	3rd	Transacting insurance without a certificate of authority.
508	624.401 (4) (b) 1.	3rd	Transacting insurance without a certificate of authority; premium collected less than \$20,000.
509	626.902 (1) (a) & (b)	3rd	Representing an unauthorized insurer.
510	697.08	3rd	Equity skimming.
511	790.15 (3)	3rd	Person directs another to discharge firearm from a vehicle.
512	806.10 (1)	3rd	Maliciously injure, destroy, or interfere with vehicles or equipment used in firefighting.
513	806.10 (2)	3rd	Interferes with or assaults firefighter in performance of duty.
514			



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515	810.09 (2) (c)	3rd	Trespass on property other than structure or conveyance armed with firearm or dangerous weapon.
516	812.014 (2) (c) 2.	3rd	Grand theft; \$5,000 or more but less than \$10,000.
517	812.0145 (2) (c)	3rd	Theft from person 65 years of age or older; \$300 or more but less than \$10,000.
518	812.015 (8) (b)	3rd	Retail theft with intent to sell; conspires with others.
519	812.081 (2)	3rd	Theft of a trade secret.
520	815.04 (5) (b)	2nd	Computer offense devised to defraud or obtain property.
	817.034 (4) (a) 3.	3rd	Engages in scheme to defraud (Florida Communications Fraud Act), property valued at less



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than \$20,000.

521

817.233 3rd Burning to defraud
insurer.

522

817.234 3rd Unlawful solicitation of
(8) (b) & (c) persons involved in motor
vehicle accidents.

523

817.234 (11) (a) 3rd Insurance fraud; property
value less than \$20,000.

524

817.236 3rd Filing a false motor
vehicle insurance
application.

525

817.2361 3rd Creating, marketing, or
presenting a false or
fraudulent motor vehicle
insurance card.

526

817.413 (2) 3rd Sale of used goods of
\$1,000 or more as new.

527

817.49 (2) (b) 1. 3rd Willful making of a false
report of a crime causing
great bodily harm,
permanent disfigurement,
or permanent disability.



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528	831.28 (2) (a)	3rd	Counterfeiting a payment instrument with intent to defraud or possessing a counterfeit payment instrument with intent to defraud.
529	831.29	2nd	Possession of instruments for counterfeiting driver licenses or identification cards.
530	<u>836.13 (2) (b)</u>	<u>3rd</u>	<u>Person who promotes an altered sexually explicit depiction of an identifiable person without consent.</u>
531	838.021 (3) (b)	3rd	Threatens unlawful harm to public servant.
532	843.19	2nd	Injure, disable, or kill police, fire, or SAR canine or police horse.
533	860.15 (3)	3rd	Overcharging for repairs and parts.
534			



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535	870.01 (2)	3rd	Riot.
536	870.01 (4)	3rd	Inciting a riot.
537	893.13 (1) (a) 2.	3rd	Sell, manufacture, or deliver cannabis (or other s. 893.03 (1) (c), (2) (c) 1., (2) (c) 2., (2) (c) 3., (2) (c) 6., (2) (c) 7., (2) (c) 8., (2) (c) 9., (2) (c) 10., (3), or (4) drugs).
538	893.13 (1) (d) 2.	2nd	Sell, manufacture, or deliver s. 893.03 (1) (c), (2) (c) 1., (2) (c) 2., (2) (c) 3., (2) (c) 6., (2) (c) 7., (2) (c) 8., (2) (c) 9., (2) (c) 10., (3), or (4) drugs within 1,000 feet of university.
	893.13 (1) (f) 2.	2nd	Sell, manufacture, or deliver s. 893.03 (1) (c), (2) (c) 1., (2) (c) 2., (2) (c) 3., (2) (c) 6., (2) (c) 7., (2) (c) 8., (2) (c) 9., (2) (c) 10., (3), or (4) drugs within 1,000



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539			feet of public housing facility.
	893.13(4)(c)	3rd	Use or hire of minor; deliver to minor other controlled substances.
540			
	893.13(6)(a)	3rd	Possession of any controlled substance other than felony possession of cannabis.
541			
	893.13(7)(a)8.	3rd	Withhold information from practitioner regarding previous receipt of or prescription for a controlled substance.
542			
	893.13(7)(a)9.	3rd	Obtain or attempt to obtain controlled substance by fraud, forgery, misrepresentation, etc.
543			
	893.13(7)(a)10.	3rd	Affix false or forged label to package of controlled substance.
544			
	893.13(7)(a)11.	3rd	Furnish false or



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fraudulent material
information on any
document or record
required by chapter 893.

545

893.13(8)(a)1.

3rd

Knowingly assist a
patient, other person, or
owner of an animal in
obtaining a controlled
substance through
deceptive, untrue, or
fraudulent representations
in or related to the
practitioner's practice.

546

893.13(8)(a)2.

3rd

Employ a trick or scheme
in the practitioner's
practice to assist a
patient, other person, or
owner of an animal in
obtaining a controlled
substance.

547

893.13(8)(a)3.

3rd

Knowingly write a
prescription for a
controlled substance for a
fictitious person.

548

893.13(8)(a)4.

3rd

Write a prescription for a



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controlled substance for a patient, other person, or an animal if the sole purpose of writing the prescription is a monetary benefit for the practitioner.

549

918.13(1)(a)

3rd

Alter, destroy, or conceal investigation evidence.

550

944.47
(1)(a)1. & 2.

3rd

Introduce contraband to correctional facility.

551

944.47(1)(c)

2nd

Possess contraband while upon the grounds of a correctional institution.

552

985.721

3rd

Escapes from a juvenile facility (secure detention or residential commitment facility).

553

554

555

(d) LEVEL 4

556

Florida
Statute

Felony
Degree

Description

557



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316.1935 (3) (a) 2nd Driving at high speed
or with wanton
disregard for safety
while fleeing or
attempting to elude law
enforcement officer who
is in a patrol vehicle
with siren and lights
activated.

558

499.0051 (1) 3rd Failure to maintain or
deliver transaction
history, transaction
information, or
transaction statements.

559

499.0051 (5) 2nd Knowing sale or
delivery, or possession
with intent to sell,
contraband prescription
drugs.

560

517.07 (1) 3rd Failure to register
securities.

561

517.12 (1) 3rd Failure of dealer,
associated person, or
issuer of securities to
register.



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562	784.07 (2) (b)	3rd	Battery of law enforcement officer, firefighter, etc.
563	784.074 (1) (c)	3rd	Battery of sexually violent predators facility staff.
564	784.075	3rd	Battery on detention or commitment facility staff.
565	784.078	3rd	Battery of facility employee by throwing, tossing, or expelling certain fluids or materials.
566	784.08 (2) (c)	3rd	Battery on a person 65 years of age or older.
567	784.081 (3)	3rd	Battery on specified official or employee.
568	784.082 (3)	3rd	Battery by detained person on visitor or other detainee.
569			



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570	784.083 (3)	3rd	Battery on code inspector.
571	784.085	3rd	Battery of child by throwing, tossing, projecting, or expelling certain fluids or materials.
572	787.03 (1)	3rd	Interference with custody; wrongly takes minor from appointed guardian.
573	787.04 (2)	3rd	Take, entice, or remove child beyond state limits with criminal intent pending custody proceedings.
574	787.04 (3)	3rd	Carrying child beyond state lines with criminal intent to avoid producing child at custody hearing or delivering to designated person.
	787.07	3rd	Human smuggling.



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575	790.115 (1)	3rd	Exhibiting firearm or weapon within 1,000 feet of a school.
576	790.115 (2) (b)	3rd	Possessing electric weapon or device, destructive device, or other weapon on school property.
577	790.115 (2) (c)	3rd	Possessing firearm on school property.
578	800.04 (7) (c)	3rd	Lewd or lascivious exhibition; offender less than 18 years.
579	806.135	2nd	Destroying or demolishing a memorial or historic property.
580	810.02 (4) (a)	3rd	Burglary, or attempted burglary, of an unoccupied structure; unarmed; no assault or battery.
581	810.02 (4) (b)	3rd	Burglary, or attempted



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582			burglary, of an unoccupied conveyance; unarmed; no assault or battery.
583	810.06	3rd	Burglary; possession of tools.
584	810.08 (2) (c)	3rd	Trespass on property, armed with firearm or dangerous weapon.
585	812.014 (2) (c) 3.	3rd	Grand theft, 3rd degree \$10,000 or more but less than \$20,000.
586	812.014 (2) (c) 4.-10.	3rd	Grand theft, 3rd degree; specified items.
587	812.0195 (2)	3rd	Dealing in stolen property by use of the Internet; property stolen \$300 or more.
588	817.505 (4) (a)	3rd	Patient brokering.
	817.563 (1)	3rd	Sell or deliver substance other than



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589			controlled substance agreed upon, excluding s. 893.03(5) drugs.
589	817.568 (2) (a)	3rd	Fraudulent use of personal identification information.
590	817.625 (2) (a)	3rd	Fraudulent use of scanning device, skimming device, or reencoder.
591	817.625 (2) (c)	3rd	Possess, sell, or deliver skimming device.
592	828.125 (1)	2nd	Kill, maim, or cause great bodily harm or permanent breeding disability to any registered horse or cattle.
593	<u>836.13 (2) (a)</u>	<u>3rd</u>	<u>Person who creates and promotes an altered sexual depiction of an identifiable person without consent.</u>



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594	<u>836.14 (2)</u>	<u>3rd</u>	<u>Person who obtains a sexually explicit image of an identifiable person with certain intent.</u>
595	<u>836.14 (3)</u>	<u>3rd</u>	<u>Person who possesses with intent to promote for a certain purpose a sexually explicit image of an identifiable person without consent.</u>
596	837.02 (1)	3rd	Perjury in official proceedings.
597	837.021 (1)	3rd	Make contradictory statements in official proceedings.
598	838.022	3rd	Official misconduct.
599	839.13 (2) (a)	3rd	Falsifying records of an individual in the care and custody of a state agency.
600	839.13 (2) (c)	3rd	Falsifying records of



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601			the Department of Children and Families.
	843.021	3rd	Possession of a concealed handcuff key by a person in custody.
602			
	843.025	3rd	Deprive law enforcement, correctional, or correctional probation officer of means of protection or communication.
603			
	843.15 (1) (a)	3rd	Failure to appear while on bail for felony (bond estreature or bond jumping).
604			
	847.0135 (5) (c)	3rd	Lewd or lascivious exhibition using computer; offender less than 18 years.
605			
	870.01 (3)	2nd	Aggravated rioting.
606			
	870.01 (5)	2nd	Aggravated inciting a riot.



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607	874.05 (1) (a)	3rd	Encouraging or recruiting another to join a criminal gang.
608	893.13 (2) (a) 1.	2nd	Purchase of cocaine (or other s. 893.03(1) (a), (b), or (d), (2) (a), (2) (b), or (2) (c) 5. drugs).
609	914.14 (2)	3rd	Witnesses accepting bribes.
610	914.22 (1)	3rd	Force, threaten, etc., witness, victim, or informant.
611	914.23 (2)	3rd	Retaliation against a witness, victim, or informant, no bodily injury.
612	916.1085 (2) (c) 1.	3rd	Introduction of specified contraband into certain DCF facilities.
613	918.12	3rd	Tampering with jurors.



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614 934.215 3rd Use of two-way
communications device
to facilitate
commission of a crime.

615 944.47(1)(a)6. 3rd Introduction of
contraband (cellular
telephone or other
portable communication
device) into
correctional
institution.

616 951.22(1)(h), 3rd Intoxicating drug,
(j) & (k) instrumentality or
other device to aid
escape, or cellular
telephone or other
portable communication
device introduced into
county detention
facility.

617
618
619 (e) LEVEL 5

620
Florida Felony
Statute Degree Description



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621	316.027 (2) (a)	3rd	Accidents involving personal injuries other than serious bodily injury, failure to stop; leaving scene.
622	316.1935 (4) (a)	2nd	Aggravated fleeing or eluding.
623	316.80 (2)	2nd	Unlawful conveyance of fuel; obtaining fuel fraudulently.
624	322.34 (6)	3rd	Careless operation of motor vehicle with suspended license, resulting in death or serious bodily injury.
625	327.30 (5)	3rd	Vessel accidents involving personal injury; leaving scene.
626	379.365 (2) (c) 1.	3rd	Violation of rules relating to: willful molestation of stone crab traps, lines, or buoys; illegal



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bartering, trading, or
sale, conspiring or
aiding in such barter,
trade, or sale, or
supplying, agreeing to
supply, aiding in
supplying, or giving
away stone crab trap
tags or certificates;
making, altering,
forging, counterfeiting,
or reproducing stone
crab trap tags;
possession of forged,
counterfeit, or
imitation stone crab
trap tags; and engaging
in the commercial
harvest of stone crabs
while license is
suspended or revoked.

627

379.367(4)

3rd

Willful molestation of a
commercial harvester's
spiny lobster trap,
line, or buoy.

628

379.407(5)(b)3.

3rd

Possession of 100 or
more undersized spiny



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629			lobsters.
	381.0041(11)(b)	3rd	Donate blood, plasma, or organs knowing HIV positive.
630			
	440.10(1)(g)	2nd	Failure to obtain workers' compensation coverage.
631			
	440.105(5)	2nd	Unlawful solicitation for the purpose of making workers' compensation claims.
632			
	440.381(2)	3rd	Submission of false, misleading, or incomplete information with the purpose of avoiding or reducing workers' compensation premiums.
633			
	624.401(4)(b)2.	2nd	Transacting insurance without a certificate or authority; premium collected \$20,000 or more but less than \$100,000.



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634	626.902 (1) (c)	2nd	Representing an unauthorized insurer; repeat offender.
635	790.01 (2)	3rd	Carrying a concealed firearm.
636	790.162	2nd	Threat to throw or discharge destructive device.
637	790.163 (1)	2nd	False report of bomb, explosive, weapon of mass destruction, or use of firearms in violent manner.
638	790.221 (1)	2nd	Possession of short-barreled shotgun or machine gun.
639	790.23	2nd	Felons in possession of firearms, ammunition, or electronic weapons or devices.
640	796.05 (1)	2nd	Live on earnings of a prostitute; 1st offense.



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641	800.04 (6) (c)	3rd	Lewd or lascivious conduct; offender less than 18 years of age.
642	800.04 (7) (b)	2nd	Lewd or lascivious exhibition; offender 18 years of age or older.
643	806.111 (1)	3rd	Possess, manufacture, or dispense fire bomb with intent to damage any structure or property.
644	812.0145 (2) (b)	2nd	Theft from person 65 years of age or older; \$10,000 or more but less than \$50,000.
645	812.015 (8) (a) & (c) - (e)	3rd	Retail theft; property stolen is valued at \$750 or more and one or more specified acts.
646	812.019 (1)	2nd	Stolen property; dealing in or trafficking in.
647	812.081 (3)	2nd	Trafficking in trade secrets.



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648	812.131 (2) (b)	3rd	Robbery by sudden snatching.
649	812.16 (2)	3rd	Owning, operating, or conducting a chop shop.
650	817.034 (4) (a) 2.	2nd	Communications fraud, value \$20,000 to \$50,000.
651	817.234 (11) (b)	2nd	Insurance fraud; property value \$20,000 or more but less than \$100,000.
652	817.2341 (1), (2) (a) & (3) (a)	3rd	Filing false financial statements, making false entries of material fact or false statements regarding property values relating to the solvency of an insuring entity.
653	817.568 (2) (b)	2nd	Fraudulent use of personal identification information; value of benefit, services



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received, payment
avoided, or amount of
injury or fraud, \$5,000
or more or use of
personal identification
information of 10 or
more persons.

654

817.611 (2) (a)

2nd

Traffic in or possess 5
to 14 counterfeit credit
cards or related
documents.

655

817.625 (2) (b)

2nd

Second or subsequent
fraudulent use of
scanning device,
skimming device, or
reencoder.

656

825.1025 (4)

3rd

Lewd or lascivious
exhibition in the
presence of an elderly
person or disabled
adult.

657

827.071 (4)

2nd

Possess with intent to
promote any photographic
material, motion
picture, etc., which



414724

includes child sexual
abuse material ~~sexual
conduct by a child.~~

658

827.071 (5)

3rd

Possess, control, or
intentionally view any
photographic material,
motion picture, etc.,
which includes child
sexual abuse material
~~sexual conduct by a
child.~~

659

828.12 (2)

3rd

Tortures any animal with
intent to inflict
intense pain, serious
physical injury, or
death.

660

836.14 (4)

2nd

Person who promotes for
a certain purpose a
sexually explicit image
of an identifiable
person without consent.

661

839.13 (2) (b)

2nd

Falsifying records of an
individual in the care
and custody of a state
agency involving great



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recruiting person under
13 years of age to join
a criminal gang.

668

893.13(1)(a)1.

2nd

Sell, manufacture, or
deliver cocaine (or
other s. 893.03(1)(a),
(1)(b), (1)(d), (2)(a),
(2)(b), or (2)(c)5.
drugs).

669

893.13(1)(c)2.

2nd

Sell, manufacture, or
deliver cannabis (or
other s. 893.03(1)(c),
(2)(c)1., (2)(c)2.,
(2)(c)3., (2)(c)6.,
(2)(c)7., (2)(c)8.,
(2)(c)9., (2)(c)10.,
(3), or (4) drugs)
within 1,000 feet of a
child care facility,
school, or state,
county, or municipal
park or publicly owned
recreational facility or
community center.

670

893.13(1)(d)1.

1st

Sell, manufacture, or
deliver cocaine (or



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other s. 893.03(1) (a),
(1) (b), (1) (d), (2) (a),
(2) (b), or (2) (c) 5.
drugs) within 1,000 feet
of university.

671

893.13(1) (e) 2.

2nd

Sell, manufacture, or
deliver cannabis or
other drug prohibited
under s. 893.03(1) (c),
(2) (c) 1., (2) (c) 2.,
(2) (c) 3., (2) (c) 6.,
(2) (c) 7., (2) (c) 8.,
(2) (c) 9., (2) (c) 10.,
(3), or (4) within 1,000
feet of property used
for religious services
or a specified business
site.

672

893.13(1) (f) 1.

1st

Sell, manufacture, or
deliver cocaine (or
other s. 893.03(1) (a),
(1) (b), (1) (d), or
(2) (a), (2) (b), or
(2) (c) 5. drugs) within
1,000 feet of public
housing facility.

673



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893.13(4)(b) 2nd Use or hire of minor;
deliver to minor other
controlled substance.

674

893.1351(1) 3rd Ownership, lease, or
rental for trafficking
in or manufacturing of
controlled substance.

675

676

677 Section 10. Paragraph (e) of subsection (3) and subsection
678 (10) of section 960.03, Florida Statutes, are amended to read:
679 960.03 Definitions; ss. 960.01-960.28.—As used in ss.

680 960.01-960.28, unless the context otherwise requires, the term:

681 (3) "Crime" means:

682 (e) A violation of s. 827.071, s. 847.0135, s. 847.0137, or
683 s. 847.0138, related to online sexual exploitation and child
684 sexual abuse material ~~child pornography~~.

685 (10) "Identified victim of child sexual abuse material
686 ~~child pornography~~" means any person who, while under the age of
687 18, is depicted in any image or movie of child sexual abuse
688 material ~~child pornography~~ and who is identified through a
689 report generated by a law enforcement agency and provided to the
690 National Center for Missing and Exploited Children's Child
691 Victim Identification Program.

692 Section 11. Paragraph (j) of subsection (1) of section
693 288.1254, Florida Statutes, is amended to read:

694 288.1254 Entertainment industry financial incentive
695 program.—



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696 (1) DEFINITIONS.—As used in this section, the term:
697 (j) “Qualified production” means a production in this state
698 meeting the requirements of this section. The term does not
699 include a production:

700 1. In which, for the first 2 years of the incentive
701 program, less than 50 percent, and thereafter, less than 60
702 percent, of the positions that make up its production cast and
703 below-the-line production crew, or, in the case of digital media
704 projects, less than 75 percent of such positions, are filled by
705 legal residents of this state, whose residency is demonstrated
706 by a valid Florida driver license or other state-issued
707 identification confirming residency, or students enrolled full-
708 time in a film-and-entertainment-related course of study at an
709 institution of higher education in this state; or

710 2. That contains obscene content as defined in s. 847.001
711 ~~s. 847.001(10)~~.

712 Section 12. Subsection (1) of section 847.0141, Florida
713 Statutes, is amended to read:

714 847.0141 Sexting; prohibited acts; penalties.—

715 (1) A minor commits the offense of sexting if he or she
716 knowingly:

717 (a) Uses a computer, or any other device capable of
718 electronic data transmission or distribution, to transmit or
719 distribute to another minor any photograph or video of any
720 person which depicts nudity, as defined in s. 847.001 ~~s.~~
721 ~~847.001(9)~~, and is harmful to minors, as defined in s. 847.001
722 ~~s. 847.001(6)~~.

723 (b) Possesses a photograph or video of any person that was
724 transmitted or distributed by another minor which depicts



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725 nudity, as defined in s. 847.001 ~~s. 847.001(9)~~, and is harmful
726 to minors, as defined in s. 847.001 ~~s. 847.001(6)~~. A minor does
727 not violate this paragraph if all of the following apply:

- 728 1. The minor did not solicit the photograph or video.
729 2. The minor took reasonable steps to report the photograph
730 or video to the minor's legal guardian or to a school or law
731 enforcement official.
732 3. The minor did not transmit or distribute the photograph
733 or video to a third party.

734 Section 13. Subsection (3) of section 39.0138, Florida
735 Statutes, is amended to read:

736 39.0138 Criminal history and other records checks; limit on
737 placement of a child.-

738 (3) The department may not place a child with a person
739 other than a parent if the criminal history records check
740 reveals that the person has been convicted of any felony that
741 falls within any of the following categories:

- 742 (a) Child abuse, abandonment, or neglect;
743 (b) Domestic violence;
744 (c) Child sexual abuse material ~~Child pornography~~ or other
745 felony in which a child was a victim of the offense; or
746 (d) Homicide, sexual battery, or other felony involving
747 violence, other than felony assault or felony battery when an
748 adult was the victim of the assault or battery, or resisting
749 arrest with violence.

750 Section 14. Subsection (3) of section 92.56, Florida
751 Statutes, is amended to read:

752 92.56 Judicial proceedings and court records involving
753 sexual offenses and human trafficking.-



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754 (3) The state may use a pseudonym instead of the victim's
755 name to designate the victim of a crime described in s.
756 787.06(3)(a)1., (c)1., or (e)1., in s. 787.06(3)(b), (d), (f),
757 or (g), or in chapter 794 or chapter 800, or of child abuse,
758 aggravated child abuse, or sexual performance by a child as
759 described in chapter 827, or any crime involving the production,
760 possession, or promotion of child sexual abuse material ~~child~~
761 ~~pornography~~ as described in chapter 847, in all court records
762 and records of court proceedings, both civil and criminal.

763 Section 15. Section 92.561, Florida Statutes, is amended to
764 read:

765 92.561 Prohibition on reproduction of child sexual abuse
766 material ~~child pornography~~.

767 (1) In a criminal proceeding, any property or material that
768 portrays sexual performance by a child as defined in s. 827.071,
769 or constitutes child sexual abuse material ~~child pornography~~ as
770 defined in s. 847.001, must remain secured or locked in the
771 care, custody, and control of a law enforcement agency, the
772 state attorney, or the court.

773 (2) Notwithstanding any law or rule of court, a court shall
774 deny, in a criminal proceeding, any request by the defendant to
775 copy, photograph, duplicate, or otherwise reproduce any property
776 or material that portrays sexual performance by a child or
777 constitutes child sexual abuse material ~~child pornography~~ so
778 long as the state attorney makes the property or material
779 reasonably available to the defendant.

780 (3) For purposes of this section, property or material is
781 deemed to be reasonably available to the defendant if the state
782 attorney provides ample opportunity at a designated facility for



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783 the inspection, viewing, and examination of the property or
784 material that portrays sexual performance by a child or
785 constitutes child sexual abuse material ~~child pornography~~ by the
786 defendant, his or her attorney, or any individual whom the
787 defendant uses as an expert during the discovery process or at a
788 court proceeding.

789 Section 16. Paragraph (c) of subsection (4) of section
790 435.07, Florida Statutes, is amended to read:

791 435.07 Exemptions from disqualification.—Unless otherwise
792 provided by law, the provisions of this section apply to
793 exemptions from disqualification for disqualifying offenses
794 revealed pursuant to background screenings required under this
795 chapter, regardless of whether those disqualifying offenses are
796 listed in this chapter or other laws.

797 (4)

798 (c) Disqualification from employment under this chapter may
799 not be removed from, and an exemption may not be granted to, any
800 current or prospective child care personnel, as defined in s.
801 402.302(3), and such a person is disqualified from employment as
802 child care personnel, regardless of any previous exemptions from
803 disqualification, if the person has been registered as a sex
804 offender as described in 42 U.S.C. s. 9858f(c)(1)(C) or has been
805 arrested for and is awaiting final disposition of, has been
806 convicted or found guilty of, or entered a plea of guilty or
807 nolo contendere to, regardless of adjudication, or has been
808 adjudicated delinquent and the record has not been sealed or
809 expunged for, any offense prohibited under any of the following
810 provisions of state law or a similar law of another
811 jurisdiction:



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- 812 1. A felony offense prohibited under any of the following
813 statutes:
- 814 a. Chapter 741, relating to domestic violence.
 - 815 b. Section 782.04, relating to murder.
 - 816 c. Section 782.07, relating to manslaughter, aggravated
817 manslaughter of an elderly person or disabled adult, aggravated
818 manslaughter of a child, or aggravated manslaughter of an
819 officer, a firefighter, an emergency medical technician, or a
820 paramedic.
 - 821 d. Section 784.021, relating to aggravated assault.
 - 822 e. Section 784.045, relating to aggravated battery.
 - 823 f. Section 787.01, relating to kidnapping.
 - 824 g. Section 787.025, relating to luring or enticing a child.
 - 825 h. Section 787.04(2), relating to leading, taking,
826 enticing, or removing a minor beyond the state limits, or
827 concealing the location of a minor, with criminal intent pending
828 custody proceedings.
 - 829 i. Section 787.04(3), relating to leading, taking,
830 enticing, or removing a minor beyond the state limits, or
831 concealing the location of a minor, with criminal intent pending
832 dependency proceedings or proceedings concerning alleged abuse
833 or neglect of a minor.
 - 834 j. Section 794.011, relating to sexual battery.
 - 835 k. Former s. 794.041, relating to sexual activity with or
836 solicitation of a child by a person in familial or custodial
837 authority.
 - 838 l. Section 794.05, relating to unlawful sexual activity
839 with certain minors.
 - 840 m. Section 794.08, relating to female genital mutilation.



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841 n. Section 806.01, relating to arson.
842 o. Section 826.04, relating to incest.
843 p. Section 827.03, relating to child abuse, aggravated
844 child abuse, or neglect of a child.
845 q. Section 827.04, relating to contributing to the
846 delinquency or dependency of a child.
847 r. Section 827.071, relating to sexual performance by a
848 child.
849 s. Chapter 847, relating to child sexual abuse material
850 ~~child pornography~~.
851 t. Chapter 893, relating to a drug abuse prevention and
852 control offense, if that offense was committed in the preceding
853 5 years.
854 u. Section 985.701, relating to sexual misconduct in
855 juvenile justice programs.
856 2. A misdemeanor offense prohibited under any of the
857 following statutes:
858 a. Section 784.03, relating to battery, if the victim of
859 the offense was a minor.
860 b. Section 787.025, relating to luring or enticing a child.
861 c. Chapter 847, relating to child sexual abuse material
862 ~~child pornography~~.
863 3. A criminal act committed in another state or under
864 federal law which, if committed in this state, constitutes an
865 offense prohibited under any statute listed in subparagraph 1.
866 or subparagraph 2.
867 Section 17. Paragraph (z) of subsection (5) of section
868 456.074, Florida Statutes, is amended to read:
869 456.074 Certain health care practitioners; immediate



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870 suspension of license.-

871 (5) The department shall issue an emergency order
872 suspending the license of any health care practitioner who is
873 arrested for committing or attempting, soliciting, or conspiring
874 to commit any act that would constitute a violation of any of
875 the following criminal offenses in this state or similar
876 offenses in another jurisdiction:

877 (z) Section 847.0137, relating to the transmission of child
878 sexual abuse material ~~child pornography~~ by electronic device or
879 equipment.

880 Section 18. Section 847.002, Florida Statutes, is amended
881 to read:

882 847.002 Child sexual abuse material ~~Child pornography~~
883 prosecutions.-

884 (1) Any law enforcement officer who, pursuant to a criminal
885 investigation, recovers images or movies of child sexual abuse
886 material ~~child pornography~~ shall:

887 (a) Provide such images or movies to the law enforcement
888 agency representative assigned to the Child Victim
889 Identification Program at the National Center for Missing and
890 Exploited Children, as required by the center's guidelines.

891 (b) Request the law enforcement agency contact information
892 from the Child Victim Identification Program for any images or
893 movies recovered which contain an identified victim of child
894 sexual abuse material ~~child pornography~~ as defined in s. 960.03.

895 (c) Provide case information to the Child Victim
896 Identification Program, as required by the National Center for
897 Missing and Exploited Children guidelines, in any case where the
898 law enforcement officer identifies a previously unidentified



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899 victim of child sexual abuse material ~~child pornography~~.

900 (2) Any law enforcement officer submitting a case for
901 prosecution which involves the production, promotion, or
902 possession of child sexual abuse material ~~child pornography~~
903 shall submit to the designated prosecutor the law enforcement
904 agency contact information provided by the Child Victim
905 Identification Program at the National Center for Missing and
906 Exploited Children, for any images or movies involved in the
907 case which contain the depiction of an identified victim of
908 child sexual abuse material ~~child pornography~~ as defined in s.
909 960.03.

910 (3) In every filed case involving an identified victim of
911 child sexual abuse material ~~child pornography~~, as defined in s.
912 960.03, the prosecuting agency shall enter the following
913 information into the Victims in Child Sexual Abuse Material
914 ~~Child Pornography~~ Tracking Repeat Exploitation database
915 maintained by the Office of the Attorney General:

- 916 (a) The case number and agency file number.
917 (b) The named defendant.
918 (c) The circuit court division and county.
919 (d) Current court dates and the status of the case.
920 (e) Contact information for the prosecutor assigned.
921 (f) Verification that the prosecutor is or is not in
922 possession of a victim impact statement and will use the
923 statement in sentencing.

924 Section 19. Subsections (1) and (4) of section 847.01357,
925 Florida Statutes, are amended to read:

926 847.01357 Exploited children's civil remedy.—

927 (1) Any person who, while under the age of 18, was a victim



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928 of a sexual abuse crime listed in chapter 794, chapter 800,
929 chapter 827, or chapter 847, where any portion of such abuse was
930 used in the production of child sexual abuse material ~~child~~
931 ~~pornography~~, and who suffers personal or psychological injury as
932 a result of the production, promotion, or possession of such
933 images or movies, may bring an action in an appropriate state
934 court against the producer, promoter, or possessor of such
935 images or movies, regardless of whether the victim is now an
936 adult. In any action brought under this section, a prevailing
937 plaintiff shall recover the actual damages such person sustained
938 and the cost of the suit, including reasonable attorney's fees.
939 Any victim who is awarded damages under this section shall be
940 deemed to have sustained damages of at least \$150,000.

941 (4) It is not a defense to a civil cause of action under
942 this section that the respondent did not know the victim or
943 commit the abuse depicted in any image of child sexual abuse
944 material ~~child pornography~~.

945 Section 20. Section 847.0139, Florida Statutes, is amended
946 to read:

947 847.0139 Immunity from civil liability for reporting child
948 sexual abuse material ~~child pornography~~, transmission of child
949 sexual abuse material ~~child pornography~~, or any image,
950 information, or data harmful to minors to a minor in this
951 state.—Any person who reports to a law enforcement officer what
952 the person reasonably believes to be child sexual abuse material
953 ~~child pornography~~, transmission of child sexual abuse material
954 ~~child pornography~~, or any image, information, or data that is
955 harmful to minors to a minor in this state may not be held
956 civilly liable for such reporting. For purposes of this section,



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957 such reporting may include furnishing the law enforcement
958 officer with any image, information, or data that the person
959 reasonably believes to be evidence of child sexual abuse
960 material child pornography, transmission of child sexual abuse
961 material child pornography, or an image, information, or data
962 that is harmful to minors to a minor in this state.

963 Section 21. Paragraph (c) of subsection (8) of section
964 948.06, Florida Statutes, is amended to read:

965 948.06 Violation of probation or community control;
966 revocation; modification; continuance; failure to pay
967 restitution or cost of supervision.—

968 (8)

969 (c) For purposes of this section, the term "qualifying
970 offense" means any of the following:

971 1. Kidnapping or attempted kidnapping under s. 787.01,
972 false imprisonment of a child under the age of 13 under s.
973 787.02(3), or luring or enticing a child under s. 787.025(2) (b)
974 or (c).

975 2. Murder or attempted murder under s. 782.04, attempted
976 felony murder under s. 782.051, or manslaughter under s. 782.07.

977 3. Aggravated battery or attempted aggravated battery under
978 s. 784.045.

979 4. Sexual battery or attempted sexual battery under s.
980 794.011(2), (3), (4), or (8) (b) or (c).

981 5. Lewd or lascivious battery or attempted lewd or
982 lascivious battery under s. 800.04(4), lewd or lascivious
983 molestation under s. 800.04(5) (b) or (c)2., lewd or lascivious
984 conduct under s. 800.04(6) (b), lewd or lascivious exhibition
985 under s. 800.04(7) (b), or lewd or lascivious exhibition on



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986 computer under s. 847.0135(5) (b) .
987 6. Robbery or attempted robbery under s. 812.13, carjacking
988 or attempted carjacking under s. 812.133, or home invasion
989 robbery or attempted home invasion robbery under s. 812.135.
990 7. Lewd or lascivious offense upon or in the presence of an
991 elderly or disabled person or attempted lewd or lascivious
992 offense upon or in the presence of an elderly or disabled person
993 under s. 825.1025.
994 8. Sexual performance by a child or attempted sexual
995 performance by a child under s. 827.071.
996 9. Computer pornography under s. 847.0135(2) or (3),
997 transmission of child sexual abuse material ~~child pornography~~
998 under s. 847.0137, or selling or buying of minors under s.
999 847.0145.
1000 10. Poisoning food or water under s. 859.01.
1001 11. Abuse of a dead human body under s. 872.06.
1002 12. Any burglary offense or attempted burglary offense that
1003 is either a first degree felony or second degree felony under s.
1004 810.02(2) or (3).
1005 13. Arson or attempted arson under s. 806.01(1).
1006 14. Aggravated assault under s. 784.021.
1007 15. Aggravated stalking under s. 784.048(3), (4), (5), or
1008 (7).
1009 16. Aircraft piracy under s. 860.16.
1010 17. Unlawful throwing, placing, or discharging of a
1011 destructive device or bomb under s. 790.161(2), (3), or (4).
1012 18. Treason under s. 876.32.
1013 19. Any offense committed in another jurisdiction which
1014 would be an offense listed in this paragraph if that offense had



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1015 been committed in this state.

1016 Section 22. Section 960.197, Florida Statutes, is amended
1017 to read:

1018 960.197 Assistance to victims of online sexual exploitation
1019 and child sexual abuse material ~~child pornography~~.-

1020 (1) Notwithstanding the criteria set forth in s. 960.13 for
1021 crime victim compensation awards, the department may award
1022 compensation for counseling and other mental health services to
1023 treat psychological injury or trauma to:

1024 (a) A child younger than 18 years of age who suffers
1025 psychiatric or psychological injury as a direct result of online
1026 sexual exploitation under any provision of s. 827.071, s.
1027 847.0135, s. 847.0137, or s. 847.0138, and who does not
1028 otherwise sustain a personal injury or death; or

1029 (b) Any person who, while younger than age 18, was depicted
1030 in any image or movie, regardless of length, of child sexual
1031 abuse material ~~child pornography~~ as defined in s. 847.001, who
1032 has been identified by a law enforcement agency or the National
1033 Center for Missing and Exploited Children as an identified
1034 victim of child sexual abuse material ~~child pornography~~, who
1035 suffers psychiatric or psychological injury as a direct result
1036 of the crime, and who does not otherwise sustain a personal
1037 injury or death.

1038 (2) Compensation under this section is not contingent upon
1039 pursuit of a criminal investigation or prosecution.

1040 Section 23. This act shall take effect October 1, 2022.

1041

1042 ===== T I T L E A M E N D M E N T =====

1043 And the title is amended as follows:



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1044 Delete everything before the enacting clause
1045 and insert:

1046 A bill to be entitled
1047 An act relating to sexually explicit material;
1048 amending s. 775.0847, F.S.; redefining terms;
1049 replacing the term "child pornography" with the term
1050 "child sexual abuse material"; defining the term
1051 "identifiable minor"; revising the list of
1052 circumstances under which specified offenses may be
1053 reclassified; amending s. 784.049, F.S.; increasing
1054 the monetary damages that an aggrieved person may
1055 receive as a result of violations relating to sexual
1056 cyberharassment; amending s. 827.071, F.S.; defining
1057 and redefining terms; conforming provisions to changes
1058 made by the act; creating s. 836.13, F.S.; defining
1059 terms; prohibiting the willful and malicious promotion
1060 of certain images without consent; providing criminal
1061 penalties; providing a civil cause of action;
1062 providing applicability; providing construction;
1063 creating s. 836.14, F.S.; defining terms; prohibiting
1064 a person from obtaining certain images with the intent
1065 to promote such images; prohibiting the possession of
1066 certain images with intent to promote without consent;
1067 prohibiting the promotion of certain images without
1068 consent; providing criminal penalties; providing a
1069 civil cause of action; providing applicability;
1070 providing construction; amending s. 847.001, F.S.;
1071 redefining terms; replacing the term "child
1072 pornography" with the term "child sexual abuse



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1073 material"; defining the terms "identifiable minor" and
1074 "promote"; amending 847.011; authorizing law
1075 enforcement officers to arrest certain persons without
1076 a warrant; authorizing a search warrant to be issued
1077 for further investigation upon proper affidavits being
1078 made; amending 847.0137, F.S.; deleting the definition
1079 of the term "minor"; redefining the term "transmit";
1080 conforming provisions to changes made by the act;
1081 amending s. 921.0022, F.S.; ranking offenses created
1082 by this act for purposes of the severity ranking chart
1083 of the Criminal Punishment Code; conforming provisions
1084 to changes made by the act; amending s. 960.03, F.S.;
1085 replacing the term "child pornography" with the term
1086 "child sexual abuse material"; conforming provisions
1087 to changes made by the act; amending ss. 288.1254, and
1088 847.0141 F.S.; conforming cross-references; amending
1089 ss. 39.0138, 92.56, 92.561, 435.07, 456.074, 847.002,
1090 847.01357, 847.0139, 948.06, and 960.197, F.S.;
1091 conforming provisions to changes made by the act;
1092 providing an effective date.



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LEGISLATIVE ACTION

Senate	.	House
Comm: RCS	.	
01/25/2022	.	
	.	
	.	
	.	

The Committee on Criminal Justice (Book) recommended the following:

Senate Amendment to Amendment (414724)

Delete lines 254 - 618

and insert:

(2) A person who willfully and maliciously promotes any altered sexual depiction of an identifiable person, without the consent of the identifiable person, and who knows or reasonably should have known that such visual depiction was an altered sexual depiction, commits a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.



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11 (3) Every act, thing, or transaction prohibited by this
12 section constitutes a separate offense and is punishable as
13 such.

14 (4) The presence of a disclaimer within an altered sexual
15 depiction which notifies a viewer that the person or persons
16 depicted did not consent to or participate in the creation or
17 promotion of the material, or that the person or persons
18 depicted did not actually perform the actions portrayed, is not
19 a defense and does not relieve a person of criminal liability
20 under this section.

21 (5) An aggrieved person may initiate a civil action against
22 a person who violates subsection (2) to obtain appropriate
23 relief in order to prevent or remedy a violation of subsection
24 (2), including all of the following:

25 (a) Injunctive relief.

26 (b) Monetary damages up to and including \$10,000 or actual
27 damages incurred as a result of a violation of subsection (2),
28 whichever is greater.

29 (c) Reasonable attorney fees and costs.

30 (6) The criminal and civil penalties of this section do not
31 apply to:

32 (a) A provider of an interactive computer service as
33 defined in 47 U.S.C. s. 230(f), of an information service as
34 defined in 47 U.S.C. s. 153, or of a communications service as
35 defined in s. 202.11 which provides the transmission, storage,
36 or caching of electronic communications or messages of others;
37 another related telecommunications or commercial mobile radio
38 service; or content provided by another person;

39 (b) A law enforcement officer, as defined in s. 943.10, or



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40 any local, state, federal, or military law enforcement agency
41 that promotes an altered sexual depiction in connection with the
42 performance of his or her duties as a law enforcement officer or
43 the duties of the law enforcement agency;

44 (c) A person reporting unlawful activity; or

45 (d) A person participating in a hearing, trial, or other
46 legal proceeding.

47 (7) A violation of this section is committed within this
48 state if any conduct that is an element of the offense, or any
49 harm to the depicted person resulting from the offense, occurs
50 within this state.

51 Section 5. Section 836.14, Florida Statutes, is created to
52 read:

53 836.14 Unlawfully obtaining, possessing, or promoting a
54 sexually explicit image.—

55 (1) As used in this section, the term:

56 (a) "Identifiable person" has the same meaning as in s.
57 836.13.

58 (b) "Promote" has the same meaning as in s. 836.13.

59 (c) "Sexually explicit image" means any image depicting
60 nudity as defined in s. 847.001 or a person engaging in sexual
61 conduct as defined in s. 847.001.

62 (2) A person who knowingly and unlawfully obtains a
63 sexually explicit image of an identifiable person with the
64 intent to promote such image commits a felony of the third
65 degree, punishable as provided in s. 775.082, s. 775.083, or s.
66 775.084.

67 (3) A person who willfully possesses with the intent to
68 promote for the purpose of pecuniary or any other type of



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69 financial gain a sexually explicit image of an identifiable
70 person without that person's consent commits a felony of the
71 third degree, punishable as provided in s. 775.082, s. 775.083,
72 or s. 775.084.

73 (4) A person who willfully promotes for the purpose of
74 pecuniary or any other financial gain a sexually explicit image
75 of an identifiable person without that person's consent commits
76 a felony of the second degree, punishable as provided in s.
77 775.082, s. 775.083, or s. 775.084.

78 (5) Every act, thing, or transaction prohibited by this
79 section constitutes a separate offense and is punishable as
80 such.

81 (6) An aggrieved person may initiate a civil action against
82 a person who violates this section to obtain all appropriate
83 relief in order to prevent or remedy a violation of this
84 section, including the following:

85 (a) Injunctive relief.

86 (b) Monetary damages to include \$10,000 or actual damages
87 incurred as a result of a violation of this section, whichever
88 is greater.

89 (c) Reasonable attorney fees and costs.

90 (7) The criminal and civil penalties of this section do not
91 apply to:

92 (a) A provider of an interactive computer service as
93 defined in 47 U.S.C. s. 230(f), of an information service as
94 defined in 47 U.S.C. s. 153, or of a communications service as
95 defined in s. 202.11 which provides the transmission, storage,
96 or caching of electronic communications or messages of others;
97 another related telecommunications or commercial mobile radio



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98 service; or content provided by another person;

99 (b) A law enforcement officer, as defined in s. 943.10, or
100 any local, state, federal, or military law enforcement agency
101 that disseminates a sexually explicit image in connection with
102 the performance of his or her duties as a law enforcement
103 officer or the duties of the law enforcement agency;

104 (c) A person reporting unlawful activity;

105 (d) A person participating in a hearing, trial, or other
106 legal proceeding; or

107 (e) Sexually explicit images involving voluntary exposure
108 in a public or commercial setting.

109 (8) A violation of this section is committed within this
110 state if any conduct that is an element of the offense, or any
111 harm to the depicted individual resulting from the offense,
112 occurs within this state.

113 Section 6. Present subsections (7) through (11) and (12)
114 through (20) of section 847.001, Florida Statutes, are
115 redesignated as subsections (8) through (12) and (14) through
116 (22), respectively, new subsections (7) and (13) are added to
117 that section, and subsection (3) and present subsections (8),
118 (16), and (19) of that section are amended, to read:

119 847.001 Definitions.—As used in this chapter, the term:

120 (3) "Child sexual abuse material" ~~"Child pornography"~~
121 means:

122 (a) Any image depicting a minor engaged in sexual conduct;
123 or

124 (b) Any image that has been created, altered, adapted, or
125 modified by electronic, mechanical, or other means, to portray
126 an identifiable minor engaged in sexual conduct.



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127 (7) "Identifiable minor" means a person:
128 (a) Who was a minor at the time the image was created,
129 adapted, or modified, or whose image as a minor was used in the
130 creating, adapting, or modifying of the image; and
131 (b) Who is recognizable as an actual person by the person's
132 face, likeness, or other distinguishing characteristic, such as
133 a unique birthmark, or other recognizable feature.
134
135 The term may not be construed to require proof of the actual
136 identity of the identifiable minor.
137 (9)~~(8)~~ "Minor" or "child" means any person, whose identity
138 is known or unknown, younger than ~~under the age of~~ 18 years of
139 age.
140 (13) "Promote" means to procure, manufacture, issue, sell,
141 give, provide, lend, mail, deliver, transfer, transmit,
142 transmute, publish, distribute, circulate, disseminate, present,
143 exhibit, send, post, share, or advertise or to offer or agree to
144 do the same.
145 (18)~~(16)~~ "Sexual conduct" means actual or simulated sexual
146 intercourse, deviate sexual intercourse, sexual bestiality,
147 masturbation, or sadomasochistic abuse; actual or simulated lewd
148 exhibition of the genitals; actual physical contact with a
149 person's clothed or unclothed genitals, pubic area, buttocks,
150 or, if such person is a female, breast with the intent to arouse
151 or gratify the sexual desire of either party; or any act or
152 conduct which constitutes sexual battery or simulates that
153 sexual battery is being or will be committed. A mother's
154 breastfeeding of her baby does not under any circumstance
155 constitute "sexual conduct."



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156 ~~(21)(19)~~ "Simulated" means the explicit depiction of
157 conduct described in subsection (18) ~~(16)~~ which creates the
158 appearance of such conduct and which exhibits any uncovered
159 portion of the breasts, genitals, or buttocks.

160 Section 7. Subsection (5) of section 847.011, Florida
161 Statutes, is amended to read:

162 847.011 Prohibition of certain acts in connection with
163 obscene, lewd, etc., materials; penalty.—

164 (5) (a) 1. A person may not knowingly sell, lend, give away,
165 distribute, transmit, show, or transmute; offer to sell, lend,
166 give away, distribute, transmit, show, or transmute; have in his
167 or her possession, custody, or control with the intent to sell,
168 lend, give away, distribute, transmit, show, or transmute; or
169 advertise in any manner an obscene, child-like sex doll.

170 2.a. Except as provided in sub-subparagraph b., a person
171 who violates this paragraph commits a felony of the third
172 degree, punishable as provided in s. 775.082, s. 775.083, or s.
173 775.084.

174 b. A person who is convicted of violating this paragraph a
175 second or subsequent time commits a felony of the second degree,
176 punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

177 (b) 1. Except as provided in subparagraph 2., a person who
178 knowingly has in his or her possession, custody, or control an
179 obscene, child-like sex doll commits a misdemeanor of the first
180 degree, punishable as provided in s. 775.082 or s. 775.083.

181 2. A person who is convicted of violating this paragraph a
182 second or subsequent time commits a felony of the third degree,
183 punishable as provided in s. 775.082 or s. 775.083.

184 (c) 1. A law enforcement officer may arrest without a



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185 warrant any person who he or she has probable cause to believe
186 has violated paragraph (b).

187 2. Upon proper affidavits being made, a search warrant may
188 be issued to further investigate a violation of paragraph (b),
189 including to search a private dwelling.

190 Section 8. Subsections (1) through (4) of section 847.0137,
191 Florida Statutes, are amended to read:

192 847.0137 Transmission of pornography by electronic device
193 or equipment prohibited; penalties.—

194 (1) As used in this section, the term ~~For purposes of this~~
195 ~~section:~~

196 ~~(a) "Minor" means any person less than 18 years of age.~~

197 ~~(b) "transmit" means the act of sending and causing to be~~
198 delivered, including the act of providing access for receiving
199 and causing to be delivered, any image, information, or data
200 ~~from one or more persons or places to one or more other persons~~
201 ~~or places over or through any medium, including the Internet or~~
202 an interconnected network, by use of any electronic equipment or
203 other device.

204 (2) Notwithstanding ss. 847.012 and 847.0133, any person in
205 this state who knew or reasonably should have known that he or
206 she was transmitting child sexual abuse material ~~child~~
207 ~~pornography~~, as defined in s. 847.001, to another person in this
208 state or in another jurisdiction commits a felony of the third
209 degree, punishable as provided in s. 775.082, s. 775.083, or s.
210 775.084.

211 (3) Notwithstanding ss. 847.012 and 847.0133, any person in
212 any jurisdiction other than this state who knew or reasonably
213 should have known that he or she was transmitting child sexual



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214 abuse material ~~child pornography~~, as defined in s. 847.001, to
215 any person in this state commits a felony of the third degree,
216 punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

217 (4) This section shall not be construed to prohibit
218 prosecution of a person in this state or another jurisdiction
219 for a violation of any law of this state, including a law
220 providing for greater penalties than prescribed in this section,
221 for the transmission of child sexual abuse material ~~child~~
222 pornography, as defined in s. 847.001, to any person in this
223 state.

224
225 The provisions of this section do not apply to subscription-
226 based transmissions such as list servers.

227 Section 9. Paragraphs (c), (d), and (e) of subsection (3)
228 of section 921.0022, Florida Statutes, are amended to read:

229 921.0022 Criminal Punishment Code; offense severity ranking
230 chart.—

231 (3) OFFENSE SEVERITY RANKING CHART

232 (c) LEVEL 3

233

Florida Statute	Felony Degree	Description
119.10(2)(b)	3rd	Unlawful use of confidential information from police reports.
316.066 (3)(b)-(d)	3rd	Unlawfully obtaining or using confidential crash

234

235



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236			reports.
	316.193 (2) (b)	3rd	Felony DUI, 3rd conviction.
237			
	316.1935 (2)	3rd	Fleeing or attempting to elude law enforcement officer in patrol vehicle with siren and lights activated.
238			
	319.30 (4)	3rd	Possession by junkyard of motor vehicle with identification number plate removed.
239			
	319.33 (1) (a)	3rd	Alter or forge any certificate of title to a motor vehicle or mobile home.
240			
	319.33 (1) (c)	3rd	Procure or pass title on stolen vehicle.
241			
	319.33 (4)	3rd	With intent to defraud, possess, sell, etc., a blank, forged, or unlawfully obtained title or registration.



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242	327.35 (2) (b)	3rd	Felony BUI.
243	328.05 (2)	3rd	Possess, sell, or counterfeit fictitious, stolen, or fraudulent titles or bills of sale of vessels.
244	328.07 (4)	3rd	Manufacture, exchange, or possess vessel with counterfeit or wrong ID number.
245	376.302 (5)	3rd	Fraud related to reimbursement for cleanup expenses under the Inland Protection Trust Fund.
246	379.2431 (1) (e) 5.	3rd	Taking, disturbing, mutilating, destroying, causing to be destroyed, transferring, selling, offering to sell, molesting, or harassing marine turtles, marine turtle eggs, or marine turtle nests in violation of the Marine Turtle



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247			Protection Act.
	379.2431	3rd	Possessing any marine turtle species or hatchling, or parts thereof, or the nest of any marine turtle species described in the Marine Turtle Protection Act.
	(1) (e) 6.		
248			
	379.2431	3rd	Soliciting to commit or conspiring to commit a violation of the Marine Turtle Protection Act.
	(1) (e) 7.		
249			
	400.9935 (4) (a)	3rd	Operating a clinic, or offering services requiring licensure, without a license.
	or (b)		
250			
	400.9935 (4) (e)	3rd	Filing a false license application or other required information or failing to report information.
251			
	440.1051 (3)	3rd	False report of workers' compensation fraud or retaliation for making



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252			such a report.
	501.001 (2) (b)	2nd	Tampers with a consumer product or the container using materially false/misleading information.
253			
	624.401 (4) (a)	3rd	Transacting insurance without a certificate of authority.
254			
	624.401 (4) (b) 1.	3rd	Transacting insurance without a certificate of authority; premium collected less than \$20,000.
255			
	626.902 (1) (a) & (b)	3rd	Representing an unauthorized insurer.
256			
	697.08	3rd	Equity skimming.
257			
	790.15 (3)	3rd	Person directs another to discharge firearm from a vehicle.
258			
	806.10 (1)	3rd	Maliciously injure,



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259			destroy, or interfere with vehicles or equipment used in firefighting.
260	806.10 (2)	3rd	Interferes with or assaults firefighter in performance of duty.
261	810.09 (2) (c)	3rd	Trespass on property other than structure or conveyance armed with firearm or dangerous weapon.
262	812.014 (2) (c) 2.	3rd	Grand theft; \$5,000 or more but less than \$10,000.
263	812.0145 (2) (c)	3rd	Theft from person 65 years of age or older; \$300 or more but less than \$10,000.
264	812.015 (8) (b)	3rd	Retail theft with intent to sell; conspires with others.
265	812.081 (2)	3rd	Theft of a trade secret.



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266	815.04 (5) (b)	2nd	Computer offense devised to defraud or obtain property.
267	817.034 (4) (a) 3.	3rd	Engages in scheme to defraud (Florida Communications Fraud Act), property valued at less than \$20,000.
268	817.233	3rd	Burning to defraud insurer.
269	817.234 (8) (b) & (c)	3rd	Unlawful solicitation of persons involved in motor vehicle accidents.
270	817.234 (11) (a)	3rd	Insurance fraud; property value less than \$20,000.
271	817.236	3rd	Filing a false motor vehicle insurance application.
272	817.2361	3rd	Creating, marketing, or presenting a false or fraudulent motor vehicle insurance card.



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273	817.413 (2)	3rd	Sale of used goods of \$1,000 or more as new.
274	817.49 (2) (b) 1.	3rd	Willful making of a false report of a crime causing great bodily harm, permanent disfigurement, or permanent disability.
275	831.28 (2) (a)	3rd	Counterfeiting a payment instrument with intent to defraud or possessing a counterfeit payment instrument with intent to defraud.
276	831.29	2nd	Possession of instruments for counterfeiting driver licenses or identification cards.
277	<u>836.13 (2)</u>	<u>3rd</u>	<u>Person who promotes an altered sexually explicit depiction of an identifiable person without consent.</u>
	838.021 (3) (b)	3rd	Threatens unlawful harm to public servant.



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278	843.19	2nd	Injure, disable, or kill police, fire, or SAR canine or police horse.
279	860.15(3)	3rd	Overcharging for repairs and parts.
280	870.01(2)	3rd	Riot.
281	870.01(4)	3rd	Inciting a riot.
282	893.13(1)(a)2.	3rd	Sell, manufacture, or deliver cannabis (or other s. 893.03(1)(c), (2)(c)1., (2)(c)2., (2)(c)3., (2)(c)6., (2)(c)7., (2)(c)8., (2)(c)9., (2)(c)10., (3), or (4) drugs).
283	893.13(1)(d)2.	2nd	Sell, manufacture, or deliver s. 893.03(1)(c), (2)(c)1., (2)(c)2., (2)(c)3., (2)(c)6., (2)(c)7., (2)(c)8., (2)(c)9., (2)(c)10., (3), or (4) drugs within 1,000 feet of university.



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284	893.13(1)(f)2.	2nd	Sell, manufacture, or deliver s. 893.03(1)(c), (2)(c)1., (2)(c)2., (2)(c)3., (2)(c)6., (2)(c)7., (2)(c)8., (2)(c)9., (2)(c)10., (3), or (4) drugs within 1,000 feet of public housing facility.
285	893.13(4)(c)	3rd	Use or hire of minor; deliver to minor other controlled substances.
286	893.13(6)(a)	3rd	Possession of any controlled substance other than felony possession of cannabis.
287	893.13(7)(a)8.	3rd	Withhold information from practitioner regarding previous receipt of or prescription for a controlled substance.
288	893.13(7)(a)9.	3rd	Obtain or attempt to obtain controlled substance by fraud,



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289

893.13(7)(a)10.

3rd

forgery,
misrepresentation, etc.

Affix false or forged
label to package of
controlled substance.

290

893.13(7)(a)11.

3rd

Furnish false or
fraudulent material
information on any
document or record
required by chapter 893.

291

893.13(8)(a)1.

3rd

Knowingly assist a
patient, other person, or
owner of an animal in
obtaining a controlled
substance through
deceptive, untrue, or
fraudulent representations
in or related to the
practitioner's practice.

292

893.13(8)(a)2.

3rd

Employ a trick or scheme
in the practitioner's
practice to assist a
patient, other person, or
owner of an animal in
obtaining a controlled



293			substance.
	893.13 (8) (a) 3.	3rd	Knowingly write a prescription for a controlled substance for a fictitious person.
294			
	893.13 (8) (a) 4.	3rd	Write a prescription for a controlled substance for a patient, other person, or an animal if the sole purpose of writing the prescription is a monetary benefit for the practitioner.
295			
	918.13 (1) (a)	3rd	Alter, destroy, or conceal investigation evidence.
296			
	944.47	3rd	Introduce contraband to correctional facility.
	(1) (a) 1. & 2.		
297			
	944.47 (1) (c)	2nd	Possess contraband while upon the grounds of a correctional institution.
298			
	985.721	3rd	Escapes from a juvenile facility (secure detention



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or residential commitment
facility).

299

300

301

302

(d) LEVEL 4

303

Florida

Felony

Statute

Degree

Description

304

316.1935 (3) (a)

2nd

Driving at high speed
or with wanton
disregard for safety
while fleeing or
attempting to elude law
enforcement officer who
is in a patrol vehicle
with siren and lights
activated.

305

499.0051 (1)

3rd

Failure to maintain or
deliver transaction
history, transaction
information, or
transaction statements.

306

499.0051 (5)

2nd

Knowing sale or
delivery, or possession
with intent to sell,



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307			contraband prescription drugs.
308	517.07 (1)	3rd	Failure to register securities.
309	517.12 (1)	3rd	Failure of dealer, associated person, or issuer of securities to register.
310	784.07 (2) (b)	3rd	Battery of law enforcement officer, firefighter, etc.
311	784.074 (1) (c)	3rd	Battery of sexually violent predators facility staff.
312	784.075	3rd	Battery on detention or commitment facility staff.
313	784.078	3rd	Battery of facility employee by throwing, tossing, or expelling certain fluids or materials.



314	784.08 (2) (c)	3rd	Battery on a person 65 years of age or older.
315	784.081 (3)	3rd	Battery on specified official or employee.
316	784.082 (3)	3rd	Battery by detained person on visitor or other detainee.
317	784.083 (3)	3rd	Battery on code inspector.
318	784.085	3rd	Battery of child by throwing, tossing, projecting, or expelling certain fluids or materials.
319	787.03 (1)	3rd	Interference with custody; wrongly takes minor from appointed guardian.
	787.04 (2)	3rd	Take, entice, or remove child beyond state limits with criminal intent pending custody proceedings.



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320	787.04 (3)	3rd	Carrying child beyond state lines with criminal intent to avoid producing child at custody hearing or delivering to designated person.
321	787.07	3rd	Human smuggling.
322	790.115 (1)	3rd	Exhibiting firearm or weapon within 1,000 feet of a school.
323	790.115 (2) (b)	3rd	Possessing electric weapon or device, destructive device, or other weapon on school property.
324	790.115 (2) (c)	3rd	Possessing firearm on school property.
325	800.04 (7) (c)	3rd	Lewd or lascivious exhibition; offender less than 18 years.
326	806.135	2nd	Destroying or



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327	810.02 (4) (a)	3rd	demolishing a memorial or historic property. Burglary, or attempted burglary, of an unoccupied structure; unarmed; no assault or battery.
328	810.02 (4) (b)	3rd	Burglary, or attempted burglary, of an unoccupied conveyance; unarmed; no assault or battery.
329	810.06	3rd	Burglary; possession of tools.
330	810.08 (2) (c)	3rd	Trespass on property, armed with firearm or dangerous weapon.
331	812.014 (2) (c) 3.	3rd	Grand theft, 3rd degree \$10,000 or more but less than \$20,000.
332	812.014 (2) (c) 4.-10.	3rd	Grand theft, 3rd degree; specified items.



333	812.0195 (2)	3rd	Dealing in stolen property by use of the Internet; property stolen \$300 or more.
334	817.505 (4) (a)	3rd	Patient brokering.
335	817.563 (1)	3rd	Sell or deliver substance other than controlled substance agreed upon, excluding s. 893.03(5) drugs.
336	817.568 (2) (a)	3rd	Fraudulent use of personal identification information.
337	817.625 (2) (a)	3rd	Fraudulent use of scanning device, skimming device, or reencoder.
338	817.625 (2) (c)	3rd	Possess, sell, or deliver skimming device.
339	828.125 (1)	2nd	Kill, maim, or cause great bodily harm or



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permanent breeding
disability to any
registered horse or
cattle.

340

836.14(2)

3rd

Person who obtains a
sexually explicit image
of an identifiable
person with certain
intent.

341

836.14(3)

3rd

Person who possesses
with intent to promote
for a certain purpose a
sexually explicit image
of an identifiable
person without consent.

342

837.02(1)

3rd

Perjury in official
proceedings.

343

837.021(1)

3rd

Make contradictory
statements in official
proceedings.

344

838.022

3rd

Official misconduct.

345

839.13(2)(a)

3rd

Falsifying records of
an individual in the



346			care and custody of a state agency.
	839.13 (2) (c)	3rd	Falsifying records of the Department of Children and Families.
347			
	843.021	3rd	Possession of a concealed handcuff key by a person in custody.
348			
	843.025	3rd	Deprive law enforcement, correctional, or correctional probation officer of means of protection or communication.
349			
	843.15 (1) (a)	3rd	Failure to appear while on bail for felony (bond estreature or bond jumping).
350			
	847.0135 (5) (c)	3rd	Lewd or lascivious exhibition using computer; offender less than 18 years.
351			



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352	870.01 (3)	2nd	Aggravated rioting.
353	870.01 (5)	2nd	Aggravated inciting a riot.
354	874.05 (1) (a)	3rd	Encouraging or recruiting another to join a criminal gang.
355	893.13 (2) (a) 1.	2nd	Purchase of cocaine (or other s. 893.03 (1) (a), (b), or (d), (2) (a), (2) (b), or (2) (c) 5. drugs).
356	914.14 (2)	3rd	Witnesses accepting bribes.
357	914.22 (1)	3rd	Force, threaten, etc., witness, victim, or informant.
358	914.23 (2)	3rd	Retaliation against a witness, victim, or informant, no bodily injury.
	916.1085	3rd	Introduction of specified contraband



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359	(2) (c) 1.		into certain DCF facilities.
360	918.12	3rd	Tampering with jurors.
361	934.215	3rd	Use of two-way communications device to facilitate commission of a crime.
362	944.47 (1) (a) 6.	3rd	Introduction of contraband (cellular telephone or other portable communication device) into correctional institution.
363	951.22 (1) (h) ,	3rd	Intoxicating drug, instrumentality or other device to aid escape, or cellular telephone or other portable communication device introduced into county detention facility.
364	(j) & (k)		

By Senator Book

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1 A bill to be entitled
 2 An act relating to sexually explicit material;
 3 amending s. 775.0847, F.S.; redefining the term "child
 4 pornography"; defining the term "digitization";
 5 amending s. 784.049, F.S.; increasing the monetary
 6 damages that an aggrieved person may receive as a
 7 result of violations relating to sexual
 8 cyberharassment; creating s. 784.0491, F.S.; defining
 9 terms; prohibiting persons from willfully and
 10 maliciously creating and disseminating or selling any
 11 sexually explicit image of a depicted individual
 12 without that individual's consent; providing criminal
 13 penalties; prohibiting persons from willfully and
 14 maliciously disseminating or selling any such image if
 15 the persons knows or reasonably should have known the
 16 image is digitized; providing criminal penalties;
 17 providing enhanced criminal penalties for second or
 18 subsequent offenses; authorizing a law enforcement
 19 officer to arrest without a warrant any person he or
 20 she has probable cause to believe has violated
 21 specified provisions; authorizing the issuance of a
 22 search warrant if certain conditions are met;
 23 authorizing an aggrieved person to initiate a civil
 24 action to obtain certain relief against a person who
 25 violates specified provisions; providing
 26 applicability; providing construction; creating s.
 27 784.0492, F.S.; defining terms; prohibiting a person
 28 from knowingly and unlawfully obtaining a specified
 29 sexually explicit image of a person with a certain

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30 intent; providing criminal penalties; prohibiting a
 31 person from willfully possessing with a certain intent
 32 a specified sexually explicit image of a person
 33 without that person's consent; providing criminal
 34 penalties; prohibiting a person from willfully
 35 disseminating for financial gain a specified sexually
 36 explicit image of a person without that person's
 37 consent; providing criminal penalties; authorizing an
 38 aggrieved person to initiate a civil action to obtain
 39 certain relief against a person who violates specified
 40 provisions; providing applicability; providing
 41 construction; amending s. 827.071, F.S.; defining the
 42 terms "child pornography" and "digitization"; revising
 43 existing unlawful conduct relating to possessing with
 44 the intent to promote and knowingly possessing,
 45 controlling, or intentionally viewing presentations
 46 that include child pornography, rather than sexual
 47 conduct by a child; making technical changes; amending
 48 s. 847.001, F.S.; redefining the term "child
 49 pornography"; defining the term "digitization";
 50 amending s. 921.0022, F.S.; ranking offenses created
 51 by this act for purposes of the offense severity
 52 ranking chart of the Criminal Punishment Code;
 53 amending ss. 288.1254 and 847.0141, F.S.; conforming
 54 cross-references; providing an effective date.

56 Be It Enacted by the Legislature of the State of Florida:

58 Section 1. Present paragraphs (c) through (f) of subsection

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59 (1) of section 775.0847, Florida Statutes, are redesignated as
60 paragraphs (d) through (g), respectively, a new paragraph (c) is
61 added to that subsection, and paragraph (b) of that subsection
62 is amended, to read:

63 775.0847 Possession or promotion of certain images of child
64 pornography; reclassification.—

65 (1) For purposes of this section:

66 (b) "Child pornography" means:

67 1. Any image depicting a minor engaged in sexual conduct;

68 or

69 2. Any image depicting an actual and identifiable minor who
70 appears, as a result of digitization, to be engaged in sexual
71 conduct.

72 (c) "Digitization" means to realistically depict any of the
73 following:

74 1. The nude body parts of another human being as the nude
75 body parts of a minor.

76 2. Computer-generated nude body parts as the nude body
77 parts of a minor.

78 3. A minor engaging in sexual conduct.

79
80 For purposes of sentencing under chapter 921 and determining
81 incentive gain-time eligibility under chapter 944, a felony
82 offense that is reclassified under this section is ranked one
83 level above the ranking under s. 921.0022 or s. 921.0023 of the
84 offense committed.

85 Section 2. Paragraph (b) of subsection (5) of section
86 784.049, Florida Statutes, is amended to read:

87 784.049 Sexual cyberharassment.—

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88 (5) An aggrieved person may initiate a civil action against
89 a person who violates this section to obtain all appropriate
90 relief in order to prevent or remedy a violation of this
91 section, including the following:

92 (b) Monetary damages to include ~~\$10,000~~ ~~\$5,000~~ or actual
93 damages incurred as a result of a violation of this section,
94 whichever is greater.

95 Section 3. Section 784.0491, Florida Statutes, is created
96 to read:

97 784.0491 Unlawful dissemination of sexually explicit
98 material depicting an individual.—

99 (1) As used in this section, the term:

100 (a) "Depicted individual" means an actual and identifiable
101 person who appears, as a result of digitization, to be engaged
102 in a performance he or she did not actually perform or to be
103 performing in an altered depiction.

104 (b) "Digitization" means to realistically depict any of the
105 following:

106 1. The nude body parts of another human being as the nude
107 body parts of a depicted individual.

108 2. Computer-generated nude body parts as the nude body
109 parts of a depicted individual.

110 3. A depicted individual engaging in sexual conduct as
111 defined in s. 847.001 in which the depicted individual did not
112 engage.

113 (c) "Disseminate" includes, but is not limited to, the
114 publishing of an image to an Internet website or the transfer of
115 an image through electronic means to another person.

116 (d) "Image" includes, but is not limited to, any

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117 photograph, picture, motion picture, film, video, or
118 representation.

119 (e) "Sexually explicit image" means any image depicting
120 nudity as defined in s. 847.001 or depicting a person engaging
121 in sexual conduct as defined in s. 847.001.

122 (2) (a) A person who willfully and maliciously creates and
123 disseminates or sells any sexually explicit image of a depicted
124 individual, without the consent of the depicted individual,
125 commits a misdemeanor of the first degree for a first offense,
126 punishable as provided in s. 775.082 or s. 775.083.

127 (b) A person who willfully and maliciously disseminates or
128 sells any sexually explicit image of a depicted individual,
129 without the consent of the depicted individual, and who knows or
130 reasonably should have known that such image was the result of
131 digitization, commits a misdemeanor of the first degree for a
132 first offense, punishable as provided in s. 775.082 or s.
133 775.083.

134 (c) A second or subsequent violation of paragraph (a) or
135 paragraph (b) is a felony of the third degree, punishable as
136 provided in s. 775.082, s. 775.083, or s. 775.084.

137 (3) (a) A law enforcement officer may arrest without a
138 warrant any person who he or she has probable cause to believe
139 has violated subsection (2).

140 (b) Upon proper affidavits being made, a search warrant may
141 be issued to further investigate a violation of subsection (2),
142 including to search a private dwelling.

143 (4) An aggrieved person may initiate a civil action against
144 a person who violates subsection (2) to obtain appropriate
145 relief in order to prevent or remedy a violation of subsection

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146 (2), including all of the following:

147 (a) Injunctive relief.

148 (b) Monetary damages up to and including \$5,000 or actual
149 damages incurred as a result of a violation of subsection (2),
150 whichever is greater.

151 (c) Reasonable attorney fees and costs.

152 (5) The criminal and civil penalties of this section do not
153 apply to:

154 (a) A provider of an interactive computer services as
155 defined in 47 U.S.C. s. 230(f), of an information service as
156 defined in 47 U.S.C. s. 153, or of a communications services as
157 defined in s. 202.11 which provides the transmission, storage,
158 or caching of electronic communications or messages of others;
159 another related telecommunications or commercial mobile radio
160 service; or content provided by another person; or

161 (b) A law enforcement officer, as defined in s. 943.10, or
162 any local, state, federal, or military law enforcement agency
163 that disseminates a sexually explicit image in connection with
164 the performance of his or her duties as a law enforcement
165 officer or the duties of the law enforcement agency.

166 (6) A violation of this section is committed within this
167 state if any conduct that is an element of the offense, or any
168 harm to the depicted individual resulting from the offense,
169 occurs within this state.

170 Section 4. Section 784.0492, Florida Statutes, is created
171 to read:

172 784.0492 Unlawful taking or criminal use of a sexually
173 explicit image.—

174 (1) As used in this section, the term:

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175 (a) "Disseminate" includes, but is not limited to, the
 176 publishing of an image to an Internet website or the transfer of
 177 an image through electronic means to another person.

178 (b) "Image" includes, but is not limited to, any
 179 photograph, picture, motion picture, film, video, or
 180 representation.

181 (c) "Obtains" means any manner of taking or exercising
 182 control over an image or obtaining an image by fraud, willful
 183 misrepresentation, or false promise.

184 (d) "Personal identification information" means any
 185 information that identifies an individual, and includes, but is
 186 not limited to, any name, postal or electronic mail address,
 187 telephone number, social security number, date of birth, or
 188 unique physical representation.

189 (e) "Sexually explicit image" means any image depicting
 190 nudity as defined in s. 847.001 or depicting a person engaging
 191 in sexual conduct as defined in s. 847.001.

192 (2) A person who knowingly and unlawfully obtains a
 193 sexually explicit image of a person which contains or conveys
 194 the personal identification information of the depicted person
 195 with the intent of causing substantial emotional distress to
 196 that person commits the offense of unlawful taking of a sexually
 197 explicit image, punishable as a felony of the third degree, as
 198 provided in s. 775.082, s. 775.083, or s. 775.084.

199 (3) A person who willfully possesses with the intent to
 200 disseminate for the purposes of pecuniary or any type of
 201 financial gain a sexually explicit image of a person which
 202 contains or conveys the personal identification information of
 203 the depicted person without first obtaining that person's

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204 consent commits the offense of criminal use of a sexually
 205 explicit image, punishable as a felony of the third degree, as
 206 provided in s. 775.082, s. 775.083, or s. 775.084.

207 (4) A person who willfully disseminates for the purposes of
 208 pecuniary or any type of financial gain a sexually explicit
 209 image of a person which contains or conveys the personal
 210 identification information of the depicted person without first
 211 obtaining that person's consent commits the offense of criminal
 212 use of a sexually explicit image, punishable as a felony of the
 213 second degree, as provided in s. 775.082, s. 775.083, or s.
 214 775.084.

215 (5) Every act, thing, or transaction prohibited by this
 216 section constitutes a separate offense and is punishable as
 217 such.

218 (6) An aggrieved person may initiate a civil action against
 219 a person who violates this section to obtain all appropriate
 220 relief in order to prevent or remedy a violation of this
 221 section, including the following:

222 (a) Injunctive relief.

223 (b) Monetary damages to include \$10,000 or actual damages
 224 incurred as a result of a violation of this section, whichever
 225 is greater.

226 (c) Reasonable attorney fees and costs.

227 (7) The criminal and civil penalties of this section do not
 228 apply to:

229 (a) A provider of an interactive computer services as
 230 defined in 47 U.S.C. s. 230(f), of an information service as
 231 defined in 47 U.S.C. s. 153, or of a communications services as
 232 defined in s. 202.11 which provides the transmission, storage,

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233 or caching of electronic communications or messages of others;
 234 another related telecommunications or commercial mobile radio
 235 service; or content provided by another person;

236 (b) A law enforcement officer, as defined in s. 943.10, or
 237 any local, state, federal, or military law enforcement agency
 238 that disseminates a sexually explicit image in connection with
 239 the performance of his or her duties as a law enforcement
 240 officer or the duties of the law enforcement agency; or

241 (c) Sexually explicit images involving voluntary exposure
 242 in a public or commercial setting.

243 (8) A violation of this section is committed within this
 244 state if any conduct that is an element of the offense, or any
 245 harm to the depicted individual resulting from the offense,
 246 occurs within this state.

247 Section 5. Section 827.071, Florida Statutes, is amended to
 248 read:

249 827.071 Sexual performance by a child; child pornography;
 250 penalties.—

251 (1) As used in this section, the term following definitions
 252 shall apply:

253 (a) “Child pornography” means:

254 1. Any image depicting a minor engaged in sexual conduct;

255 or

256 2. Any image depicting an actual and identifiable minor who
 257 appears, as a result of digitization, to be engaged in sexual
 258 conduct.

259 (b) “Deviate sexual intercourse” means sexual conduct
 260 between persons not married to each other consisting of contact
 261 between the penis and the anus, the mouth and the penis, or the

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262 mouth and the vulva.

263 (c) “Digitization” means to realistically depict any of the
 264 following:

265 1. The nude body parts of another human being as the nude
 266 body parts of a minor.

267 2. Computer-generated nude body parts as the nude body
 268 parts of a minor.

269 3. A minor engaging in sexual conduct.

270 (d) ~~(b)~~ “Intentionally view” means to deliberately,
 271 purposefully, and voluntarily view. Proof of intentional viewing
 272 requires establishing more than a single image, motion picture,
 273 exhibition, show, image, data, computer depiction,
 274 representation, or other presentation over any period of time.

275 (e) ~~(c)~~ “Performance” means any play, motion picture,
 276 photograph, or dance or any other visual representation
 277 exhibited before an audience.

278 (f) ~~(d)~~ “Promote” means to procure, manufacture, issue,
 279 sell, give, provide, lend, mail, deliver, transfer, transmute,
 280 publish, distribute, circulate, disseminate, present, exhibit,
 281 or advertise or to offer or agree to do the same.

282 (g) ~~(e)~~ “Sadomasochistic abuse” means flagellation or
 283 torture by or upon a person, or the condition of being fettered,
 284 bound, or otherwise physically restrained, for the purpose of
 285 deriving sexual satisfaction from inflicting harm on another or
 286 receiving such harm oneself.

287 (h) ~~(f)~~ “Sexual battery” means oral, anal, or vaginal
 288 penetration by, or union with, the sexual organ of another or
 289 the anal or vaginal penetration of another by any other object;
 290 however, “sexual battery” does not include an act done for a

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291 bona fide medical purpose.

292 ~~(i)(g)~~ "Sexual bestiality" means any sexual act between a
293 person and an animal involving the sex organ of the one and the
294 mouth, anus, or vagina of the other.

295 ~~(j)(h)~~ "Sexual conduct" means actual or simulated sexual
296 intercourse, deviate sexual intercourse, sexual bestiality,
297 masturbation, or sadomasochistic abuse; actual lewd exhibition
298 of the genitals; actual physical contact with a person's clothed
299 or unclothed genitals, pubic area, buttocks, or, if such person
300 is a female, breast, with the intent to arouse or gratify the
301 sexual desire of either party; or any act or conduct which
302 constitutes sexual battery or simulates that sexual battery is
303 being or will be committed. A mother's breastfeeding of her baby
304 does not under any circumstance constitute "sexual conduct."

305 ~~(k)(i)~~ "Sexual performance" means any performance or part
306 thereof which includes sexual conduct by a child younger of less
307 than 18 years of age.

308 ~~(l)(j)~~ "Simulated" means the explicit depiction of conduct
309 set forth in paragraph ~~(j)~~ ~~(h)~~ which creates the appearance of
310 such conduct and which exhibits any uncovered portion of the
311 breasts, genitals, or buttocks.

312 (2) A person is guilty of the use of a child in a sexual
313 performance if, knowing the character and content thereof, he or
314 she employs, authorizes, or induces a child younger less than 18
315 years of age to engage in a sexual performance or, being a
316 parent, legal guardian, or custodian of such child, consents to
317 the participation by such child in a sexual performance. A
318 person who ~~whoever~~ violates this subsection commits is guilty of
319 a felony of the second degree, punishable as provided in s.

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320 775.082, s. 775.083, or s. 775.084.

321 (3) A person is guilty of promoting a sexual performance by
322 a child when, knowing the character and content thereof, he or
323 she produces, directs, or promotes any performance which
324 includes sexual conduct by a child younger less than 18 years of
325 age. A person who ~~whoever~~ violates this subsection commits is
326 guilty of a felony of the second degree, punishable as provided
327 in s. 775.082, s. 775.083, or s. 775.084.

328 (4) It is unlawful for any person to possess with the
329 intent to promote any photograph, motion picture, exhibition,
330 show, representation, or other presentation which, in whole or
331 in part, includes child pornography ~~any sexual conduct by a~~
332 ~~child~~. The possession of three or more copies of such
333 photograph, motion picture, representation, or presentation is
334 prima facie evidence of an intent to promote. A person who
335 ~~whoever~~ violates this subsection commits is guilty of a felony
336 of the second degree, punishable as provided in s. 775.082, s.
337 775.083, or s. 775.084.

338 (5) (a) It is unlawful for any person to knowingly possess,
339 control, or intentionally view a photograph, motion picture,
340 exhibition, show, representation, image, data, computer
341 depiction, or other presentation which, in whole or in part, he
342 or she knows to include child pornography ~~any sexual conduct by~~
343 ~~a child~~. The possession, control, or intentional viewing of each
344 such photograph, motion picture, exhibition, show, image, data,
345 computer depiction, representation, or presentation is a
346 separate offense. If such photograph, motion picture,
347 exhibition, show, representation, image, data, computer
348 depiction, or other presentation includes child pornography

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349 ~~depicting sexual conduct by~~ more than one child, then each such
 350 child in each such photograph, motion picture, exhibition, show,
 351 representation, image, data, computer depiction, or other
 352 presentation that is knowingly possessed, controlled, or
 353 intentionally viewed is a separate offense. A person who
 354 violates this ~~paragraph subsection~~ commits a felony of the third
 355 degree, punishable as provided in s. 775.082, s. 775.083, or s.
 356 775.084.

357 (b) Paragraph (a) ~~This subsection~~ does not apply to any
 358 material possessed, controlled, or intentionally viewed as part
 359 of a law enforcement investigation.

360 (6) Prosecution of a ~~any~~ person for an offense under this
 361 section ~~does shall~~ not prohibit prosecution of that person in
 362 this state for a violation of any other law of this state,
 363 including a law providing for greater penalties than prescribed
 364 in this section or any other crime punishing the sexual
 365 performance or the sexual exploitation of children.

366 Section 6. Present subsections (6) through (20) of section
 367 847.001, Florida Statutes, are redesignated as subsections (7)
 368 through (21), respectively, a new subsection (6) is added to
 369 that section, and subsection (3) and present subsection (19) of
 370 that section are amended, to read:

371 847.001 Definitions.—As used in this chapter, the term:

372 (3) "Child pornography" means:

373 (a) Any image depicting a minor engaged in sexual conduct;
 374 or

375 (b) Any image depicting an actual and identifiable minor
 376 who appears, as a result of digitization, to be engaged in
 377 sexual conduct.

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378 (6) "Digitization" means to realistically depict any of the
 379 following:

380 (a) The nude body parts of another human being as the nude
 381 body parts of a minor.

382 (b) Computer-generated nude body parts as the nude body
 383 parts of a minor.

384 (c) A minor engaging in sexual conduct.

385 ~~(20)(19)~~ "Simulated" means the explicit depiction of
 386 conduct described in subsection (17) ~~(16)~~ which creates the
 387 appearance of such conduct and which exhibits any uncovered
 388 portion of the breasts, genitals, or buttocks.

389 Section 7. Paragraphs (d) and (e) of subsection (3) of
 390 section 921.0022, Florida Statutes, are amended to read:

391 921.0022 Criminal Punishment Code; offense severity ranking
 392 chart.—

393 (3) OFFENSE SEVERITY RANKING CHART

394 (d) LEVEL 4

395

Florida Statute	Felony Degree	Description
316.1935(3) (a)	2nd	Driving at high speed or with wanton disregard for safety while fleeing or attempting to elude law enforcement officer who is in a patrol vehicle with siren and lights

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 activated.
 397 499.0051 (1) 3rd Failure to maintain or
 deliver transaction
 history, transaction
 information, or
 398 499.0051 (5) 2nd Knowing sale or
 delivery, or possession
 with intent to sell,
 contraband prescription
 drugs.
 399 517.07 (1) 3rd Failure to register
 securities.
 400 517.12 (1) 3rd Failure of dealer,
 associated person, or
 issuer of securities to
 register.
 401 784.0492 (2) 3rd Unlawful taking of a
sexually explicit
image.
 402 784.0492 (3) 3rd Criminal use of a
sexually explicit
image.

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 403 784.07 (2) (b) 3rd Battery of law
 enforcement officer,
 firefighter, etc.
 404 784.074 (1) (c) 3rd Battery of sexually
 violent predators
 facility staff.
 405 784.075 3rd Battery on detention or
 commitment facility
 staff.
 406 784.078 3rd Battery of facility
 employee by throwing,
 tossing, or expelling
 certain fluids or
 407 784.08 (2) (c) 3rd Battery on a person 65
 years of age or older.
 408 784.081 (3) 3rd Battery on specified
 official or employee.
 409 784.082 (3) 3rd Battery by detained
 person on visitor or
 other detainee.
 410

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411	784.083(3)	3rd	Battery on code inspector.
	784.085	3rd	Battery of child by throwing, tossing, projecting, or expelling certain fluids or materials.
412	787.03(1)	3rd	Interference with custody; wrongly takes minor from appointed guardian.
413	787.04(2)	3rd	Take, entice, or remove child beyond state limits with criminal intent pending custody proceedings.
414	787.04(3)	3rd	Carrying child beyond state lines with criminal intent to avoid producing child at custody hearing or delivering to designated person.
415	787.07	3rd	Human smuggling.

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416	790.115(1)	3rd	Exhibiting firearm or weapon within 1,000 feet of a school.
417	790.115(2)(b)	3rd	Possessing electric weapon or device, destructive device, or other weapon on school property.
418	790.115(2)(c)	3rd	Possessing firearm on school property.
419	800.04(7)(c)	3rd	Lewd or lascivious exhibition; offender less than 18 years.
420	806.135	2nd	Destroying or demolishing a memorial or historic property.
421	810.02(4)(a)	3rd	Burglary, or attempted burglary, of an unoccupied structure; unarmed; no assault or battery.
422	810.02(4)(b)	3rd	Burglary, or attempted

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			burglary, of an	
			unoccupied conveyance;	
			unarmed; no assault or	
423			battery.	
	810.06	3rd	Burglary; possession of	
			tools.	
424				
	810.08(2)(c)	3rd	Trespass on property,	
			armed with firearm or	
			dangerous weapon.	
425				
	812.014(2)(c)3.	3rd	Grand theft, 3rd degree	
			\$10,000 or more but	
			less than \$20,000.	
426				
	812.014	3rd	Grand theft, 3rd	
	(2)(c)4.-10.		degree; specified	
			items.	
427				
	812.0195(2)	3rd	Dealing in stolen	
			property by use of the	
			Internet; property	
			stolen \$300 or more.	
428				
	817.505(4)(a)	3rd	Patient brokering.	
429				
	817.563(1)	3rd	Sell or deliver	
			substance other than	

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			controlled substance	
			agreed upon, excluding	
			s. 893.03(5) drugs.	
430				
	817.568(2)(a)	3rd	Fraudulent use of	
			personal identification	
			information.	
431				
	817.625(2)(a)	3rd	Fraudulent use of	
			scanning device,	
			skimming device, or	
			reencoder.	
432				
	817.625(2)(c)	3rd	Possess, sell, or	
			deliver skimming	
			device.	
433				
	828.125(1)	2nd	Kill, maim, or cause	
			great bodily harm or	
			permanent breeding	
			disability to any	
			registered horse or	
			cattle.	
434				
	837.02(1)	3rd	Perjury in official	
			proceedings.	
435				
	837.021(1)	3rd	Make contradictory	
			statements in official	

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			proceedings.	
436	838.022	3rd	Official misconduct.	
437	839.13(2)(a)	3rd	Falsifying records of an individual in the care and custody of a state agency.	
438	839.13(2)(c)	3rd	Falsifying records of the Department of Children and Families.	
439	843.021	3rd	Possession of a concealed handcuff key by a person in custody.	
440	843.025	3rd	Deprive law enforcement, correctional, or correctional probation officer of means of protection or communication.	
441	843.15(1)(a)	3rd	Failure to appear while on bail for felony (bond estreature or bond jumping).	

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442	847.0135(5)(c)	3rd	Lewd or lascivious exhibition using computer; offender less than 18 years.	
443	870.01(3)	2nd	Aggravated rioting.	
444	870.01(5)	2nd	Aggravated inciting a riot.	
445	874.05(1)(a)	3rd	Encouraging or recruiting another to join a criminal gang.	
446	893.13(2)(a)1.	2nd	Purchase of cocaine (or other s. 893.03(1)(a), (b), or (d), (2)(a), (2)(b), or (2)(c)5. drugs).	
447	914.14(2)	3rd	Witnesses accepting bribes.	
448	914.22(1)	3rd	Force, threaten, etc., witness, victim, or informant.	
449	914.23(2)	3rd	Retaliation against a	

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CODING: Words ~~stricken~~ are deletions; words underlined are additions.

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witness, victim, or informant, no bodily injury.

450

916.1085
(2) (c) 1.

3rd

Introduction of specified contraband into certain DCF facilities.

451

918.12

3rd

Tampering with jurors.

452

934.215

3rd

Use of two-way communications device to facilitate commission of a crime.

453

944.47(1) (a) 6.

3rd

Introduction of contraband (cellular telephone or other portable communication device) into correctional institution.

454

951.22(1) (h),
(j) & (k)

3rd

Intoxicating drug, instrumentality or other device to aid escape, or cellular telephone or other

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portable communication device introduced into county detention facility.

455

456

(e) LEVEL 5

457

Florida
Statute

Felony
Degree

Description

458

316.027(2) (a)

3rd

Accidents involving personal injuries other than serious bodily injury, failure to stop; leaving scene.

459

316.1935(4) (a)

2nd

Aggravated fleeing or eluding.

460

316.80(2)

2nd

Unlawful conveyance of fuel; obtaining fuel fraudulently.

461

322.34(6)

3rd

Careless operation of motor vehicle with suspended license, resulting in death or serious bodily injury.

462

463

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327.30(5)	3rd	Vessel accidents involving personal injury; leaving scene.
379.365(2)(c)1.	3rd	Violation of rules relating to: willful molestation of stone crab traps, lines, or buoys; illegal bartering, trading, or sale, conspiring or aiding in such barter, trade, or sale, or supplying, agreeing to supply, aiding in supplying, or giving away stone crab trap tags or certificates; making, altering, forging, counterfeiting, or reproducing stone crab trap tags; possession of forged, counterfeit, or imitation stone crab trap tags; and engaging in the commercial harvest of stone crabs while license is

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		suspended or revoked.
379.367(4)	3rd	Willful molestation of a commercial harvester's spiny lobster trap, line, or buoy.
379.407(5)(b)3.	3rd	Possession of 100 or more undersized spiny lobsters.
381.0041(11)(b)	3rd	Donate blood, plasma, or organs knowing HIV positive.
440.10(1)(g)	2nd	Failure to obtain workers' compensation coverage.
440.105(5)	2nd	Unlawful solicitation for the purpose of making workers' compensation claims.
440.381(2)	3rd	Submission of false, misleading, or incomplete information with the purpose of

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				avoiding or reducing workers' compensation premiums.
470	624.401(4)(b)2.	2nd		Transacting insurance without a certificate or authority; premium collected \$20,000 or more but less than \$100,000.
471	626.902(1)(c)	2nd		Representing an unauthorized insurer; repeat offender.
472	<u>784.0492(4)</u>	<u>2nd</u>		<u>Criminal use of a sexually explicit image.</u>
473	790.01(2)	3rd		Carrying a concealed firearm.
474	790.162	2nd		Threat to throw or discharge destructive device.
475	790.163(1)	2nd		False report of bomb, explosive, weapon of mass destruction, or

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				use of firearms in violent manner.
476	790.221(1)	2nd		Possession of short-barreled shotgun or machine gun.
477	790.23	2nd		Felons in possession of firearms, ammunition, or electronic weapons or devices.
478	796.05(1)	2nd		Live on earnings of a prostitute; 1st offense.
479	800.04(6)(c)	3rd		Lewd or lascivious conduct; offender less than 18 years of age.
480	800.04(7)(b)	2nd		Lewd or lascivious exhibition; offender 18 years of age or older.
481	806.111(1)	3rd		Possess, manufacture, or dispense fire bomb with intent to damage any structure or property.

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482	812.0145 (2) (b)	2nd	Theft from person 65 years of age or older; \$10,000 or more but less than \$50,000.
483	812.015 (8) (a) & (c)-(e)	3rd	Retail theft; property stolen is valued at \$750 or more and one or more specified acts.
484	812.019(1)	2nd	Stolen property; dealing in or trafficking in.
485	812.081 (3)	2nd	Trafficking in trade secrets.
486	812.131 (2) (b)	3rd	Robbery by sudden snatching.
487	812.16(2)	3rd	Owning, operating, or conducting a chop shop.
488	817.034 (4) (a) 2.	2nd	Communications fraud, value \$20,000 to \$50,000.
489	817.234 (11) (b)	2nd	Insurance fraud;

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			property value \$20,000 or more but less than \$100,000.
490	817.2341 (1), (2) (a) & (3) (a)	3rd	Filing false financial statements, making false entries of material fact or false statements regarding property values relating to the solvency of an insuring entity.
491	817.568 (2) (b)	2nd	Fraudulent use of personal identification information; value of benefit, services received, payment avoided, or amount of injury or fraud, \$5,000 or more or use of personal identification information of 10 or more persons.
492	817.611 (2) (a)	2nd	Traffic in or possess 5 to 14 counterfeit credit cards or related

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493 documents.

493 817.625(2)(b) 2nd Second or subsequent fraudulent use of scanning device, skimming device, or reencoder.

494 825.1025(4) 3rd Lewd or lascivious exhibition in the presence of an elderly person or disabled adult.

495 827.071(4) 2nd Possess with intent to promote any photographic material, motion picture, etc., which includes ~~sexual conduct by a~~ child pornography.

496 827.071(5) 3rd Possess, control, or intentionally view any photographic material, motion picture, etc., which includes ~~sexual conduct by a~~ child pornography.

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497 828.12(2) 3rd Tortures any animal with intent to inflict intense pain, serious physical injury, or death.

498 839.13(2)(b) 2nd Falsifying records of an individual in the care and custody of a state agency involving great bodily harm or death.

499 843.01 3rd Resist officer with violence to person; resist arrest with violence.

500 847.0135(5)(b) 2nd Lewd or lascivious exhibition using computer; offender 18 years or older.

501 847.0137(2) & (3) 3rd Transmission of pornography by electronic device or equipment.

502

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	847.0138	3rd	Transmission of
	(2) & (3)		material harmful to
503			minors to a minor by
			electronic device or
			equipment.
	874.05(1)(b)	2nd	Encouraging or
			recruiting another to
			join a criminal gang;
504			second or subsequent
			offense.
	874.05(2)(a)	2nd	Encouraging or
			recruiting person under
			13 years of age to join
505			a criminal gang.
	893.13(1)(a)1.	2nd	Sell, manufacture, or
			deliver cocaine (or
			other s. 893.03(1)(a),
			(1)(b), (1)(d), (2)(a),
			(2)(b), or (2)(c)5.
			drugs).
506	893.13(1)(c)2.	2nd	Sell, manufacture, or
			deliver cannabis (or
			other s. 893.03(1)(c),
			(2)(c)1., (2)(c)2.,
			(2)(c)3., (2)(c)6.,

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			(2)(c)7., (2)(c)8.,
			(2)(c)9., (2)(c)10.,
			(3), or (4) drugs)
			within 1,000 feet of a
			child care facility,
			school, or state,
			county, or municipal
			park or publicly owned
			recreational facility
			or community center.
507	893.13(1)(d)1.	1st	Sell, manufacture, or
			deliver cocaine (or
			other s. 893.03(1)(a),
			(1)(b), (1)(d), (2)(a),
			(2)(b), or (2)(c)5.
			drugs) within 1,000
			feet of university.
508	893.13(1)(e)2.	2nd	Sell, manufacture, or
			deliver cannabis or
			other drug prohibited
			under s. 893.03(1)(c),
			(2)(c)1., (2)(c)2.,
			(2)(c)3., (2)(c)6.,
			(2)(c)7., (2)(c)8.,
			(2)(c)9., (2)(c)10.,
			(3), or (4) within
			1,000 feet of property

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used for religious services or a specified business site.

509

893.13(1)(f)1. 1st Sell, manufacture, or deliver cocaine (or other s. 893.03(1)(a), (1)(b), (1)(d), or (2)(a), (2)(b), or (2)(c)5. drugs) within 1,000 feet of public housing facility.

510

893.13(4)(b) 2nd Use or hire of minor; deliver to minor other controlled substance.

511

893.1351(1) 3rd Ownership, lease, or rental for trafficking in or manufacturing of controlled substance.

512

Section 8. Paragraph (j) of subsection (1) of section 288.1254, Florida Statutes, is amended to read:

513

288.1254 Entertainment industry financial incentive program.—

514

(1) DEFINITIONS.—As used in this section, the term:

515

(j) "Qualified production" means a production in this state meeting the requirements of this section. The term does not

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include a production:

520

1. In which, for the first 2 years of the incentive program, less than 50 percent, and thereafter, less than 60 percent, of the positions that make up its production cast and below-the-line production crew, or, in the case of digital media projects, less than 75 percent of such positions, are filled by legal residents of this state, whose residency is demonstrated by a valid Florida driver license or other state-issued identification confirming residency, or students enrolled full-time in a film-and-entertainment-related course of study at an institution of higher education in this state; or

521

2. That contains obscene content as defined in s. 847.001

522

~~s. 847.001(10)~~.

523

Section 9. Subsection (1) of section 847.0141, Florida Statutes, is amended to read:

524

847.0141 Sexting; prohibited acts; penalties.—

525

(1) A minor commits the offense of sexting if he or she knowingly:

526

(a) Uses a computer, or any other device capable of electronic data transmission or distribution, to transmit or distribute to another minor any photograph or video of any person which depicts nudity, as defined in s. 847.001 ~~s. 847.001(9)~~, and is harmful to minors, as defined in s. 847.001

527

~~s. 847.001(6)~~.

528

(b) Possesses a photograph or video of any person that was transmitted or distributed by another minor which depicts nudity, as defined in s. 847.001 ~~s. 847.001(9)~~, and is harmful to minors, as defined in s. 847.001 ~~s. 847.001(6)~~. A minor does not violate this paragraph if all of the following apply:

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- 549 1. The minor did not solicit the photograph or video.
550 2. The minor took reasonable steps to report the photograph
551 or video to the minor's legal guardian or to a school or law
552 enforcement official.
553 3. The minor did not transmit or distribute the photograph
554 or video to a third party.
555 Section 10. This act shall take effect October 1, 2022.



The Florida Senate

Committee Agenda Request

To: Senator Jason Pizzo, Chair
Committee on Criminal Justice

Subject: Committee Agenda Request

Date: January 13, 2022

I respectfully request that **Senate Bill 1798**, relating to Sexually Explicit Material, be placed on the:

- committee agenda at your earliest possible convenience.
- next committee agenda.

Thank you for your consideration.

A handwritten signature in cursive script that reads "Lauren Book".

Minority Leader Lauren Book
Florida Senate, District 32

SB 1798
~~SB 1534~~
Bill Number or Topic

The Florida Senate
APPEARANCE RECORD

Deliver both copies of this form to
Senate professional staff conducting the meeting

1/25/22

Meeting Date

Criminal Justice

Committee

Amendment Barcode (if applicable)

Name Jack Campbell

Phone 850-606-6012

Address Florida Prosecuting Attorneys / State
Street

Email Ato-nos

Tallahassee, FL
City State Zip

Speaking: For Against Information **OR** Waive Speaking: In Support Against

PLEASE CHECK ONE OF THE FOLLOWING:

I am appearing without compensation or sponsorship.

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While it is a tradition to encourage public testimony, time may not permit all persons wishing to speak to be heard at this hearing. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard. If you have questions about registering to lobby please see Fla. Stat. §11,045 and Joint Rule 1. [2020-2022 Joint Rules.pdf \(flsenate.gov\)](#)

This form is part of the public record for this meeting.

S-001 (08/10/2021)

Deep Fakes: A Looming Challenge for Privacy, Democracy, and National Security

Bobby Chesney* and Danielle Citron**

Harmful lies are nothing new. But the ability to distort reality has taken an exponential leap forward with “deep fake” technology. This capability makes it possible to create audio and video of real people saying and doing things they never said or did. Machine learning techniques are escalating the technology’s sophistication, making deep fakes ever more realistic and increasingly resistant to detection. Deep-fake technology has characteristics that enable rapid and widespread diffusion, putting it into the hands of both sophisticated and unsophisticated actors.

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** Professor of Law, Boston University School of Law; Vice President, Cyber Civil Rights Initiative; Affiliate Fellow, Yale Information Society Project; Affiliate Scholar, Stanford Center on Internet and Society. We thank Benjamin Wittes, Quinta Jurecic, Marc Blitz, Jennifer Finney Boylan, Chris Bregler, Rebecca Crootof, Jeanmarie Fenrich, Mary Anne Franks, Nathaniel Gleicher, Patrick Gray, Yasmin Green, Klion Kitchen, Woodrow Hartzog, Herb Lin, Helen Norton, Suzanne Nossel, Andreas Schou, and Jessica Silbey for helpful suggestions. We are grateful to Susan McCarty, Samuel Morse, Jessica Burgard, and Alex Holland for research assistance. We had the great fortune of getting feedback from audiences at the PEN Board of Trustees meeting; Heritage Foundation; Yale Information Society Project; University of California, Hastings College of the Law; Northeastern School of Journalism 2019 symposium on AI, Media, and the Threat to Democracy; and the University of Maryland School of Law’s Trust and Truth Decay symposium. We appreciate the Deans who generously supported this research: Dean Ward Farnsworth of the University of Texas School of Law, and Dean Donald Tobin and Associate Dean Mike Pappas of the University of Maryland Carey School of Law. We are grateful to the editors of the California Law Review, especially Erik Kundu, Alex Copper, Yesenia Flores, Faye Hipsman, Gus Tupper, and Brady Williams, for their superb editing and advice.

While deep-fake technology will bring certain benefits, it also will introduce many harms. The marketplace of ideas already suffers from truth decay as our networked information environment interacts in toxic ways with our cognitive biases. Deep fakes will exacerbate this problem significantly. Individuals and businesses will face novel forms of exploitation, intimidation, and personal sabotage. The risks to our democracy and to national security are profound as well.

Our aim is to provide the first in-depth assessment of the causes and consequences of this disruptive technological change, and to explore the existing and potential tools for responding to it. We survey a broad array of responses, including: the role of technological solutions; criminal penalties, civil liability, and regulatory action; military and covert-action responses; economic sanctions; and market developments. We cover the waterfront from immunities to immutable authentication trails, offering recommendations to improve law and policy and anticipating the pitfalls embedded in various solutions.

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INTRODUCTION

Through the magic of social media, it all went viral: a vivid photograph, an inflammatory fake version, an animation expanding on the fake, posts debunking the fakes, and stories trying to make sense of the situation.¹ It was both a sign of the times and a cautionary tale about the challenges ahead.

The episode centered on Emma González, a student who survived the horrific shooting at Marjory Stoneman Douglas High School in Parkland, Florida, in February 2018. In the aftermath of the shooting, a number of the students emerged as potent voices in the national debate over gun control. Emma, in particular, gained prominence thanks to the closing speech she delivered during the “March for Our Lives” protest in Washington, D.C., as well as a contemporaneous article she wrote for *Teen Vogue*.² Fatefully, the *Teen Vogue*

1. Alex Horton, *A Fake Photo of Emma González Went Viral on the Far Right, Where Parkland Teens are Villains*, WASH. POST (Mar. 26, 2018), https://www.washingtonpost.com/news/the-intersect/wp/2018/03/25/a-fake-photo-of-emma-gonzalez-went-viral-on-the-far-right-where-parkland-teens-are-villains/?utm_term=.0b0f8655530d [<https://perma.cc/6NDJ-WADV>].

2. *Florida Student Emma Gonzalez [sic] to Lawmakers and Gun Advocates: ‘We call BS’*, CNN (Feb. 17, 2018), <https://www.cnn.com/2018/02/17/us/florida-student-emma-gonzalez-speech/index.html> [<https://perma.cc/ZE3B-MVPD>]; Emma González, *Emma González on Why This Generation Needs Gun Control*, TEEN VOGUE (Mar. 23, 2018), https://www.teenvogue.com/story/emma-gonzalez-parkland-gun-control-cover?mbid=social_twitter [<https://perma.cc/P8TQ-P2ZR>].

piece incorporated a video entitled “This Is Why We March,” including a visually arresting sequence in which Emma rips up a large sheet displaying a bullseye target.

A powerful still image of Emma ripping up the bullseye target began to circulate on the Internet. But soon someone generated a fake version, in which the torn sheet is not a bullseye, but rather a copy of the Constitution of the United States. While on some level the fake image might be construed as artistic fiction highlighting the inconsistency of gun control with the Second Amendment, the fake was not framed that way. Instead, it was depicted as a true image of Emma González ripping up the Constitution.

The image soon went viral. A fake of the video also appeared, though it



was more obvious that it had been manipulated. Still, the video circulated widely, thanks in part to actor Adam Baldwin circulating it to a quarter million followers on Twitter (along with the disturbing hashtag #Vorwärts—the German word for “forward,” a reference to neo-Nazis’ nod to the word’s role in a Hitler Youth anthem).³

Several factors combined to limit the harm from this fakery. First, the genuine image already was in wide circulation and available at its original source. This made it fast and easy to fact-check the fakes. Second, the intense national attention associated with the post-Parkland gun control debate and, especially, the role of students like Emma in that debate, ensured that journalists paid attention to the issue, spending time and effort to debunk the fakes. Third, the fakes were of poor quality (though audiences inclined to believe their message might disregard the red flags).

Even with those constraints, though, many believed the fakes, and harm ensued. Our national dialogue on gun control has suffered some degree of

3. See Horton, *supra* note 1.

distortion; Emma has likely suffered some degree of anguish over the episode; and other Parkland victims likely felt maligned and discredited. Falsified imagery, in short, has already exacted significant costs for individuals and society. But the situation is about to get much worse, as this Article shows.

Technologies for altering images, video, or audio (or even creating them from scratch) in ways that are highly -realistic and difficult to detect are maturing rapidly. As they ripen and diffuse, the problems illustrated by the Emma González episode will expand and generate significant policy and legal challenges. Imagine a deep fake video, released the day before an election, making it appear that a candidate for office has made an inflammatory statement. Or what if, in the wake of the Trump-Putin tête-à-tête at Helsinki in 2018, someone circulated a deep fake audio recording that seemed to portray President Trump as promising not to take any action should Russia interfere with certain NATO allies. Screenwriters are already building such prospects into their plotlines.⁴ The real world will not lag far behind.

Pornographers have been early adopters of the technology, interposing the faces of celebrities into sex videos. This has given rise to the label “deep fake” for such digitized impersonations. We use that label here more broadly, as shorthand for the full range of hyper-realistic digital falsification of images, video, and audio.

This full range will entail, sooner rather than later, a disturbing array of malicious uses. We are by no means the first to observe that deep fakes will migrate far beyond the pornography context, with great potential for harm.⁵ We

4. See, e.g., Vinu Goel & Sheera Frenkel, *In India Election, False Posts and Hate Speech Flummox Facebook*, N. Y. TIMES (Apr. 1, 2019), <https://www.nytimes.com/2019/04/01/technology/india-elections-facebook.html> [<https://perma.cc/B9CP-MPPK>] (describing the deluge of fake and manipulated videos and images circulated in the lead up to elections in India); *Homeland: Like Bad at Things* (Showtime television broadcast Mar. 4, 2018), <https://www.sho.com/homeland/season/7/episode/4/like-bad-at-things> [<https://perma.cc/25XK-NN3Y>]; *Taken: Verum Nocet* (NBC television broadcast Mar. 30, 2018) <https://www.nbc.com/taken/video/verum-nocet/3688929> [<https://perma.cc/CVP2-PNXZ>] (depicting a deep-fake video in which a character appears to recite song lyrics); *The Good Fight: Day 408* (CBS television broadcast Mar. 4, 2018) (depicting fake audio purporting to be President Trump); *The Good Fight: Day 464* (CBS television broadcast Apr. 29, 2018) (featuring a deep-fake video of the alleged “golden shower” incident involving President Trump).

5. See, e.g., Samantha Cole, *We Are Truly Fucked: Everyone is Making AI-Generated Fake Porn Now*, VICE: MOTHERBOARD (Jan. 24, 2018), https://motherboard.vice.com/en_us/article/bjye8a/reddit-fake-porn-app-daisy-ridley [<https://perma.cc/V9NT-CBW8>] (“[T]echnology[] allows anyone with sufficient raw footage to work with to convincingly place any face in any video.”); see also @BuzzFeed, *You Won’t Believe What Obama Says in This Video*, TWITTER (Apr. 17, 2018, 8:00 AM), <https://twitter.com/BuzzFeed/status/986257991799222272> [<https://perma.cc/C38K-B377>] (“We’re entering an era in which our enemies can make anyone say anything at any point in time.”); Tim Mak, *All Things Considered: Technologies to Create Fake Audio and Video Are Quickly Evolving*, NAT’L PUB. RADIO (Apr. 2, 2018), <https://www.npr.org/2018/04/02/598916380/technologies-to-create-fake-audio-and-video-are-quickly-evolving> [<https://perma.cc/NY23-YVQD>] (discussing deep-fake videos created for political reasons and misinformation campaigns); Julian Sanchez (@normative), TWITTER (Jan. 24, 2018, 12:26 PM) (“The prospect of any Internet rando being able to swap anyone’s face into

do, however, provide the first comprehensive survey of these harms and potential responses to them. We break new ground by giving early warning regarding the powerful incentives that deep fakes produce for privacy-destructive solutions.

This Article unfolds as follows. Part I begins with a description of the technological innovations pushing deep fakes into the realm of hyper-realism and making them increasingly difficult to debunk. It then discusses the amplifying power of social media and the confounding influence of cognitive biases.

Part II surveys the benefits and the costs of deep fakes. The upsides of deep fakes include artistic exploration and educative contributions. The downsides of deep fakes, however, are as varied as they are costly. Some harms are suffered by individuals or groups, such as when deep fakes are deployed to exploit or sabotage individual identities and corporate opportunities. Others impact society more broadly, such as distortion of policy debates, manipulation of elections, erosion of trust in institutions, exacerbation of social divisions, damage to national security, and disruption of international relations. And, in what we call the “liar’s dividend,” deep fakes make it easier for liars to avoid accountability for things that are in fact true.

Part III turns to the question of remedies. We survey an array of existing or potential solutions involving civil and criminal liability, agency regulation, and “active measures” in special contexts like armed conflict and covert action. We also discuss technology-driven market responses, including not just the promotion of debunking technologies, but also the prospect of an alibi service, such as privacy-destructive life logging. We find, in the end, that there are no silver-bullet solutions. Thus, we couple our recommendations with warnings to the public, policymakers, and educators.

I.

TECHNOLOGICAL FOUNDATIONS OF THE DEEP-FAKES PROBLEM

Digital impersonation is increasingly realistic and convincing. Deep-fake technology is the cutting-edge of that trend. It leverages machine-learning algorithms to insert faces and voices into video and audio recordings of actual people and enables the creation of realistic impersonations out of digital whole cloth.⁶ The end result is realistic-looking video or audio making it appear that someone said or did something. Although deep fakes can be created with the consent of people being featured, more often they will be created without it. This Part describes the technology and the forces ensuring its diffusion, virality, and entrenchment.

porn is incredibly creepy. But my first thought is that we have not even scratched the surface of how bad ‘fake news’ is going to get.”).

6. See Cole, *supra* note 5.

A. Emergent Technology for Robust Deep Fakes

Doctored imagery is neither new nor rare. Innocuous doctoring of images—such as tweaks to lighting or the application of a filter to improve image quality—is ubiquitous. Tools like Photoshop enable images to be tweaked in both superficial and substantive ways.⁷ The field of digital forensics has been grappling with the challenge of detecting digital alterations for some time.⁸ Generally, forensic techniques are automated and thus less dependent on the human eye to spot discrepancies.⁹ While the detection of doctored audio and video was once fairly straightforward,¹⁰ the emergence of generative technology capitalizing on machine learning promises to shift this balance. It will enable the production of altered (or even wholly invented) images, videos, and audios that are more realistic and more difficult to debunk than they have been in the past. This technology often involves the use of a “neural network” for machine learning. The neural network begins as a kind of tabula rasa featuring a nodal network controlled by a set of numerical standards set at random.¹¹ Much as experience refines the brain’s neural nodes, examples train the neural network system.¹² If the network processes a broad array of training examples, it should be able to create increasingly accurate models.¹³ It is through this process that neural networks categorize audio, video, or images and generate realistic impersonations or alterations.¹⁴

7. See, e.g., Stan Horaczek, *Spot Faked Photos Using Digital Forensic Techniques*, POPULAR SCIENCE (July 21, 2017), <https://www.popsci.com/use-photo-forensics-to-spot-faked-images> [<https://perma.cc/G72B-VLF2>] (depicting and discussing a series of manipulated photographs).

8. Doctored images have been prevalent since the advent of the photography. See PHOTO TAMPERING THROUGHOUT HISTORY, <http://pth.izitru.com> [<https://perma.cc/5QSZ-NULR>]. The gallery was curated by FourandSix Technologies, Inc.

9. See Tiffanie Wen, *The Hidden Signs That Can Reveal a Fake Photo*, BBC FUTURE (June 30, 2017), <http://www.bbc.com/future/story/20170629-the-hidden-signs-that-can-reveal-if-a-photo-is-fake> [<https://perma.cc/W9NX-XGKJ>]. IZITRU.COM was a project spearheaded by Dartmouth’s Dr. Hany Farid. It allowed users to upload photos to determine if they were fakes. The service was aimed at “legions of citizen journalists who want[ed] to dispel doubts that what they [were] posting [wa]s real.” Rick Gladstone, *Photos Trusted but Verified*, N.Y. TIMES (May 7, 2014), <https://lens.blogs.nytimes.com/2014/05/07/photos-trusted-but-verified> [<https://perma.cc/7A73-URKP>].

10. See Steven Melendez, *How DARPA’s Fighting Deepfakes*, FAST COMPANY (Apr. 4, 2018), <https://www.fastcompany.com/40551971/can-new-forensic-tech-win-war-on-ai-generated-fake-images> [<https://perma.cc/9A8L-LFTQ>].

11. Larry Hardesty, *Explained: Neural Networks*, MIT NEWS (Apr. 14, 2017), <http://news.mit.edu/2017/explained-neural-networks-deep-learning-0414> [<https://perma.cc/VTA6-4Z2D>].

12. Natalie Wolchover, *New Theory Cracks Open the Black Box of Deep Neural Networks*, WIRED (Oct. 8, 2017), <https://www.wired.com/story/new-theory-deep-learning> [<https://perma.cc/UEL5-69ND>].

13. Will Knight, *Meet the Fake Celebrities Dreamed Up By AI*, MIT TECH. REV. (Oct. 31, 2017), <https://www.technologyreview.com/the-download/609290/meet-the-fake-celebrities-dreamed-up-by-ai> [<https://perma.cc/D3A3-JFY4>].

14. Will Knight, *Real or Fake? AI is Making it Very Hard to Know*, MIT TECH. REV. (May 1, 2017), <https://www.technologyreview.com/s/604270/real-or-fake-ai-is-making-it-very-hard-to-know> [<https://perma.cc/3MQN-A4VH>].

To take a prominent example, researchers at the University of Washington have created a neural network tool that alters videos so speakers say something different from what they originally said.¹⁵ They demonstrated the technology with a video of former President Barack Obama (for whom plentiful video footage was available to train the network) that made it appear that he said things that he had not.¹⁶

By itself, the emergence of machine learning through neural network methods would portend a significant increase in the capacity to create false images, videos, and audio. But the story does not end there. Enter “generative adversarial networks,” otherwise known as GANs. The GAN approach, invented by Google researcher Ian Goodfellow, brings two neural networks to bear simultaneously.¹⁷ One network, known as the generator, draws on a dataset to produce a sample that mimics the dataset.¹⁸ The other network, the discriminator, assesses the degree to which the generator succeeded.¹⁹ In an iterative fashion, the assessments from the discriminator inform the assessments of the generator. The result far exceeds the speed, scale, and nuance of what human reviewers could achieve.²⁰ Growing sophistication of the GAN approach is sure to lead to the production of increasingly convincing deep fakes.²¹

15. SUPASORN SUWAJANAKORN ET AL., SYNTHESIZING OBAMA: LEARNING LIP SYNC FROM AUDIO, 36 ACM TRANSACTIONS ON GRAPHICS, no. 4, art. 95 (July 2017), http://grail.cs.washington.edu/projects/AudioToObama/siggraph17_obama.pdf [<https://perma.cc/7DCY-XK58>]; James Vincent, *New AI Research Makes It Easier to Create Fake Footage of Someone Speaking*, VERGE (July 12, 2017), <https://www.theverge.com/2017/7/12/15957844/ai-fake-video-audio-speech-obama> [<https://perma.cc/3SKP-EKGT>].

16. Charles Q. Choi, *AI Creates Fake Obama*, IEEE SPECTRUM (July 12, 2017), <https://spectrum.ieee.org/tech-talk/robotics/artificial-intelligence/ai-creates-fake-obama> [<https://perma.cc/M6GP-TNZ4>]; see also Joon Son Chung et al., *You Said That?* (July 18, 2017) (British Machine Vision conference paper), <https://arxiv.org/abs/1705.02966> [<https://perma.cc/6NAH-MAYL>].

17. See Ian J. Goodfellow et al., *Generative Adversarial Nets* (June 10, 2014) (Neural Information Processing Systems conference paper), <https://arxiv.org/abs/1406.2661> [<https://perma.cc/97SH-H7DD>] (introducing the GAN approach); see also Tero Karras, et al., *Progressive Growing of GANs for Improved Quality, Stability, and Variation*, ICLR 2018, at 1-2 (Apr. 2018) (conference paper), http://research.nvidia.com/sites/default/files/pubs/2017-10_Progressive-Growing-of/karras2018iclr-paper.pdf [<https://perma.cc/RSK2-NBAE>] (explaining neural networks in the GAN approach).

18. Karras, *supra* note 17, at 1.

19. *Id.*

20. *Id.* at 2.

21. Consider research conducted at Nvidia. Karras, *supra* note 17, at 2 (explaining a novel approach that begins training cycles with low-resolution images and gradually shifts to higher-resolution images, producing better and much quicker results). The *New York Times* recently profiled the Nvidia team’s work. See Cade Metz & Keith Collins, *How an A.I. ‘Cat-and-Mouse Game’ Generates Believable Fake Photos*, N.Y. TIMES (Jan. 2, 2018), <https://www.nytimes.com/interactive/2018/01/02/technology/ai-generated-photos.html> [<https://perma.cc/6DLQ-RDWD>]. For further illustrations of the GAN approach, see Martin Arjovsky et al., *Wasserstein GAN* (Dec. 6, 2017) (unpublished manuscript) (on file with California Law Review); Chris Donahue et al., *Semantically Decomposing the Latent Spaces of Generative Adversarial Networks*, ICLR 2018 (Feb. 22, 2018) (conference paper) (on file with California Law Review).

The same is true with respect to generating convincing audio fakes. In the past, the primary method of generating audio entailed the creation of a large database of sound fragments from a source, which would then be combined and reordered to generate simulated speech. New approaches promise greater sophistication, including Google DeepMind’s “Wavenet” model,²² Baidu’s DeepVoice,²³ and GAN models.²⁴ Startup Lyrebird has posted short audio clips simulating Barack Obama, Donald Trump, and Hillary Clinton discussing its technology with admiration.²⁵

In comparison to private and academic efforts to develop deep-fake technology, less is currently known about governmental research.²⁶ Given the possible utility of deep-fake techniques for various government purposes—including the need to defend against hostile uses—it is a safe bet that state actors

<https://github.com/chrisdonahue/sdgan>; Phillip Isola et al., Image-to-Image Translation with Conditional Adversarial Nets (Nov. 26, 2018) (unpublished manuscript) (on file with California Law Review); Alec Radford et al., Unsupervised Representation Learning with Deep Convolutional Generative Adversarial Networks (Jan. 7, 2016) (unpublished manuscript) (on file with California Law Review); Jun-Yan Zhu et al., Unpaired Image-to-Image Translation Using Cycle-Consistent Adversarial Networks (Nov. 15, 2018) (unpublished manuscript) (on file with California Law Review).

22. Aaron van den Oord et al., WaveNet: A Generative Model for Raw Audio (Sept. 19, 2016) (unpublished manuscript) (on file with California Law Review), <https://arxiv.org/pdf/1609.03499.pdf> [<https://perma.cc/QX4W-E6JT>].

23. Ben Popper, *Baidu’s New System Can Learn to Imitate Every Accent*, VERGE (Oct. 24, 2017), <https://www.theverge.com/2017/10/24/16526370/baidu-deepvoice-3-ai-text-to-speech-voice> [<https://perma.cc/NXV2-GDVJ>].

24. See Chris Donahue et al., Adversarial Audio Synthesis (Feb. 9, 2019) (conference paper), <https://arxiv.org/pdf/1802.04208.pdf> [<https://perma.cc/F5UG-334U>]; Yang Gao et al., Voice Impersonation Using Generative Adversarial Networks (Feb. 19, 2018) (unpublished manuscript), <https://arxiv.org/abs/1802.06840> [<https://perma.cc/5HZV-ZLD3>].

25. See Bahar Gholipour, *New AI Tech Can Mimic Any Voice*, SCI. AM. (May 2, 2017), <https://www.scientificamerican.com/article/new-ai-tech-can-mimic-any-voice> [<https://perma.cc/2HSP-83C3>]. The ability to cause havoc by using this technology to portray persons saying things they have never said looms large. Lyrebird’s website includes an “ethics” statement, which defensively invokes notions of technological determinism. The statement argues that impersonation technology is inevitable and that society benefits from gradual introduction to it. *Ethics*, LYREBIRD, <https://lyrebird.ai/ethics> [<https://perma.cc/Q57E-G6MK>] (“Imagine that we had decided not to release this technology at all. Others would develop it and who knows if their intentions would be as sincere as ours: they could, for example, only sell the technology to a specific company or an ill-intentioned organization. By contrast, we are making the technology available to anyone and we are introducing it incrementally so that society can adapt to it, leverage its positive aspects for good, while preventing potentially negative applications.”).

26. DARPA’s MediFor program is working to “[develop] technologies for the automated assessment of the integrity of an image or video and [integrate] these in an end-to-end media forensics platform.” Matt Turek, *Media Forensics (MediFor)*, DEF. ADVANCED RES. PROJECTS AGENCY, <https://www.darpa.mil/program/media-forensics> [<https://perma.cc/VBY5-BQJA>]. IARPA’s DIVA program is attempting to use artificial intelligence to identify threats by sifting through video imagery. *Deep Intermodal Video Analytics (DIVA) Program*, INTELLIGENCE ADVANCED RES. PROJECTS ACTIVITY, <https://www.iarpa.gov/index.php/research-programs/diva> [<https://perma.cc/4VDX-B68W>]. There are no grants from the National Science Foundation awarding federal dollars to researchers studying the detection of doctored audio and video content at this time. E-mail from Seth M. Goldstein, Project Manager, IARPA, Office of the Director of National Intelligence, to Samuel Morse (Apr. 6, 2018, 7:49 AM) (on file with authors).

are conducting classified research in this area. However, it is unclear whether classified research lags behind or outpaces commercial and academic efforts. At the least, we can say with confidence that industry, academia, and governments have the motive, means, and opportunity to push this technology forward at a rapid clip.

B. Diffusion of Deep-Fake Technology

The capacity to generate persuasive deep fakes will not stay in the hands of either technologically sophisticated or responsible actors.²⁷ For better or worse, deep-fake technology will diffuse and democratize rapidly.

As Benjamin Wittes and Gabriella Blum explained in *The Future of Violence: Robots and Germs, Hackers and Drones*, technologies—even dangerous ones—tend to diffuse over time.²⁸ Firearms developed for state-controlled armed forces are now sold to the public for relatively modest prices.²⁹ The tendency for technologies to spread only lags if they require scarce inputs that function (or are made to function) as chokepoints to curtail access.³⁰ Scarcity as a constraint on diffusion works best where the input in question is tangible and hard to obtain; such as plutonium or highly enriched uranium to create nuclear weapons.³¹

Often though, the only scarce input for a new technology is the knowledge behind a novel process or unique data sets. Where the constraint involves an intangible resource like information, preserving secrecy requires not only security against theft, espionage, and mistaken disclosure, but also the capacity and will to keep the information confidential.³² Depending on the circumstances, the relevant actors may not want to keep the information to themselves and, indeed, may have affirmative commercial or intellectual motivation to disperse it, as in the case of academics or business enterprises.³³

27. See Jaime Dunaway, *Reddit (Finally) Bans Deepfake Communities, but Face-Swapping Porn Isn't Going Anywhere*, SLATE (Feb. 8, 2018), <https://slate.com/technology/2018/02/reddit-finally-bans-deepfake-communities-but-face-swapping-porn-isnt-going-anywhere.html> [<https://perma.cc/A4Z7-2LDF>].

28. See generally BENJAMIN WITTES & GABRIELLA BLUM, *THE FUTURE OF VIOLENCE: ROBOTS AND GERMS, HACKERS AND DRONES. CONFRONTING A NEW AGE OF THREAT* (2015).

29. *Fresh Air: Assault Style Weapons in the Civilian Market*, NPR (radio broadcast Dec. 20, 2012). Program host Terry Gross interviews Tom Diaz, a policy analyst for the Violence Policy Center. A transcript of the interview can be found at <https://www.npr.org/templates/transcript/transcript.php?storyId=167694808> [<https://perma.cc/CE3F-5AFX>].

30. See generally GRAHAM T. ALLISON ET AL., *AVOIDING NUCLEAR ANARCHY* (1996).

31. *Id.*

32. The techniques that are used to combat cyber attacks and threats are often published in scientific papers, so that a multitude of actors can implement these shields as a defense measure. However, the sophisticated malfeator can use this information to create cyber weapons that circumvent the defenses that researchers create.

33. In April 2016, the hacker group “Shadow Brokers” released malware that had allegedly been created by the National Security Agency (NSA). One month later, the malware was used to propagate

Consequently, the capacity to generate deep fakes is sure to diffuse rapidly no matter what efforts are made to safeguard it. The capacity does not depend on scarce tangible inputs, but rather on access to knowledge like GANs and other approaches to machine learning. As the volume and sophistication of publicly available deep-fake research and services increase, user-friendly tools will be developed and propagated online, allowing diffusion to reach beyond experts. Such diffusion has occurred in the past both through commercial and black-market means, as seen with graphic manipulation tools like Photoshop and malware services on the dark web.³⁴ User-friendly capacity to generate deep fakes likely will follow a similar course on both dimensions.³⁵

Indeed, diffusion has begun for deep-fake technology. The recent wave of attention generated by deep fakes began after a Reddit user posted a tool inserting the faces of celebrities into porn videos.³⁶ Once Fake App, “a desktop app for creating photorealistic faceswap videos made with deep learning,” appeared online, the public adopted it in short order.³⁷ Following the straightforward steps provided by Fake App, a *New York Times* reporter created a semi-realistic deep-fake video of his face on actor Chris Pratt’s body with 1,861 images of himself and 1,023 images of Chris Pratt.³⁸ After enlisting the help of someone with experience blending facial features and source footage, the reporter created a realistic video featuring him as Jimmy Kimmel.³⁹ This portends the diffusion of ever more sophisticated versions of deep-fake technology.

C. Fueling the Fire

The capacity to create deep fakes comes at a perilous time. No longer is the public’s attention exclusively in the hands of trusted media companies. Individuals peddling deep fakes can quickly reach a massive, even global,

the WannaCry cyber attacks, which wreaked havoc on network systems around the globe, threatening to erase files if a ransom was not paid through Bitcoin. See Bruce Schneier, *Who Are the Shadow Brokers?*, ATLANTIC (May 23, 2017), <https://www.theatlantic.com/technology/archive/2017/05/shadow-brokers/527778> [https://perma.cc/UW2F-V36G].

34. See ARMOR, THE BLACK MARKET REPORT: A LOOK INSIDE THE DARK WEB 2 (2018), <https://www.armor.com/app/uploads/2018/03/2018-Q1-Reports-BlackMarket-DIGITAL.pdf> [https://perma.cc/4UJA-QJ94] (explaining that the means to conduct a DDoS attack can be purchased for \$10/hour, or \$200/day).

35. See *id.*

36. Emma Grey Ellis, *People Can Put Your Face on Porn—And the Law Can’t Help You*, WIRED (Jan. 26, 2018), <https://www.wired.com/story/face-swap-porn-legal-limbo> [https://perma.cc/B7K7-Y79L].

37. FAKEAPP, <https://www.fakeapp.org>.

38. Kevin Roose, *Here Come the Fake Videos, Too*, N.Y. TIMES (Mar. 4, 2018), <https://www.nytimes.com/2018/03/04/technology/fake-videos-deepfakes.html> [https://perma.cc/U5QE-EPHX].

39. *Id.*

audience. As this section explores, networked phenomena, rooted in cognitive bias, will fuel that effort.⁴⁰

Twenty-five years ago, the practical ability of individuals and organizations to distribute images, audio, and video (whether authentic or not) was limited. In most countries, a handful of media organizations disseminated content on a national or global basis. In the U.S., the major television and radio networks, newspapers, magazines, and book publishers controlled the spread of information.⁴¹ While governments, advertisers, and prominent figures could influence mass media, most were left to pursue local distribution of content. For better or worse, relatively few individuals or entities could reach large audiences in this few-to-many information distribution environment.⁴²

The information revolution has disrupted this content distribution model.⁴³ Today, innumerable platforms facilitate global connectivity. Generally speaking, the networked environment blends the few-to-many and many-to-many models of content distribution, democratizing access to communication to an unprecedented degree.⁴⁴ This reduces the overall amount of gatekeeping, though control still remains with the companies responsible for our digital infrastructure.⁴⁵ For instance, content platforms have terms-of-service agreements, which ban certain forms of content based on companies' values.⁴⁶

40. See generally DANIELLE KEATS CITRON, *HATE CRIMES IN CYBERSPACE* (2014) [hereinafter CITRON, *HATE CRIMES IN CYBERSPACE*] (exploring pathologies attendant to online speech including deindividuation, virality, information cascades, group polarization, and filter bubbles). For important early work on filter bubbles, echo chambers, and group polarization in online interactions, see generally ELI PARISER, *THE FILTER BUBBLE: WHAT THE INTERNET IS HIDING FROM YOU* (2011); CASS R. SUNSTEIN, *REPUBLIC.COM* (2001).

41. See generally NICHOLAS CARR, *THE BIG SWITCH: REWIRING THE WORLD, FROM EDISON TO GOOGLE* (2008); HOWARD RHEINGOLD, *SMART MOBS: THE NEXT SOCIAL REVOLUTION* (2002).

42. See *id.*

43. See generally SIVA VAIDHYANATHAN, *THE GOOGLIZATION OF EVERYTHING (AND WHY WE SHOULD WORRY)* (2011).

44. This ably captures the online environment accessible for those living in the United States. As Jack Goldsmith and Tim Wu argued a decade ago, geographic borders and the will of governments can and do make themselves known online. See generally JACK GOLDSMITH & TIM WU, *WHO OWNS THE INTERNET?: ILLUSIONS OF A BORDERLESS WORLD* (2006). The Internet visible in China is vastly different from the Internet visible in the EU, which is different from the Internet visible in the United States (and likely to become more so soon). See, e.g., Elizabeth C. Economy, *The Great Firewall of China: Xi Jinping's Internet Shutdown*, *GUARDIAN* (June 29, 2018) <https://www.theguardian.com/news/2018/jun/29/the-great-firewall-of-china-xi-jinpings-internet-shutdown> [<https://perma.cc/8GUS-EC59>]; Casey Newton, *Europe Is Splitting the Internet into Three: How the Copyright Directive Reshapes the Open Web*, *VERGE* (Mar. 27, 2019) <https://www.theverge.com/2019/3/27/18283541/european-union-copyright-directive-Internet-article-13> [<https://perma.cc/K235-RZ7Q>].

45. Danielle Keats Citron & Neil M. Richards, *Four Principles for Digital Expression (You Won't Believe #3!)*, 95 *WASH. U. L. REV.* 1353, 1361–64 (2018).

46. See CITRON, *HATE CRIMES IN CYBERSPACE*, *supra* note 40, at 232–35; Danielle Keats Citron, *Extremist Speech, Compelled Conformity, and Censorship Creep*, 93 *NOTRE DAME L. REV.* 1035, 1037 (2018) [hereinafter Citron, *Extremist Speech*] (noting that platforms' terms of service and community guidelines have banned child pornography, spam, phishing, fraud, impersonation, copyright violations, threats, cyber stalking, nonconsensual pornography, and hate speech); see also DANIELLE

They experience pressure from, or adhere to legal mandates of, governments to block or filter certain information like hate speech or “fake news.”⁴⁷

Although private companies have enormous power to moderate content (shadow banning it, lowering its prominence, and so on), they may decline to filter or block content that does not amount to obvious illegality. Generally speaking, there is far less screening of content for accuracy, quality, or suppression of facts or opinions that some authority deems undesirable.

Content not only can find its way to online audiences, but can circulate far and wide, sometimes going viral both online and, at times, amplifying further once picked up by traditional media. A variety of cognitive heuristics help fuel these dynamics. Three phenomena in particular—the “information cascade” dynamic, human attraction to negative and novel information, and filter bubbles—help explain why deep fakes may be especially prone to going viral.

First, consider the “information cascade” dynamic.⁴⁸ Information cascades result when people stop paying sufficient attention to their own information, relying instead on what they assume others have reliably determined and then passing that information along. Because people cannot know everything, they often rely on what others say, even if it contradicts their own knowledge.⁴⁹ At a certain point, people stop paying attention to their own information and look to what others know.⁵⁰ And when people pass along what others think, the

KEATS CITRON & QUINTA JURECIC, PLATFORM JUSTICE: CONTENT MODERATION AT AN INFLECTION POINT 12 (Hoover Institution ed., 2018) [hereinafter CITRON & JURECIC, PLATFORM JUSTICE], https://www.hoover.org/sites/default/files/research/docs/citron-jurecic_webready.pdf [<https://perma.cc/M5L6-GNCH>] (noting Facebook’s Terms of Service agreement banning nonconsensual pornography). See generally Danielle Keats Citron, *Cyber Civil Rights*, 89 B.U. L. REV. 61 (2009) [hereinafter Citron, *Cyber Civil Rights*]; Danielle Keats Citron & Helen Norton, *Intermediaries and Hate Speech: Fostering Digital Citizenship for Our Information Age*, 91 B.U. L. REV. 1435, 1458 (2011) (discussing hate speech restrictions contained in platforms’ terms of service agreements); Danielle Keats Citron & Benjamin Wittes, *The Internet Will Not Break: Denying Bad Samaritans § 230 Immunity*, 86 FORDHAM L. REV. 401 (2017) (arguing that law should incentivize online platforms to address known illegality in a reasonable manner).

47. See Citron, *Extremist Speech*, *supra* note 46, at 1040–49 (exploring pressure from EU Commission on major platforms to remove extremist speech and hate speech). For important work on global censorship efforts, see the scholarship of Anupam Chander, Daphne Keller, and Rebecca McKinnon. See generally REBECCA MCKINNON, CONSENT OF THE NETWORKED: THE WORLDWIDE STRUGGLE FOR INTERNET FREEDOM 6 (2012) (arguing that ISPs and online platforms have “far too much power over citizens’ lives, in ways that are insufficiently transparent or accountable to the public interest.”); Anupam Chander, *Facebookistan*, 90 N.C. L. REV. 1807, 1819–35 (2012); Anupam Chander, *Googling Freedom*, 99 CALIF. L. REV. 1, 5–9 (2011); Daphne Keller, *Toward a Clearer Conversation About Platform Liability*, KNIGHT FIRST AMEND. INST. AT COLUM. U. (April 6, 2018), <https://knightcolumbia.org/content/toward-clearer-conversation-about-platform-liability> [<https://perma.cc/GWM7-J8PW>].

48. Carr, *supra* note 41. See generally DAVID EASLEY & JON KLEINBERG, NETWORKS, CROWDS, AND MARKETS: REASONING ABOUT A HIGHLY CONNECTED WORLD (2010) (exploring cognitive biases in the information marketplace); CASS SUNSTEIN, REPUBLIC.COM 2.0 (2007) (same).

49. See generally EASLEY & KLEINBERG, *supra* note 48.

50. *Id.*

credibility of the original claim snowballs.⁵¹ As the cycle repeats, the cascade strengthens.⁵²

Social media platforms are a ripe environment for the formation of information cascades spreading content of all stripes. From there, cascades can spill over to traditional mass-audience outlets that take note of the surge of social media interest and as a result cover a story that otherwise they might not have.⁵³ Social movements have leveraged the power of information cascades, including Black Lives Matter activists⁵⁴ and the Never Again movement of the Parkland High School students.⁵⁵ Arab Spring protesters spread videos and photographs of police torture.⁵⁶ Journalist Howard Rheingold refers to positive information cascades as “smart mobs.”⁵⁷ But not every mob is smart or laudable, and the information cascade dynamic does not account for such distinctions. The Russian covert action program to sow discord in the United States during the 2016 election provides ample demonstration.⁵⁸

Second, our natural tendency to propagate negative and novel information may enable viral circulation of deep fakes. Negative and novel information “grab[s] our attention as human beings and [] cause[s] us to want to share that information with others—we’re attentive to novel threats and especially attentive to negative threats.”⁵⁹ Data scientists, for instance, studied 126,000 news stories shared on Twitter from 2006 to 2010, using third-party fact-checking sites to

51. *Id.*

52. *Id.*

53. *See generally* YOCHAI BENKLER, *THE WEALTH OF NETWORKS: HOW SOCIAL PRODUCTION TRANSFORMS MARKETS AND FREEDOM* (2006) (elaborating the concept of social production in relation to rapid evolution of the information marketplace and resistance to that trend).

54. *See* Monica Anderson & Paul Hitlin, *The Hashtag #BlackLivesMatter Emerges: Social Activism on Twitter*, PEW RES. CTR. (Aug. 15, 2016), <http://www.pewInternet.org/2016/08/15/the-hashtag-blacklivesmatter-emerges-social-activism-on-twitter> [<https://perma.cc/4BW9-L67G>] (discussing Black Lives Matter activists’ use of the hashtag #BlackLivesMatter to identify their message and display solidarity around race and police use of force).

55. Jonah Engel Bromwich, *How the Parkland Students Got So Good at Social Media*, N.Y. TIMES (Mar. 7, 2018), <https://www.nytimes.com/2018/03/07/us/parkland-students-social-media.html> [<https://perma.cc/7AW9-4HR2>] (discussing students’ use of social media to keep sustained political attention on the Parkland tragedy).

56. CITRON, *HATE CRIMES IN CYBERSPACE*, *supra* note 40, at 68.

57. RHEINGOLD, *supra* note 41.

58. The 2018 indictment of the Internet Research Agency in the U.S. District Court for the District of Columbia is available at <https://www.justice.gov/file/1035477/download> [<https://perma.cc/B6WJ-4FLX>]; *see also* David A. Graham, *What the Mueller Indictment Reveals*, ATLANTIC (Feb. 16, 2018), <https://www.theatlantic.com/politics/archive/2018/02/mueller-roadmap/553604> [<https://perma.cc/WU2U-XHWW>]; Tim Mak & Audrey McNamara, *Mueller Indictment of Russian Operatives Details Playbook of Information Warfare*, NAT’L PUB. RADIO (Feb. 17, 2018), <https://www.npr.org/2018/02/17/586690342/mueller-indictment-of-russian-operatives-details-playbook-of-information-warfare> [<https://perma.cc/RJ6F-999R>].

59. Robinson Meyer, *The Grim Conclusions of the Largest-Ever Study of Fake News*, THE ATLANTIC (Mar. 8, 2018), <https://www.theatlantic.com/technology/archive/2018/03/largest-study-ever-fake-news-mit-twitter/555104> [<https://perma.cc/PJS2-RKMF>].

classify them as true or false.⁶⁰ According to the study, hoaxes and false rumors reached people ten times faster than accurate stories.⁶¹ Even when researchers controlled for differences between accounts originating rumors, falsehoods were 70 percent more likely to get retweeted than accurate news.⁶² The uneven spread of fake news was not due to bots, which in fact retweeted falsehoods at the same frequency as accurate information.⁶³ Rather, false news spread faster due to *people* retweeting inaccurate news items.⁶⁴ The study's authors hypothesized that falsehoods had greater traction because they seemed more "novel" and evocative than real news.⁶⁵ False rumors tended to elicit responses expressing surprise and disgust, while accurate stories evoked replies associated with sadness and trust.⁶⁶

With human beings seemingly more inclined to spread negative and novel falsehoods, the field is ripe for bots to spur and escalate the spreading of negative misinformation.⁶⁷ Facebook estimates that as many as 60 million bots may be infesting its platform.⁶⁸ Bots were responsible for a substantial portion of political content posted during the 2016 election.⁶⁹ Bots also can manipulate algorithms used to predict potential engagement with content.

Negative information not only is tempting to share, but is also relatively "sticky." As social science research shows, people tend to credit—and remember—negative information far more than positive information.⁷⁰ Coupled with our natural predisposition towards certain stimuli like sex, gossip, and violence, that tendency provides a welcome environment for harmful deep fakes.⁷¹ The Internet amplifies this effect, which helps explain the popularity of

60. Soroush Vosoughi et al., *The Spread of True and False News Online*, 359 SCIENCE 1146, 1146 (2018), <http://science.sciencemag.org/content/359/6380/1146/tab-pdf> [<https://perma.cc/5U5D-UHPZ>].

61. *Id.* at 1148.

62. *Id.* at 1149.

63. *Id.* at 1146.

64. *Id.*

65. *Id.* at 1149.

66. *Id.* at 1146, 1150.

67. Meyer, *supra* note 59 (quoting political scientist Dave Karpf).

68. Nicholas Confessore et al., *The Follower Factory*, N.Y. TIMES (Jan. 27, 2018), <https://www.nytimes.com/interactive/2018/01/27/technology/social-media-bots.html>

[<https://perma.cc/DX34-RENV>] ("In November, Facebook disclosed to investors that it had at least twice as many fake users as it previously estimated, indicating that up to 60 million automated accounts may roam the world's largest social media platform."); see also *Extremist Content and Russian Disinformation Online: Working with Tech to Find Solutions: Hearing Before the S. Judiciary Comm.*, 117th Cong. (2017) <https://www.judiciary.senate.gov/meetings/extremist-content-and-russian-disinformation-online-working-with-tech-to-find-solutions> [<https://perma.cc/M5L9-R2MY>].

69. David M. J. Lazer et al., *The Science of Fake News: Addressing Fake News Requires a Multidisciplinary Effort*, 359 SCIENCE 1094, 1095 (2018).

70. See, e.g., Elizabeth A. Kensinger, *Negative Emotion Enhances Memory Accuracy: Behavioral and Neuroimaging Evidence*, 16 CURRENT DIRECTIONS IN PSYCHOL. SCI. 213, 217 (2007) (finding that "negative emotion conveys focal benefits on memory for detail").

71. PARISER, *supra* note 40, at 13–14.

gossip sites like TMZ.com.⁷² Because search engines produce results based on our interests, they tend to feature more of the same—more sex and more gossip.⁷³

Third, filter bubbles further aggravate the spread of false information. Even without the aid of technology, we naturally tend to surround ourselves with information confirming our beliefs. Social media platforms supercharge this tendency by empowering users to endorse and re-share content.⁷⁴ Platforms' algorithms highlight popular information, especially if it has been shared by friends, and surround us with content from relatively homogenous groups.⁷⁵ As endorsements and shares accumulate, the chances for an algorithmic boost increase. After seeing friends' recommendations online, individuals tend to pass on those recommendations to their own networks.⁷⁶ Because people tend to share information with which they agree, social media users are surrounded by information confirming their preexisting beliefs.⁷⁷ This is what we mean by "filter bubble."⁷⁸

Filter bubbles can be powerful insulators against the influence of contrary information. In a study of Facebook users, researchers found that individuals reading fact-checking articles had not originally consumed the fake news at issue, and those who consumed fake news in the first place almost never read a fact-check that might debunk it.⁷⁹

Taken together, common cognitive biases and social media capabilities are behind the viral spread of falsehoods and decay of truth. They have helped entrench what amounts to information tribalism, and the results plague public and private discourse. Information cascades, natural attraction to negative and novel information, and filter bubbles provide an all-too-welcoming environment as deep-fake capacities mature and proliferate.

II.

COSTS AND BENEFITS

Deep-fake technology can and will be used for a wide variety of purposes. Not all will be antisocial; some, in fact, will be profoundly prosocial.

72. CITRON, HATE CRIMES IN CYBERSPACE, *supra* note 40, at 68.

73. *Id.*

74. *Id.* at 67.

75. *Id.*

76. *Id.*

77. *Id.*

78. Political scientists Andrew Guess, Brendan Nyhan, and Jason Reifler studied the production and consumption of fake news on Facebook during the 2016 U.S. Presidential election. According to the study, filter bubbles were deep (with one in four individuals visiting from fake news websites), but narrow (the majority of fake news group consumption was concentrated among 10% of the public). See ANDREW GUESS ET AL., SELECTIVE EXPOSURE TO MISINFORMATION: EVIDENCE FROM THE CONSUMPTION OF FAKE NEWS DURING THE 2016 U.S. PRESIDENTIAL CAMPAIGN 1 (2018) <https://www.dartmouth.edu/~nyhan/fake-news-2016.pdf> [<https://perma.cc/F3VF-JVCL>].

79. *See id.* at 11.

Nevertheless, deep fakes can inflict a remarkable array of harms, many of which are exacerbated by features of the information environment explored above.

A. Beneficial Uses of Deep-Fake Technology

Human ingenuity no doubt will conceive many beneficial uses for deep-fake technology. For now, the most obvious possibilities for beneficial uses fall under the headings of education, art, and the promotion of individual autonomy.

1. Education

Deep-fake technology creates an array of opportunities for educators, including the ability to provide students with information in compelling ways relative to traditional means like readings and lectures. This is similar to an earlier wave of educational innovation made possible by increasing access to ordinary video.⁸⁰ With deep fakes, it will be possible to manufacture videos of historical figures speaking directly to students, giving an otherwise unappealing lecture a new lease on life.⁸¹

Creating modified content will raise interesting questions about intellectual property protections and the reach of the fair use exemption. Setting those obstacles aside, the educational benefits of deep fakes are appealing from a pedagogical perspective in much the same way that is true for the advent of virtual and augmented reality production and viewing technologies.⁸²

The technology opens the door to relatively cheap and accessible production of video content that alters existing films or shows, particularly on the audio track, to illustrate a pedagogical point. For example, a scene from a war film could be altered to make it seem that a commander and her legal advisor are discussing application of the laws of war, when in the original the dialogue had nothing to do with that—and the scene could be re-run again and again with modifications to the dialogue tracking changes to the hypothetical scenario under

80. Emily Cruse, *Using Educational Video in the Classroom: Theory, Research, and Practice*, 1-2 (2013) (unpublished manuscript), <https://www.safarimontage.com/pdfs/training/UsingEducationalVideoInTheClassroom.pdf> [<https://perma.cc/AJ8Q-WZP4>].

81. Face2Face is a real-time face capture and reenactment software developed by researchers at the University of Erlangen-Nuremberg, the Max-Planck-Institute for Informatics, and Stanford University. The applications of this technology could reinvent the way students learn about historical events and figures. See Justus Thies et al., *Face2Face: Real-time Face Capture and Reenactment of RGB Videos* (June 2016) (29th IEEE-CVPR 2016 conference paper), <http://www.graphics.stanford.edu/~niessner/papers/2016/1facetoface/thies2016face.pdf> [<https://perma.cc/S94K-DPU5>].

82. Adam Evans, *Pros and Cons of Virtual Reality in the Classroom*, *CHRON. HIGHER EDUC.* (Apr. 8, 2018), <https://www.chronicle.com/article/ProsCons-of-Virtual/243016> [<https://perma.cc/TN84-89SQ>].

consideration. If done well, it would surely beat just having the professor asking students to imagine the shifting scenario out of whole cloth.⁸³

The educational value of deep fakes will extend beyond the classroom. In the spring of 2018, BuzzFeed provided an apt example when it circulated a video that appeared to feature Barack Obama warning of the dangers of deep-fake technology itself.⁸⁴ One can imagine deep fakes deployed to support educational campaigns by public-interest organizations such as Mothers Against Drunk Driving.

2. Art

The potential artistic benefits of deep-fake technology relate to its educational benefits, though they need not serve any formal educational purpose. Thanks to the use of existing technologies that resurrect dead performers for fresh roles, the benefits to creativity are already familiar to mass audiences.⁸⁵ For example, the startling appearance of the long-dead Peter Cushing as the venerable Grand Moff Tarkin in 2016's *Rogue One* was made possible by a deft combination of live acting and technical wizardry. That prominent illustration delighted some and upset others.⁸⁶ The *Star Wars* contribution to this theme continued in *The Last Jedi* when Carrie Fisher's death led the filmmakers to fake additional dialogue using snippets from real recordings.⁸⁷

Not all artistic uses of deep-fake technologies will have commercial potential. Artists may find it appealing to express ideas through deep fakes, including, but not limited to, productions showing incongruities between apparent speakers and their apparent speech. Video artists might use deep-fake technology to satirize, parody, and critique public figures and public officials. Activists could use deep fakes to demonstrate their point in a way that words alone could not.

3. Autonomy

Just as art overlaps with education, deep fakes implicate self-expression. But not all uses of deep fakes for self-expression are best understood as art. Some

83. The facial animation software CrazyTalk, by Reallusion, animates faces from photographs or cartoons and can be used by educators to further pedagogical goals. The software is available at <https://www.reallusion.com/crazytalk/default.html> [<https://perma.cc/TTX8-QMJP>].

84. See Choi, *supra* note 16.

85. Indeed, film contracts now increasingly address future uses of a person's image in subsequent films via deep fake technology in the event of their death.

86. Dave Itzkoff, *How 'Rogue One' Brought Back Familiar Faces*, N.Y. TIMES (Dec. 27, 2016), <https://www.nytimes.com/2016/12/27/movies/how-rogue-one-brought-back-grand-moff-tarkin.html> [<https://perma.cc/F53C-TDYV>].

87. Evan Narcisse, *It Took Some Movie Magic to Complete Carrie Fisher's Leia Dialogue in The Last Jedi*, GIZMODO (Dec. 8, 2017), <https://io9.gizmodo.com/it-took-some-movie-magic-to-complete-carrie-fishers-lei-1821121635> [<https://perma.cc/NF5H-GPJF>].

may be used to facilitate “avatar” experiences for a variety of self-expressive ends that might best be described in terms of autonomy.

Perhaps most notably, deep-fake audio technology holds promise to restore the ability of persons suffering from certain forms of paralysis, such as ALS, to speak with their own voice.⁸⁸ Separately, individuals suffering from certain physical disabilities might interpose their faces and that of consenting partners into pornographic videos, enabling virtual engagement with an aspect of life unavailable to them in a conventional sense.⁸⁹

The utility of deep-fake technology for avatar experiences, which need not be limited to sex, closely relates to more familiar examples of technology. Video games, for example, enable a person to have or perceive experiences that might otherwise be impossible, dangerous, or otherwise undesirable if pursued in person. The customizable avatars from Nintendo Wii (known as “Mii”) provide a familiar and non-threatening example. The video game example underscores that the avatar scenario is not always a serious matter, and sometimes boils down to no more and no less than the pursuit of happiness.

Deep-fake technology confers the ability to integrate more realistic simulacrum of one’s own self into an array of media, thus producing a stronger avatar effect. For some aspects of the pursuit of autonomy, this will be a very good thing (as the book and film *Ready Player One* suggests, albeit with reference to a vision of advanced virtual reality rather than deep-fake technology). Not so for others, however. Indeed, as we describe below, the prospects for the harmful use of deep-fake technology are legion.

B. Harmful Uses of Deep-Fake Technology

Human ingenuity, alas, is not limited to applying technology to beneficial ends. Like any technology, deep fakes also will be used to cause a broad spectrum of serious harms, many of them exacerbated by the combination of networked information systems and cognitive biases described above.

1. Harm to Individuals or Organizations

Lies about what other people have said or done are as old as human society, and come in many shapes and sizes. Some merely irritate or embarrass, while others humiliate and destroy; some spur violence. All of this will be true with deep fakes as well, only more so due to their inherent credibility and the manner

88. Sima Shakeri, *Lyrebird Helps ALS Ice Bucket Challenge Co-Founder Pat Quinn Get His Voice Back: Project Revoice Can Change Lives*, HUFFINGTON POST (Apr. 14, 2018), https://www.huffingtonpost.ca/2018/04/14/lyrebird-helps-als-ice-bucket-challenge-co-founder-pat-quinn-get-his-voice-back_a_23411403 [https://perma.cc/R5SD-Y37Y].

89. See Allie Volpe, *Deepfake Porn has Terrifying Implications. But What if it Could Be Used for Good?*, MEN’S HEALTH (Apr. 13, 2018), <https://www.menshealth.com/sex-women/a19755663/deepfakes-porn-reddit-pornhub> [https://perma.cc/EFX9-2BUE].

in which they hide the liar's creative role. Deep fakes will emerge as powerful mechanisms for some to exploit and sabotage others.

a. Exploitation

There will be no shortage of harmful exploitations. Some will be in the nature of theft, such as stealing people's identities to extract financial or some other benefit. Others will be in the nature of abuse, commandeering a person's identity to harm them or individuals who care about them. And some will involve both dimensions, whether the person creating the fake so intended or not.

As an example of extracting value, consider the possibilities for the realm of extortion. Blackmailers might use deep fakes to extract something of value from people, even those who might normally have little or nothing to fear in this regard, who (quite reasonably) doubt their ability to debunk the fakes persuasively, or who fear that any debunking would fail to reach far and fast enough to prevent or undo the initial damage.⁹⁰ In that case, victims might be forced to provide money, business secrets, or nude images or videos (a practice known as sextortion) to prevent the release of the deep fakes.⁹¹ Likewise, fraudulent kidnapping claims might prove more effective in extracting ransom when backed by video or audio appearing to depict a victim who is not in fact in the fraudster's control.

Not all value extraction takes a tangible form. Deep-fake technology can also be used to exploit an individual's sexual identity for other's gratification.⁹² Thanks to deep-fake technology, an individual's face, voice, and body can be swapped into real pornography.⁹³ A subreddit (now closed) featured deep-fake sex videos of female celebrities and amassed more than 100,000 users.⁹⁴ As one Reddit user asked, "I want to make a porn video with my ex-girlfriend. But I

90. See generally ADAM DODGE & ERICA JOHNSTONE, USING FAKE VIDEO TECHNOLOGY TO PERPETUATE INTIMATE PARTNER ABUSE 6 (2018), <http://withoutmyconsent.org/blog/new-advisory-helps-domestic-violence-survivors-prevent-and-stop-deepfake-abuse> [<https://perma.cc/K3Y2-XG2Q>] (discussing how deep fakes used as black mail of an intimate partner could violate the California Family Code). The advisory was published by the non-profit organization Without My Consent, which combats online invasions of privacy.

91. Sextortion thrives on the threat that the extortionist will disclose sex videos or nude images unless more nude images or videos are provided. BENJAMIN WITTES ET AL., SEXTORTION: CYBERSECURITY, TEENAGERS, AND REMOTE SEXUAL ASSAULT (Brookings Inst. ed., 2016), <https://www.brookings.edu/wp-content/uploads/2016/05/sextortion1-1.pdf> [<https://perma.cc/7K9N-5W7C>].

92. See DODGE & JOHNSTONE, *supra* note 90, at 6 (explaining the likelihood that domestic abusers and cyber stalkers will use deep sex tapes to harm victims); Janko Roettgers, 'Deep Fakes' Will Create Hollywood's Next Sex Tape Scare, VARIETY (Feb. 2, 2018), <http://variety.com/2018/digital/news/hollywood-sex-tapes-deepfakes-ai-1202685655> [<https://perma.cc/98HQ-668G>].

93. Danielle Keats Citron, *Sexual Privacy*, 128 YALE L. J. 1870, 1921–24 (2019) [hereinafter Citron, *Sexual Privacy*].

94. DODGE & JOHNSTONE, *supra* note 90, at 6.

don't have any high-quality video with her, but I have lots of good photos."⁹⁵ A Discord user explained that he made a "pretty good" video of a girl he went to high school with, using around 380 photos scraped from her Instagram and Facebook accounts.⁹⁶

These examples highlight an important point: the gendered dimension of the exploitation of deep fakes. In all likelihood, the majority of victims of fake sex videos will be female. This has been the case for cyber stalking and non-consensual pornography, and likely will be the case for deep-fake sex videos.⁹⁷

One can easily imagine deep-fake sex videos subjecting individuals to violent, humiliating sex acts. This shows that not all such fakes will be designed primarily, or at all, for the creator's sexual or financial gratification. Some will be nothing less than cruel weapons meant to terrorize and inflict pain. Of deep-fake sex videos, Mary Anne Franks has astutely said, "If you were the worst misogynist in the world, this technology would allow you to accomplish whatever you wanted."⁹⁸

When victims discover that they have been used in deep-fake sex videos, the psychological damage may be profound—whether or not this was the video creator's aim. Victims may feel humiliated and scared.⁹⁹ Deep-fake sex videos force individuals into virtual sex, reducing them to sex objects. As Robin West has observed, threats of sexual violence "literally, albeit not physically, penetrates the body."¹⁰⁰ Deep-fake sex videos can transform rape threats into a terrifying virtual reality. They send the message that victims can be sexually abused at whim. Given the stigma of nude images, especially for women and girls, individuals depicted in fake sex videos also may suffer collateral consequences in the job market, among other places, as we explain in more detail below in our discussion of sabotage.¹⁰¹

95. *Id.*

96. *Id.*

97. ASIA A. EATON ET AL., 2017 NATIONWIDE ONLINE STUDY OF NONCONSENSUAL PORN VICTIMIZATION AND PERPETRATION 12 (Cyber C.R. Initiative ed., 2017), <https://www.cybercivilrights.org/wp-content/uploads/2017/06/CCRI-2017-Research-Report.pdf> [<https://perma.cc/2HYP-7ELV>] ("Women were significantly more likely [1.7 times] to have been victims of [non-consensual porn] or to have been threatened with [non-consensual porn]. . . .").

98. Drew Harwell, *Fake-Porn Videos Are Being Weaponized to Harass and Humiliate Women: 'Everybody is a Potential Target'*, WASH. POST (Dec. 30, 2018), https://www.washingtonpost.com/technology/2018/12/30/fake-porn-videos-are-being-weaponized-harass-humiliate-women-everybody-is-potential-target/?utm_term=.936bfc339777 [<https://perma.cc/D37Y-DPXB>].

99. See generally Rana Ayyub, *In India, Journalists Face Slut-Shaming and Rape Threats*, N.Y. TIMES (May 22, 2018), <https://www.nytimes.com/2018/05/22/opinion/india-journalists-slut-shaming-rape.html> [<https://perma.cc/A7WR-PF6L>]; *'I Couldn't Talk or Sleep for Three Days': Journalist Rana Ayyub's Horrific Social Media Ordeal over Fake Tweet*, DAILY O (Apr. 26, 2018), <https://www.dailyo.in/variety/rana-ayyub-trolling-fake-tweet-social-media-harassment-hindutva/story/1/23733.html> [<https://perma.cc/J6G6-H6GZ>].

100. ROBIN WEST, CARING FOR JUSTICE 102–03 (1997) (emphasis omitted).

101. Deep-fake sex videos should be considered in light of the broader cyber stalking phenomenon, which more often targets women and usually involves online assaults that are sexually

These examples are but the tip of a disturbing iceberg. Like sexualized deep fakes, imagery depicting non-sexual abuse or violence might also be used to threaten, intimidate, and inflict psychological harm on the depicted victim (or those who care for that person). Deep fakes also might be used to portray someone, falsely, as endorsing a product, service, idea, or politician. Other forms of exploitation will abound.

b. Sabotage

In addition to inflicting direct psychological harm on victims, deep-fake technology can be used to harm victims along other dimensions due to their utility for reputational sabotage. Across every field of competition—workplace, romance, sports, marketplace, and politics—people will have the capacity to deal significant blows to the prospects of their rivals.

It could mean the loss of romantic opportunity, the support of friends, the denial of a promotion, the cancellation of a business opportunity, and beyond. Deep-fake videos could depict a person destroying property in a drunken rage. They could show people stealing from a store; yelling vile, racist epithets; using drugs; or any manner of antisocial or embarrassing behavior like sounding incoherent. Depending on the circumstances, timing, and circulation of the fake, the effects could be devastating.

In some instances, debunking the fake may come too late to remedy the initial harm. For example, consider how a rival might torpedo the draft position of a top pro sports prospect by releasing a compromising deep-fake video just as the draft begins. Even if the video is later doubted as a fake, it could be impossible to undo the consequences (which might involve the loss of millions of dollars) because once cautious teams make other picks, the victim may fall into later rounds of the draft (or out of the draft altogether).¹⁰²

The nature of today's communication environment enhances the capacity of deep fakes to cause reputational harm. The combination of cognitive biases and algorithmic boosting increases the chances for salacious fakes to circulate. The ease of copying and storing data online—including storage in remote jurisdictions—makes it much harder to eliminate fakes once they are posted and shared. These considerations combined with the ever-improving search engines increase the chances that employers, business partners, or romantic interests will encounter the fake.

threatening and sexually demeaning. See CITRON, HATE CRIMES IN CYBERSPACE, *supra* note 40, at 13–19.

102. This hypothetical is modeled on an actual event, albeit one involving a genuine rather than a falsified compromising video. In 2016, a highly regarded NFL prospect named Laremy Tunsill may have lost as much as \$16 million when, on the verge of the NFL draft, someone released a video showing him smoking marijuana with a bong and gas mask. See Jack Holmes, *A Hacker's Tweet May Have Cost This NFL Prospect Almost \$16 Million*, ESQUIRE (Apr. 29, 2016), <https://www.esquire.com/sports/news/a44457/laremy-tunsill-nfl-draft-weed-lost-millions> [<https://perma.cc/7PEL-PRBF>].

Once discovered, deep fakes can be devastating to those searching for employment. Search results matter to employers.¹⁰³ According to a 2009 Microsoft study, more than 90 percent of employers use search results to make decisions about candidates, and in more than 77 percent of cases, those results have a negative result. As the study explained, employers often decline to interview or hire people because their search results featured “inappropriate photos.”¹⁰⁴ The reason for those results should be obvious. It is less risky and expensive to hire people who do not have the baggage of damaged online reputations. This is especially true in fields where the competition for jobs is steep.¹⁰⁵ There is little reason to think the dynamics would be significantly different with respect to romantic prospects.¹⁰⁶

Deep fakes can be used to sabotage business competitors. Deep-fake videos could show a rival company’s chief executive engaged in any manner of disreputable behavior, from purchasing illegal drugs to hiring underage prostitutes to uttering racial epithets to bribing government officials. Deep fakes could be released just in time to interfere with merger discussions or bids for government contracts. As with the sports draft example, mundane business opportunities could be thwarted even if the videos are ultimately exposed as fakes.

103. *Number of Employers Using Social Media to Screen Candidates at All-Time High, Finds Latest CareerBuilder Study*, CAREERBUILDER: PRESS ROOM (June 15, 2017), <http://press.careerbuilder.com/2017-06-15-Number-of-Employers-Using-Social-Media-to-Screen-Candidates-at-All-Time-High-Finds-Latest-CareerBuilder-Study> [<https://perma.cc/K6BD-DYSV>] (noting that a national survey conducted in 2017 found that over half of employers will not hire a candidate without an online presence and may choose not to hire a candidate based on negative social media content).

104. This has been the case for nude photos posted without consent, often known as revenge porn. *See generally* CITRON, HATE CRIMES IN CYBERSPACE, *supra* note 40, at 17–18, 48–49 (exploring the economic fallout of the nonconsensual posting of someone’s nude image); Mary Anne Franks, “Revenge Porn” Reform: A View from the Front Lines, 69 FLA. L. REV. 1251, 1308–23 (2017). For recent examples, see Tasneem Nashrulla, *A Middle School Teacher Was Fired After a Student Obtained Her Topless Selfie. Now She is Suing the School District for Gender Discrimination*, BUZZFEED (Apr. 4, 2019), <https://www.buzzfeednews.com/article/tasneemnashrulla/middle-school-teacher-fired-topless-selfie-lawsuit> [<https://perma.cc/3PGZ-CZ5R>]; Annie Seifullah, *Revenge Porn Took My Career. The Law Couldn’t Get It Back*, JEZEBEL (July 18, 2018), <https://jezebel.com/revenge-porn-took-my-career-the-law-couldnt-get-it-bac-1827572768> [<https://perma.cc/D9Y8-63WH>].

105. *See* Danielle Keats Citron & Mary Anne Franks, *Criminalizing Revenge Porn*, 49 WAKE FOREST L. REV. 345, 352–53 (2014) (“Most employers rely on candidates’ online reputations as an employment screen.”).

106. Journalist Rana Ayyub, who faced vicious online abuse including her image in deep-fake sex videos, explained that the deep fakes seemed designed to label her as “promiscuous,” “immoral,” and damaged goods. Ayyub, *supra* note 99. *See generally* Citron, *Sexual Privacy*, *supra* note 93, at 1925–26 (discussing how victims of deep-fake sex videos felt crippled and unable to talk or eat, let alone engage with others); Danielle Keats Citron, *Why Sexual Privacy Matters for Trust*, WASH. U. L. REV. (forthcoming) (recounting fear of dating and embarrassment experienced by individuals whose nude photos were disclosed online without consent).

2. Harm to Society

Deep fakes are not just a threat to specific individuals or entities. They have the capacity to harm society in a variety of ways. Consider the following:

- Fake videos could feature public officials taking bribes, displaying racism, or engaging in adultery.
- Politicians and other government officials could appear in locations where they were not, saying or doing things that they did not.¹⁰⁷
- Fake audio or video could involve damaging campaign material that claims to emanate from a political candidate when it does not.¹⁰⁸
- Fake videos could place them in meetings with spies or criminals, launching public outrage, criminal investigations, or both.
- Soldiers could be shown murdering innocent civilians in a war zone, precipitating waves of violence and even strategic harms to a war effort.¹⁰⁹
- A deep fake might falsely depict a white police officer shooting an unarmed black man while shouting racial epithets.
- A fake audio clip might “reveal” criminal behavior by a candidate on the eve of an election.
- Falsified video appearing to show a Muslim man at a local mosque celebrating the Islamic State could stoke distrust of, or even violence against, that community.
- A fake video might portray an Israeli official doing or saying something so inflammatory as to cause riots in neighboring countries, potentially disrupting diplomatic ties or sparking a wave of violence.
- False audio might convincingly depict U.S. officials privately “admitting” a plan to commit an outrage overseas, timed to disrupt an important diplomatic initiative.
- A fake video might depict emergency officials “announcing” an impending missile strike on Los Angeles or an emergent pandemic in New York City, provoking panic and worse.

107. See, e.g., Linton Weeks, *A Very Weird Photo of Ulysses S. Grant*, NAT'L PUB. RADIO (Oct. 27, 2015 11:03 AM), <https://www.npr.org/sections/npr-history-dept/2015/10/27/452089384/a-very-weird-photo-of-ulysses-s-grant> [<https://perma.cc/F3U6-WRVF>] (discussing a doctored photo of Ulysses S. Grant from the Library of Congress archives that was created over 100 years ago).

108. For powerful work on the potential damage of deep-fake campaign speech, see Rebecca Green, *Counterfeit Campaign Speech*, 70 HASTINGS L.J. (forthcoming 2019).

109. Cf. Vinu Goel and Sheera Frenkel, *In India Election, False Posts and Hate Speech Flummox Facebook*, N.Y. TIMES (Apr. 1, 2019), <https://www.nytimes.com/2019/04/01/technology/india-elections-facebook.html> [<https://perma.cc/55AW-X6Q3>].

As these scenarios suggest, the threats posed by deep fakes have systemic dimensions. The damage may extend to, among other things, distortion of democratic discourse on important policy questions; manipulation of elections; erosion of trust in significant public and private institutions; enhancement and exploitation of social divisions; harm to specific military or intelligence operations or capabilities; threats to the economy; and damage to international relations.

a. Distortion of Democratic Discourse

Public discourse on questions of policy currently suffers from the circulation of false information.¹¹⁰ Sometimes lies are intended to undermine the credibility of participants in such debates, and sometimes lies erode the factual foundation that ought to inform policy discourse. Even without prevalent deep fakes, information pathologies abound. But deep fakes will exacerbate matters by raising the stakes for the “fake news” phenomenon in dramatic fashion (quite literally).¹¹¹

Many actors will have sufficient interest to exploit the capacity of deep fakes to skew information and thus manipulate beliefs. As recent actions by the Russian government demonstrate, state actors sometimes have such interests.¹¹² Other actors will do it as a form of unfair competition in the battle of ideas. And others will do it simply as a tactic of intellectual vandalism and fraud. The combined effects may be significant, including but not limited to the disruption of elections. But elections are vulnerable to deep fakes in a separate and distinctive way as well, as we will explore in the next section.

Democratic discourse is most functional when debates build from a foundation of shared facts and truths supported by empirical evidence.¹¹³ In the absence of an agreed upon reality, efforts to solve national and global problems become enmeshed in needless first-order questions like whether climate change is real.¹¹⁴ The large-scale erosion of public faith in data and statistics has led us

110. See Steve Lohr, *It's True: False News Spreads Faster and Wider. And Humans Are to Blame*, N.Y. TIMES (Mar. 8, 2018), <https://www.nytimes.com/2018/03/08/technology/twitter-fake-news-research.html> [<https://perma.cc/AB74-CUWV>].

111. Franklin Foer, *The Era of Fake Video Begins*, ATLANTIC (May 2018), <https://www.theatlantic.com/magazine/archive/2018/05/realitys-end/556877> [<https://perma.cc/RX2A-X8EE>] (“Fabricated videos will create new and understandable suspicions about everything we watch. Politicians and publicists will exploit those doubts. When captured in a moment of wrongdoing, a culprit will simply declare the visual evidence a malicious concoction.”).

112. Charlie Warzel, *2017 Was the Year Our Internet Destroyed Our Shared Reality*, BUZZFEED (Dec. 28, 2017), https://www.buzzfeed.com/charliwarzel/2017-year-the-Internet-destroyed-shared-reality?utm_term=.nebaDjYmj [<https://perma.cc/8WWS-UC8K>].

113. Mark Verstraete & Derek E. Bambauer, *Ecosystem of Distrust*, 16 FIRST AMEND. L. REV. 129, 152 (2017). For powerful scholarship on how lies undermine culture of trust, see SEANA VALENTINE SHRIFFIN, *SPEECH MATTERS: ON LYING, MORALITY, AND THE LAW* (2014).

114. Verstraete & Bambauer, *supra* note 113, at 144 (“Trust in data and statistics is a precondition to being able to resolve disputes about the world—they allow participants in policy debates to operate at least from a shared reality.”).

to a point where the simple introduction of empirical evidence can alienate those who have come to view statistics as elitist.¹¹⁵ Deep fakes will allow individuals to live in their own subjective realities, where beliefs can be supported by manufactured “facts.” When basic empirical insights provoke heated contestation, democratic discourse has difficulty proceeding. In a marketplace of ideas flooded with deep-fake videos and audio, truthful facts will have difficulty emerging from the scrum.

b. Manipulation of Elections

In addition to the ability of deep fakes to inject visual and audio falsehoods into policy debates, a deeply convincing variation of a long-standing problem in politics, deep fakes can enable a particularly disturbing form of sabotage: distribution of a damaging, but false, video or audio about a political candidate. The potential to sway the outcome of an election is real, particularly if the attacker is able to time the distribution such that there will be enough window for the fake to circulate but not enough window for the victim to debunk it effectively (assuming it can be debunked at all). In this respect, the election scenario is akin to the NBA draft scenario described earlier. Both involve decisional chokepoints: narrow windows of time during which irrevocable decisions are made, and during which the circulation of false information therefore may have irremediable effects.

The 2017 election in France illustrates the perils. In this variant of the operation executed against the Clinton campaign in the United States in 2016, the Russians mounted a covert-action program that blended cyber-espionage and information manipulation in an effort to prevent the election of Emmanuel Macron as President of France in 2017.¹¹⁶ The campaign included theft of large numbers of digital communications and documents, alteration of some of those documents in hopes of making them seem problematic, and dumping a lot of them on the public alongside aggressive spin. The effort ultimately fizzled for many reasons, including: poor tradecraft that made it easy to trace the attack; smart defensive work by the Macron team, which planted their own false documents throughout their own system to create a smokescreen of distrust; a lack of sufficiently provocative material despite an effort by the Russians to engineer scandal by altering some of the documents prior to release; and mismanagement of the timing of the document dump, which left enough time for the Macron team and the media to discover and point out all these flaws.¹¹⁷

115. *Id.*

116. See Aurelien Breeden et al., *Macron Campaign Says It Was Target of ‘Massive’ Hacking Attack*, N.Y. TIMES (May 5, 2017), <https://www.nytimes.com/2017/05/05/world/europe/france-macron-hacking.html> [https://perma.cc/4RC8-PV5G].

117. See, e.g., Adam Nossiter et al., *Hackers Came, But the French Were Prepared*, N.Y. TIMES (May 9, 2017), <https://www.nytimes.com/2017/05/09/world/europe/hackers-came-but-the-french-were-prepared.html> [https://perma.cc/P3EW-H5ZY].

It was a bullet dodged, yes, but a bullet nonetheless. The Russians could have acted with greater care, both in terms of timing and tradecraft. They could have produced a more-damning fake document, for example, dropping it just as polls opened. Worse, they could have distributed a deep fake consisting of seemingly-real video or audio evidence persuasively depicting Macron speaking or doing something shocking.

This version of the deep-fake threat is not limited to state-sponsored covert action. States may have a strong incentive to develop and deploy such tools to sway elections, but there will be no shortage of non-state actors and individuals motivated to do the same. The limitation on such interventions has much more to do with means than motive, as things currently stand. The diffusion of the capacity to produce high-quality deep fakes will erode that limitation, empowering an ever-widening circle of participants to inject false-but-compelling information into a ready and willing information-sharing environment. If executed and timed well enough, such interventions are bound to tip an outcome sooner or later—and in a larger set of cases they will at least cast a shadow of illegitimacy over the election process itself.

c. Eroding Trust in Institutions

Deep fakes will erode trust in a wide range of both public and private institutions and such trust will become harder to maintain. The list of public institutions for which this will matter runs the gamut, including elected officials, appointed officials, judges, juries, legislators, staffers, and agencies. One can readily imagine, in the current climate especially, a fake-but-viral video purporting to show FBI special agents discussing ways to abuse their authority to pursue a Trump family member. Conversely, we might see a fraudulent video of ICE officers speaking with racist language about immigrants or acting cruelly towards a detained child. Particularly where strong narratives of distrust already exist, provocative deep fakes will find a primed audience.

Private sector institutions will be just as vulnerable. If an institution has a significant voice or role in society, whether nationally or locally, it is a potential target. More to the point, such institutions already are subject to reputational attacks, but soon will have to face abuse in the form of deep fakes that are harder to debunk and more likely to circulate widely. Religious institutions are an obvious target, as are politically-engaged entities ranging from Planned Parenthood to the NRA.¹¹⁸

118. Recall that the Center for Medical Progress released videos of Planned Parenthood officials that Planned Parenthood argued had been deceptively edited to embarrass the organization. *See, e.g.,* Jackie Calmes, *Planned Parenthood Videos Were Altered, Analysis Finds*, N.Y. TIMES (Aug. 27, 2015), <https://www.nytimes.com/2015/08/28/us/abortion-planned-parenthood-videos.html> [<https://perma.cc/G52X-V8ND>]. Imagine the potential for deep fakes designed for such a purpose.

d. Exacerbating Social Divisions

The institutional examples relate closely to significant cleavages in American society involving identity and policy commitments. Indeed, this is what makes institutions attractive targets for falsehoods. As divisions become entrenched, the likelihood that opponents will believe negative things about the other side—and that some will be willing to spread lies towards that end—grows.¹¹⁹ However, institutions will not be the only ones targeted with deep fakes. We anticipate that deep fakes will reinforce and exacerbate the underlying social divisions that fueled them in the first place.

Some have argued that this was the actual—or at least the original—goal of the Russian covert action program involving intervention in American politics in 2016. The Russians may have intended to enhance American social divisions as a general proposition, rendering us less capable of forming consensus on important policy questions and thus more distracted by internal squabbles.¹²⁰ Texas is illustrative.¹²¹ Russia promoted conspiracy theories about federal military power during the innocuous, “Jade Helm” training exercises.¹²² Russian operators organized an event in Houston to protest radical Islam and a counter-protest of that event;¹²³ they also promoted a Texas independence movement.¹²⁴ Deep fakes will strengthen the hand of those who seek to divide us in this way.

Deep fakes will not merely add fuel to the fire sustaining divisions. In some instances, the emotional punch of a fake video or audio might accomplish a degree of mobilization-to-action that written words alone could not.¹²⁵ Consider

119. See Brian E. Weeks, *Emotions, Partisanship, and Misperceptions: How Anger and Anxiety Moderate the Effect of Partisan Bias on Susceptibility to Political Misinformation*, 65 J. COMM. 699, 711–15 (2015) (discussing how political actors can spread political misinformation by recognizing and exploiting common human emotional states).

120. JON WHITE, DISMISS, DISTORT, DISTRACT, AND DISMAY: CONTINUITY AND CHANGE IN RUSSIAN DISINFORMATION (Inst. for European Studies ed. 2016), <https://www.ies.be/node/3689> [<https://perma.cc/P889-768J>].

121. The CalExit campaign is another illustration of Russian disinformation campaign. ‘*Russian Trolls’ Promoted California Independence*, BBC (Nov. 4, 2017), <http://www.bbc.com/news/blogs-trending-41853131> [<https://perma.cc/68Q8-KNDG>].

122. Cassandra Pollock & Alex Samuels, *Hysteria Over Jade Helm Exercise in Texas Was Fueled by Russians, Former CIA Director Says*, TEX. TRIB. (May 3, 2018), <https://www.texastribune.org/2018/05/03/hysteria-over-jade-helm-exercise-texas-was-fueled-russians-former-cia> [<https://perma.cc/BU2Y-E7EY>].

123. Scott Shane, *How Unwitting Americans Encountered Russian Operatives Online*, N.Y. TIMES (Feb. 18, 2018), <https://www.nytimes.com/2018/02/18/us/politics/russian-operatives-facebook-twitter.html> [<https://perma.cc/4C8Y-STP7>].

124. Casey Michel, *How the Russians Pretended to Be Texans—And Texans Believed Them*, WASH. POST (Oct. 17, 2017), https://www.washingtonpost.com/news/democracy-post/wp/2017/10/17/how-the-russians-pretended-to-be-texans-and-texans-believed-them/?noredirect=on&utm_term=.4730a395a684 [<https://perma.cc/3Q7V-8YZK>].

125. The “Pizzagate” conspiracy theory is a perfect example. There, an individual stormed a D.C. restaurant with a gun because online stories falsely claimed that Presidential candidate Hillary Clinton ran a child sex exploitation ring out of its basement. See Marc Fisher et al., *Pizzagate: From Rumor, to Hashtag, to Gunfire in D.C.*, WASH. POST (Dec. 6, 2016),

a situation of fraught, race-related tensions involving a police force and a local community. A sufficiently inflammatory deep fake depicting a police officer using racial slurs, shooting an unarmed person, or both could set off substantial civil unrest, riots, or worse. Of course, the same deep fake might be done in reverse, falsely depicting a community leader calling for violence against the police. Such events would impose intangible costs by sharpening societal divisions, as well as tangible costs for those tricked into certain actions and those suffering from those actions.

e. Undermining Public Safety

The foregoing example illustrates how a deep fake might be used to enhance social divisions and to spark actions—even violence—that fray our social fabric. But note, too, how deep fakes can undermine public safety.

A century ago, Justice Oliver Wendell Holmes warned of the danger of falsely shouting fire in a crowded theater.¹²⁶ Now, false cries in the form of deep fakes go viral, fueled by the persuasive power of hyper-realistic evidence in conjunction with the distribution powers of social media.¹²⁷ The panic and damage Holmes imagined may be modest in comparison to the potential unrest and destruction created by a well-timed deep fake.¹²⁸

In the best-case scenario, real public panic might simply entail economic harms and hassles. In the worst-case scenario, it might involve property destruction, personal injuries, and/or death. Deep fakes increase the chances that someone can induce a public panic.

They might not even need to capitalize on social divisions to do so. In early 2018, we saw a glimpse of how a panic might be caused through ordinary human error when an employee of Hawaii's Emergency Management Agency issued a

https://www.washingtonpost.com/local/pizzagate-from-rumor-to-hashtag-to-gunfire-in-dc/2016/12/06/4c7def50-bbd4-11e6-94ac-3d324840106c_story.html [<https://perma.cc/FV7W-PC9W>].

126. *Schenck v. United States*, 249 U.S. 47, 52 (1919) (Holmes, J.) (“The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic.”).

127. Cass R. Sunstein, *Constitutional Caution*, 1996 U. CHI. LEGAL F. 361, 365 (1996) (“It may well be that the easy transmission of such material to millions of people will justify deference to reasonable legislative judgments.”).

128. In our keynote at the University of Maryland Law Review symposium inspired by this article, we brought the issue close to home (for one of us) in Baltimore—the death of Freddie Gray while he was in police custody. We asked the audience: “Imagine if a deep-fake video appeared of the police officers responsible for Mr. Gray’s death in which they said they were ordered to kill Mr. Gray. As most readers know, the day after Mr. Gray’s death was characterized by protests and civil unrest. If such a deep-fake video had appeared and gone viral, we might have seen far more violence and disruption in Baltimore. If the timing was just right and the video sufficiently inflammatory, we might have seen greater destruction of property and possibly of lives.” Robert Chesney & Danielle Keats Citron, *21st Century Style Truth Decay: Deep Fakes and the Challenge for Privacy, Free Expression, and National Security*, 78 MD. L. REV. 887 (2019); see also Maryland Carey Law, *Truth Decay— Maryland Law Review Keynote Symposium Address*, YOUTUBE (Feb. 6, 2019), <https://www.youtube.com/watch?v=WrYIKHiWv2c> [<https://perma.cc/T28M-ZBBN>].

warning to the public about an incoming ballistic missile.¹²⁹ Less widely noted, we saw purposeful attempts to induce panic when the Russian Internet Research Agency mounted a sophisticated and well-resourced campaign to create the appearance of a chemical disaster in Louisiana and an Ebola outbreak in Atlanta.¹³⁰ There was real but limited harm in both of these cases, though the stories did not spread far because they lacked evidence and the facts were easy to check.

We will not always be so lucky as malicious attempts to spread panic grow. Deep fakes will prove especially useful for such disinformation campaigns, enhancing their credibility. Imagine if the Atlanta Ebola story had been backed by compelling fake audio appearing to capture a phone conversation with the head of the Centers for Disease Control and Prevention describing terrifying facts and calling for a cover-up to keep the public calm.

f. Undermining Diplomacy

Deep fakes will also disrupt diplomatic relations and roil international affairs, especially where the fake is circulated publicly and galvanizes public opinion. The recent Saudi-Qatari crisis might have been fueled by a hack that injected fake stories with fake quotes by Qatar's emir into a Qatari news site.¹³¹ The manipulator behind the lie could then further support the fraud with convincing video and audio clips purportedly gathered by and leaked from some unnamed intelligence agency.

A deep fake put into the hands of a state's intelligence apparatus may or may not prompt a rash action. After all, the intelligence agencies of the most capable governments are in a good position to make smart decisions about what weight to give potential fakes. But not every state has such capable institutions, and, in any event, the real utility of a deep fake for purposes of sparking an international incident lies in inciting the public in one or more states to believe that something shocking really did occur or was said. Deep fakes thus might best be used to box in a government through inflammation of relevant public opinion, constraining the government's options, and perhaps forcing its hand in some particular way. Recalling the concept of decisional chokepoints, for example, a well-timed deep fake calculated to inflame public opinion might be circulated during a summit meeting, making it politically untenable for one side to press its

129. Cecilia Kang, *Hawaii Missile Alert Wasn't Accidental, Officials Say, Blaming Worker*, N.Y. TIMES (Jan. 30, 2018), <https://www.nytimes.com/2018/01/30/technology/fcc-hawaii-missile-alert.html> [<https://perma.cc/4M39-C492>].

130. Adrian Chen, *The Agency*, N.Y. TIMES MAG. (June 2, 2015), <https://www.nytimes.com/2015/06/07/magazine/the-agency.html> [<https://perma.cc/DML3-6MWT>].

131. Krishnadev Calamur, *Did Russian Hackers Target Qatar?*, ATLANTIC (June 6, 2017), <https://www.theatlantic.com/news/archive/2017/06/qatar-russian-hacker-fake-news/529359> [<https://perma.cc/4QAW-TLY8>] (discussing how Russian hackers may have planted a fake news story on a Qatari news site that falsely suggested that the Qatari Emir had praised Iran and expressed interest in peace with Israel).

agenda as it otherwise would have, or making it too costly to reach and announce some particular agreement.

g. Jeopardizing National Security

The use of deep fakes to endanger public safety or disrupt international relations can also be viewed as harming national security. But what else belongs under that heading?

Military activity—especially combat operations—belongs under this heading as well, and there is considerable utility for deep fakes in that setting. Most obviously, deep fakes have utility as a form of disinformation supporting strategic, operational, or even tactical deception. This is a familiar aspect of warfare, famously illustrated by the efforts of the Allies in Operation Bodyguard to mislead the Axis regarding the location of what became the D-Day invasion of June 1944.¹³² In that sense, deep fakes will be (or already are) merely another instrument in the toolkit for wartime deception, one that combatants will both use and have used against them.

Critically, deep fakes may prove to have special impact when it comes to the battle for hearts and minds where a military force is occupying or at least operating amidst a civilian population, as was the case for the U.S. military for many years in Iraq and even now in Afghanistan. In that context, we have long seen contending claims about civilian casualties—including, at times, the use of falsified evidence to that effect. Deep fakes are certain to be used to make such claims more credible. At times, this will merely have a general impact in the larger battle of narratives. Nevertheless, such general impacts can matter a great deal in the long term and can spur enemy recruitment or enhance civilian support to the enemy. And, at times, it will spark specific violent reactions. One can imagine circulation of a deep-fake video purporting to depict American soldiers killing local civilians and seeming to say disparaging things about Islam in the process, precipitating an attack by civilians or even a host-state soldier or police officer against nearby U.S. persons.

Deep fakes pose similar problems for the activities of intelligence agencies. The experience of the United States since the Snowden leaks in 2013 demonstrates that the public, both in the United States and abroad, can become very alarmed about reports that the U.S. Intelligence Community has a particular capability, and this can translate into significant pressure to limit or abolish that capability both from an internal U.S. perspective and in terms of diplomatic relations. Whether those pressures resulted in changes that went too far in the case of the Snowden revelations is not our concern here. Our point is that this dynamic could be exploited if one wished to create distractions for an

132. Jamie Rubin, *Deception: the Other 'D' in D-Day*, NBC NEWS: THE ABRAMS REPORT (June 5, 2004), http://www.nbcnews.com/id/5139053/ns/msnbc-the_abrams_report/t/deception-other-d-d-day/#.WvQt5NMvYt8 [<https://perma.cc/35HX-N7LN>].

intelligence agency or generate conditions that would lead a society to limit what that agency is authorized to do. None of that would be easily done, but deep fakes make the prospect of a strategic operation to bedevil a competing state's intelligence services more plausible.¹³³

The list of potential national security harms associated with deep fakes can go on, depending on one's definition of national security. In a recent report, the Belfer Center highlighted the national security implications of sophisticated forgeries.¹³⁴ An adversary could acquire real and sensitive documents through cyber-espionage and release the real documents along with forgeries. Deep-fake video and audio could be "leaked" to verify the forgeries. Foreign policy could be changed in response to convincing deep fakes and forgeries.¹³⁵

h. Undermining Journalism

As the capacity to produce deep fakes spreads, journalists increasingly will encounter a dilemma: when someone provides video or audio evidence of a newsworthy event, can its authenticity be trusted? That is not a novel question, but it will be harder to answer as deep fakes proliferate. News organizations may be chilled from rapidly reporting real, disturbing events for fear that the evidence of them will turn out to be fake.¹³⁶

It is not just a matter of honest mistakes becoming more frequent: one can expect instances in which someone tries to trap a news organization using deep fakes. We already have seen many examples of "stings" pursued without the benefit of deep-fake technology.¹³⁷ Convincing deep fakes will make such stings more likely to succeed. Media entities may grow less willing to take risks in that

133. In this context, it is interesting to note the success of the Shadow Brokers operation, which appears to have been a Russian effort not just to steal capabilities from NSA but to embarrass the NSA through a series of taunting public releases of those capabilities. There was also some degree of accompanying spin suggesting an interest in sowing doubt both in the U.S. and abroad about the wisdom of allowing the NSA to develop, keep, and use such capabilities in the first place. *See* Scott Shane, et al., *Security Breach and Spilled Secrets Have Shaken the N.S.A. to Its Core*, N.Y. TIMES (Nov. 12, 2017), <https://www.nytimes.com/2017/11/12/us/nsa-shadow-brokers.html> [<https://perma.cc/WF6U-D4SV>].

134. GREG ALLEN & TANIEL CHAN, HARV. KENNEDY SCH. BELFER CTR. FOR SCI. AND INT'L AFF., *ARTIFICIAL INTELLIGENCE AND NATIONAL SECURITY* (July 2017), <https://www.belfercenter.org/sites/default/files/files/publication/AI%20NatSec%20-%20final.pdf> [<https://perma.cc/P4H5-QLVC>].

135. *Id.* at 34.

136. Daniel Funke, *U.S. Newsrooms are 'Largely Unprepared' to Address Misinformation Online*, POYNTER (Nov. 14, 2017), <https://www.poynter.org/news/us-newsrooms-are-largely-unprepared-address-misinformation-online> [<https://perma.cc/XUF4-8LLM>].

137. *See, e.g.*, Shawn Boburg, et al., *A Woman Approached the Post With Dramatic—and False—Tale About Roy Moore. She Appears to Be Part of Undercover Sting Operation*, WASH. POST (Nov. 27, 2017), https://www.washingtonpost.com/investigations/a-woman-approached-the-post-with-dramatic--and-false--tale-about-roy-moore-she-appears-to-be-part-of-undercover-sting-operation/2017/11/27/0c2e335a-cfb6-11e7-9d3a-bcbe2af58c3a_story.html?utm_term=.6a4e98a07c2c [<https://perma.cc/3TKD-27BP>] (discussing an attempt to trick the Washington Post into running a false story about a woman claiming to have had sex as a teenager with and become pregnant by then-U.S. Senate candidate Roy Moore).

environment, or at least less willing to do so in timely fashion. Without a quick and reliable way to authenticate video and audio, the press may find it difficult to fulfill its ethical and moral obligation to spread truth.

i. The Liar's Dividend: Beware the Cry of Deep-Fake News

We conclude our survey of the harms associated with deep fakes by flagging another possibility, one different in kind from those noted above. In each of the preceding examples, the harm stems directly from the use of a deep fake to convince people that fictional things really occurred. But not all lies involve affirmative claims that something occurred (that never did): some of the most dangerous lies take the form of denials.

Deep fakes will make it easier for liars to deny the truth in distinct ways. A person accused of having said or done something might create doubt about the accusation by using altered video or audio evidence that appears to contradict the claim. This would be a high-risk strategy, though less so in situations where the media is not involved and where no one else seems likely to have the technical capacity to expose the fraud. In situations of resource-inequality, we may see deep fakes used to escape accountability for the truth.

Deep fakes will prove useful in escaping the truth in another equally pernicious way. Ironically, liars aiming to dodge responsibility for their real words and actions will become more credible as the public becomes more educated about the threats posed by deep fakes. Imagine a situation in which an accusation is supported by genuine video or audio evidence. As the public becomes more aware of the idea that video and audio can be convincingly faked, some will try to escape accountability for their actions by denouncing authentic video and audio as deep fakes. Put simply: a skeptical public will be primed to doubt the authenticity of real audio and video evidence. This skepticism can be invoked just as well against authentic as against adulterated content.

Hence what we call the liar's dividend: this dividend flows, perversely, in proportion to success in educating the public about the dangers of deep fakes. The liar's dividend would run with the grain of larger trends involving truth skepticism. Most notably, recent years have seen mounting distrust of traditional sources of news. That distrust has been stoked relentlessly by President Trump and like-minded sources in television and radio; the mantra "fake news" has become an instantly recognized shorthand for a host of propositions about the supposed corruption and bias of a wide array of journalists, and a useful substitute for argument when confronted with damaging factual assertions. Whether one labels this collection of attitudes postmodernist or nihilist,¹³⁸ the

138. For a useful summary of that debate, see Thomas B. Edsall, *Is President Trump a Stealth Postmodernist or Just a Liar?*, N.Y. TIMES (Jan. 25, 2018), <https://www.nytimes.com/2018/01/25/opinion/trump-postmodernism-lies.html> [<https://perma.cc/DN7F-AEPA>].

fact remains that it has made substantial inroads into public opinion in recent years.

Against that backdrop, it is not difficult to see how “fake news” will extend to “deep-fake news” in the future. As deep fakes become widespread, the public may have difficulty believing what their eyes or ears are telling them—even when the information is real. In turn, the spread of deep fakes threatens to erode the trust necessary for democracy to function effectively.¹³⁹

The combination of *truth* decay and *trust* decay accordingly creates greater space for authoritarianism. Authoritarian regimes and leaders with authoritarian tendencies benefit when objective truths lose their power.¹⁴⁰ If the public loses faith in what they hear and see and truth becomes a matter of opinion, then power flows to those whose opinions are most prominent—empowering authorities along the way.¹⁴¹

Cognitive bias will reinforce these unhealthy dynamics. As Part II explored, people tend to believe facts that accord with our preexisting beliefs.¹⁴² As research shows, people often ignore information that contradicts their beliefs and interpret ambiguous evidence as consistent with their beliefs.¹⁴³ People are also inclined to accept information that pleases them when given the choice.¹⁴⁴ Growing appreciation that deep fakes exist may provide a convenient excuse for motivated reasoners to embrace these dynamics, even when confronted with information that is in fact true.

III.

WHAT CAN BE DONE? EVALUATING TECHNICAL, LEGAL, AND MARKET RESPONSES

What can be done to ameliorate these harms? Part III reviews various possibilities. To start, we explore the prospects for technological solutions that would facilitate the detection and debunking of deep fakes. We then describe

139. The Edelman Trust Barometer, which measures trust in institutions around the world, recorded a drop of nine points in the Trust Index for the United States from 2017 to 2018. Even among the informed public, the US dropped from a Trust Index of 68 to 45. 2018 EDELMAN TRUST BAROMETER GLOBAL REPORT 7 (2018), https://www.edelman.com/sites/g/files/aatuss191/files/2018-10/2018_Edelman_Trust_Barometer_Global_Report_FEB.pdf [<https://perma.cc/Z26M-GQ2A>].

140. MILES BRUNDAGE ET AL., THE MALICIOUS USE OF ARTIFICIAL INTELLIGENCE: FORECASTING, PREVENTION, AND MITIGATION 46 (2018) https://www.eff.org/files/2018/02/20/malicious_ai_report_final.pdf [<https://perma.cc/K2KT-XVZQ>].

141. *Id.*

142. *See generally* Michela Del Vicario et al., *Modeling Confirmation Bias and Polarization*, 7 SCIENTIFIC REPORTS no. 40, 391 (2017) (assessing models that describe polarization effects relating to cognitive biases).

143. *See generally* Constanza Villarroel et al., *Arguing Against Confirmation Bias: The Effect of Argumentative Discourse Goals on the Use of Disconfirming Evidence in Written Argument*, 79 INT'L J. EDUC. RES. 167 (2016) (demonstrating impact of biases on belief formation).

144. *See generally* Shanto Iyengar et al., *Selective Exposure to Campaign Communication: The Role of Anticipated Agreement and Issue Public Membership*, 70 J. POL. 186 (2008) (examining impact of bias models in the context of political campaign information).

current and potential proposals for criminal and civil liability. With law in mind, we discuss the role of regulators and identify ways in which the government might respond to deep fakes. In the shadow of these possibilities, we anticipate new services the market might spawn to protect individuals from harm associated with deep fakes—and the considerable threat to privacy such services themselves might entail.

A. *Technological Solutions*

Technology has given us deep fakes – but might it also provide us with a capacity for debunking them and limiting their harmful potential? An efficient and generally effective method for rapid detection of deep fakes would go far toward resolving this topic as a matter of pressing public-policy concern. Unfortunately, the challenges are daunting. For example, detection software would have to keep pace with innovations in deep-fake technology to retain efficacy. Moreover, if such technology existed and could be deployed through social media platforms, it would only reduce the systemic harms described above, but by no means eliminate them. Such developments might not protect individuals from deep fakes involving narrow or even isolated distribution.¹⁴⁵ Further, detection software might not disabuse certain people’s faith in deep fakes, especially those under the profound sway of cognitive bias. At the least though, the impact of harmful deep fakes might be cabined while beneficial uses could continue unabated.

At any rate, it is far from clear that such technology will emerge in the near future. There are a number of projects—academic and corporate—aimed at creating counterfeit-proof systems for authenticating content or otherwise making it easier to confirm credible provenance.¹⁴⁶ Such systems, however, are tailored to particular products rather than video or audio technologies generally. They will therefore have only limited use until one program becomes ubiquitous and effective enough for dominant platforms to incorporate them into their content-screening systems—and, indeed, to make use of them mandatory for posting. Additionally, these systems will have to withstand users’ efforts to bypass them.

For now, we are left to seek a generally applicable technology that can detect manipulated content without an expectation that the content comes with

145. GIF hosting company Gyfcat has developed and trained AI to spot fraudulent videos. Project Maru, as they call it, can spot deep-fake videos because in many frames, the faces aren’t perfectly rendered. They have also developed Project Angora, which “mask[s]” the face of a possible deep fake and searches the Internet to see if the body and background footage exist elsewhere. See Louise Matsakis, *Artificial Intelligence is Now Fighting Fake Porn*, WIRED (Feb. 14, 2018) <https://www.wired.com/story/gfyfcat-artificial-intelligence-deepfakes> [<https://perma.cc/PX4N-VZJY>].

146. For examples of provenance technologies in development, see Dia Kayyali, *Set Your Phone to ProofMode*, WITNESS, <https://blog.witness.org/2017/04/proofmode-helping-prove-human-rights-abuses-world> [<https://perma.cc/GB6M-KQPF>] (describing the concept of a metadata-rich “ProofMode” app for Android devices).

an internal certification. Professor Hany Farid, the pioneer of PhotoDNA, a technology that identifies and blocks child pornography, warns: “We’re decades away from having forensic technology that . . . [could] conclusively tell a real from a fake . . . If you really want to fool the system you will start building into the deepfake ways to break the forensic system.”¹⁴⁷ The defense, in short, is currently faring poorly in the deep-fake technology arms race.

As problems associated with deep fakes begin to accumulate, we might expect developments that could alter the current balance of power between technologies that create deep fakes and those that detect them. For example, growing awareness of the problem might produce the conditions needed for grantmaking agencies like the National Science Foundation and the Defense Advanced Research Projects Agency (DARPA) to begin steering funds toward scalable detection systems that can be commercialized or even provided freely. DARPA has an initial project in the form of a contest pitting GAN methods for generating deep fakes against would-be detection algorithms. The DARPA project manager is skeptical about the prospects for detection, however, given current technical capacities.¹⁴⁸

Emerging market forces might encourage companies to invest in such capabilities on their own or in collaboration with each other and with academics (a possibility that we revisit below). For now, however, it would be foolish to trust that technology will deliver a debunking solution that is scalable and reliable enough to minimize the harms deep fakes might cause.

B. Legal Solutions

If technology alone will not save us, might the law? Would a combination of criminal and civil liability meaningfully deter and redress the harms that deep fakes seem poised to cause? We examine the possibilities under existing and potential law.

1. Problems with an Outright Ban

No current criminal law or civil liability regime bans the creation or distribution of deep fakes. A threshold question is whether such a law would be normatively appealing and, if so, constitutionally permissible.

A flat ban is not desirable because digital manipulation is not inherently problematic. Deep fakes exact significant harm in certain contexts but not in all. A prohibition of deep fakes would bar routine modifications that improve the

147. See Matsakis, *supra* note 145 (quoting Prof. Hany Farid in reference to “fake porn”).

148. See Will Knight, *The U.S. Military Is Funding an Effort to Catch Deepfakes and Other AI Trickery*, MIT TECH. REV. (May 23, 2018), <https://www.technologyreview.com/s/611146/the-us-military-is-funding-an-effort-to-catch-deepfakes-and-other-ai-trickery> [https://perma.cc/7RD7-5CMJ] (“‘Theoretically, if you gave a GAN all the techniques we know to detect it, it could pass all of those techniques,’ says David Gunning, the DARPA program manager in charge of the project. ‘We don’t know if there’s a limit. It’s unclear.’”).

clarity of digital content. It would chill experimentation in diverse fields, from history and science to art and education.

Crafting a law prohibiting destructive applications of deep-fake technology while excluding beneficial ones would be difficult, but perhaps not impossible. For example, what if a law required proof of a deep-fake creator's intent to deceive and evidence of serious harm as a way to reduce concerns about chilling public discourse? Under such a proposal, concerns over speech still remain. The very existence of a general prohibition of deep fakes, even with those guardrails, would cast a significant shadow, potentially diminishing expression crucial to self-governance and democratic culture. The American free speech tradition warns against government having the power to pick winners and losers in the realm of ideas because it will "tend to act on behalf of the ideological powers that be."¹⁴⁹ As James Weinstein notes, we should be especially wary of entrusting government officials with the power to determine the veracity of factual claims "made in the often highly ideological context of public discourse"¹⁵⁰ A deep-fakes ban would raise the specter of penalties for parodies of would-be or current office holders.

Although self-serving prosecutions are not inevitable, they are a real possibility.¹⁵¹ Dislike of minority or unpopular viewpoints, combined with ambiguity surrounding a deep-fake creator's intent, might result in politicized enforcement.¹⁵² This might inhibit engagement in political discourse

149. Frank I. Michelman, *Conceptions of Democracy in American Constitutional Argument: The Case of Pornography Regulation*, 56 TENN. L. REV. 291, 302 (1989); see also *Thomas v. Collins*, 323 U.S. 516, 545 (1945) (Jackson, J., concurring) ("[T]he forefathers did not trust any government to separate the true from the false for us."). Justice Oliver Wendell Holmes cautioned against the human inclination to silence opinions that we dislike. See *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("[W]e should be eternally vigilant against attempts to check the expression of opinions that we loathe"). "Persecution for the expression of opinions[.]" he wrote, is "perfectly logical . . . [i]f you have no doubt of your premises or your power and want a certain result with all your heart" *Id.* Holmes offered against this certainty, and power's tendency to sweep away disagreement, a principle of epistemic doubt that is a defining hallmark of First Amendment law. See *id.*

150. James Weinstein, *Climate Change Disinformation, Citizens Competence, and the First Amendment*, 89 U. COLO. L. REV. 341, 351 (2018).

151. Indeed, public officials recently have called for a rethinking of libel laws. Alex Pappas, *Trump: 'Our Current Libel Laws Are a Sham'*, FOX NEWS (Jan. 10, 2018), <https://www.foxnews.com/politics/trump-our-current-libel-laws-are-a-sham> [<https://perma.cc/AHM4-UN6G>]; Gregg Re, *Clarence Thomas Backs Trump's Call for Changing Defamation Law for Easing Suits Against the Media*, FOX NEWS (Feb. 19, 2019), <https://www.foxnews.com/politics/clarence-thomas-calls-for-easing-defamation-suits-by-politicians-like-trump> [<https://perma.cc/RN42-DFCK>]. Although this suggestion may seem untenable given the U.S. commitment to robust and wide-open debate on public issues, it animates concerns about partisan enforcement.

152. Weinstein, *supra* note 150, at 351 ("There is even greater reason to distrust the ability of government officials to fairly and accurately determine the speaker's state of mind in making allegedly false statement."). James Weinstein explains that "government officials hostile to the speaker's point of view are more likely to believe that the speaker knew that the statement was false, while officials who share the speaker's ideological perspective will be more likely to find that any misstatement of fact was an innocent one." *Id.*

specifically, and in democratic culture more generally.¹⁵³ The “risk of censorious selectivity by prosecutors” [will] . . . distort perspectives made available” to the public.¹⁵⁴ It is far better to forego an outright ban of deep fakes than to run the risk of its abuse.

Even if these normative concerns could be overcome, it is unlikely that a flat ban on deep fakes could withstand constitutional challenge. Deep fakes implicate freedom of expression, even though they involve intentionally false statements.¹⁵⁵ In the landmark 1964 decision *New York Times v. Sullivan*,¹⁵⁶ the Supreme Court held that false speech enjoys constitutional protection insofar as its prohibition would chill truthful speech.¹⁵⁷

In 2012, in *United States v. Alvarez*,¹⁵⁸ the Court went even further. In the plurality and concurring opinions, the Court concluded that “falsity alone” does not remove expression from First Amendment protection.¹⁵⁹ As Justice Kennedy’s plurality noted, falsehoods generally warrant protection because they inspire rebuttal and “reawaken respect” for valuable ideas in public discourse.¹⁶⁰ Central to this point is faith in the public’s willingness to counter lies and engage in reasoned discourse.

While all nine Justices agreed that the harmful effect of false factual statements could be regulated, they differed in the particulars.¹⁶¹ The plurality opinion took the position that false statements can be proscribed if the speakers intended to cause “legally cognizable harm” of a kind traditionally understood as falling outside the First Amendment’s protection.¹⁶² The concurrence posited that a law aimed at regulating harm-causing falsehoods may be permissible if it

153. For Jack Balkin’s influential theory of free speech grounded in participation in democratic culture, see, for example, Jack M. Balkin, *Cultural Democracy and the First Amendment*, 110 NW. U. L. REV. 1053, 1072 (2016) (arguing that key to free society is ability to engage in meaning making and creation of culture).

154. Weinstein, *supra* note 150, at 360 (quoting *United States v. Alvarez*, 567 U.S. 709, 736 (2012) (Breyer, J., concurring)).

155. See generally Lewis Sargentich, Note, *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844, 845 (1970) (describing a judicial presumption against statutes that curtail a broad array of expressive activity).

156. *N.Y. Times v. Sullivan*, 376 U.S. 254 (1964).

157. *Id.* at 264.

158. *Alvarez*, 567 U.S. 709 (plurality opinion).

159. *Id.* at 719. For a superb discussion of the constitutional significance of lies in the aftermath of *Alvarez*, see Alan K. Chen & Justin Marceau, *High Value Lies, Ugly Truths, and the First Amendment*, 68 VAND. L. REV. 1435, 1440–54 (2015). See generally Geoffrey R. Stone, *Kenneth Karst’s Equality as the Central Principle in the First Amendment*, 75 U. CHI. L. REV. 37, 43 (2008) (discussing a “two-level” theory of the First Amendment: one that treats high value speech with stringent protections, and a second tier of speech that falls outside the First Amendment’s coverage).

160. *Alvarez*, 567 U.S. at 719, 722 (“Indeed, the outrage and contempt expressed for respondent’s lies can serve to reawaken and reinforce the public’s respect for the Medal, its recipients, and its high purpose.”).

161. *Id.* at 719 (plurality opinion); *id.* at 731–34 (Breyer, J., concurring); *id.* at 750 (Alito, J. dissenting).

162. *Id.* at 719, 725 (plurality opinion).

does not disproportionately damage First Amendment interests.¹⁶³ The dissent would have denied First Amendment protection to false factual statements that inflict harm and serve no legitimate purpose.¹⁶⁴ The court reached consensus that regulation of false statements involving history, politics, literature, and other matters of public concern requires strict scrutiny review.¹⁶⁵

The opinions in *Alvarez*, taken together, would seem to preclude a sweeping ban on deep fakes while leaving considerable room for carefully tailored prohibitions of certain harmful deep fakes. As the plurality underscored in *Alvarez*, certain categories of speech are not covered by the First Amendment due to their propensity to bring about serious harms and their slight contribution to free speech values.¹⁶⁶ Some deep fakes will fall into those categories and thus could be subject to regulation. This includes defamation of private persons, fraud, true threats, and the imminent-and-likely incitement of violence.¹⁶⁷ Speech integral to criminal conduct like extortion, blackmail, and perjury has long been understood to enjoy no First Amendment protection.¹⁶⁸

Consider as an illustration laws banning the impersonation of government officials (such as law enforcement officers or agency officials). As Helen Norton insightfully explains, these statutes are “largely uncontroversial as a First Amendment matter in great part because they address real (if often intangible) harm to the public as well as to the individual target.”¹⁶⁹ Lies about the source of speech—whether a public official is actually speaking—do not serve free speech values.¹⁷⁰ Quite the opposite, they deny listeners the ability to assess the quality and credibility of the speech, undermining democratic self-governance and the search for truth.¹⁷¹ From a normative perspective, therefore, a surgical approach

163. *Id.* at 737 (Breyer, J. concurring).

164. *Id.* at 750 (Alito, J. dissenting).

165. *Id.* at 722 (Kennedy, J. plurality); *id.* at 734 (Breyer, J. concurring); *id.* at 751 (Alito, J., dissenting). For an insightful exploration of *Alvarez* and its implications for the regulation of deep fakes, see Marc Jonathan Blitz, *Lies, Line Drawing, and (Deep) Fake News*, 71 OKLA. L. REV. 59, 110 (2018) (arguing that government should have greater power to regulate forgeries than the malicious statement of false facts); Marc Jonathan Blitz, *Deep Fakes and Other Non-Testimonial Falsehoods: When Is Belief Manipulation (Not) First Amendment Speech?* (Apr. 18, 2019) (unpublished manuscript) (on file with authors) (arguing that deep fakes may fall outside of First Amendment coverage because they arguably amount to non-testimonial evidence and change perceptions of the world around them, especially where government seeks to require disclosure that something is a deep fake).

166. See generally CITRON, HATE CRIMES IN CYBERSPACE, *supra* note 40, at 199–218 (discussing narrow categories of low-value speech accorded less rigorous protection or no protection under First Amendment analysis).

167. See Chen & Marceau, *supra* note 159, at 1480–91.

168. CITRON, HATE CRIMES IN CYBERSPACE, *supra* note 40, at 203–05 (explaining that crime-facilitating speech does not enjoy First Amendment protection in context of cyber stalking).

169. Helen Norton, *Lies to Manipulate, Misappropriate, and Acquire Government Power*, in LAW AND LIES 143, 170 (Austin Sarat ed., 2015) [hereinafter Norton, *Lies to Manipulate*].

170. *Id.* at 168. We are grateful to both Helen Norton and Marc Blitz who generously spent time talking to us about the doctrinal and theoretical free speech issues raised in regulating deep fakes.

171. Helen Norton, *(At Least) Thirteen Ways of Looking at Election Lies*, 71 OKLA. L. REV. 117, 131 (2018).

to criminal and civil liability may result in a more attractive balance of costs and benefits than a deep-fake ban perspective. And so we turn now to a discussion of specific possibilities, starting with civil liability.

2. *Specific Categories of Civil Liability*

Given that deep fakes cannot and should not be banned on a generalized basis, the question remains whether their creators and distributors in particular contexts should be subject to civil liability for the harms they cause. This section reviews relevant existing laws and possible improvements.

a. *Threshold Obstacles*

Before reviewing the prospects for particular theories of liability, we note two threshold problems.

The first involves attribution. Civil liability cannot ameliorate harms caused by deep fakes if plaintiffs cannot tie them to their creators. The attribution problem arises in the first instance because the metadata relevant for ascertaining a deep fake's provenance might be insufficient to identify the person who generated it. It arises again when the creator or someone else posts a deep fake on social media or otherwise injects it into the marketplace of information. A careful distributor of a deep fake may take pains to be anonymous, including but not limited to using technologies like Tor.¹⁷² When these technologies are employed, the IP addresses connected to posts may be impossible to find and trace back to the responsible parties.¹⁷³ In such cases, a person or entity aggrieved by a deep fake may have no practical recourse against its creator, leaving only the possibility of seeking a remedy from the owner of platforms that enabled circulation of the content.

A second obstacle arises when the creator of the deep fake—or the platform circulating it—is outside the United States and thus beyond the effective reach of US legal process, or in a jurisdiction where local legal action is unlikely to be effective. Therefore, even if attribution is known, it still may be impossible to use civil remedies effectively. While limitations of civil liability exist in many settings, the global nature of online platforms makes it a particular problem in the deep-fake context.

Moreover, regardless of whether perpetrators can be identified or reside in the US, civil suits are expensive. Victims usually bear the heavy costs of bringing civil claims and may be hesitant to initiate lawsuits if deep-fake generators are

172. See CITRON, HATE CRIMES IN CYBERSPACE, *supra* note 40, at 142–43 (arguing that law has difficulty communicating norms, deterring unlawful activity, or redressing injuries if defendants have used anonymizing technologies that make it difficult to identify them).

173. Citron, *Cyber Civil Rights*, *supra* note 46, at 117 (explaining that claims cannot be pressed against cyber stalkers if websites hosting their abuse fails to track IP addresses).

effectively judgment-proof.¹⁷⁴ Worse, the “Streisand Effect” is likely to overhang the decision to sue when the deep fake is embarrassing or reputationally harmful. Lawsuits attract publicity; unless the victim is permitted to sue under a pseudonym, filing a claim may exacerbate the victim’s harm.¹⁷⁵

b. Suing the Creators of Deep Fakes

Threshold attribution and liability hurdles are not always fatal for would-be plaintiffs. When a victim decides to sue the creator of a deep fake, several bodies of law come into play, including intellectual property and tort law.

First, consider copyright law. Some deep fakes exploit copyrighted content, opening the door to monetary damages and a notice-and-takedown procedure that can result in removal of the offending content.¹⁷⁶ A copyright owner is the person who took a photograph. Thus, if a deep fake involves a photo that the victim took of herself, the victim might have a copyright claim against the creator of the deep fake.¹⁷⁷

The prospects for success, however, are uncertain. A court will have to determine whether the deep fake is a “fair use” of the copyrighted material, intended for educational, artistic, or other expressive purposes. Whether the fake is sufficiently transformed from the original to earn fair use protection is a highly fact-specific inquiry for which a judicial track record does not yet exist.¹⁷⁸

Tort law also includes concepts that could be used to address deep-fake scenarios. Most obviously, victims can sue for defamation. Where the alleged defamation concerns private individuals rather than public figures, states may permit plaintiffs to prevail based on a showing that the falsehood was made negligently.¹⁷⁹ Public officials and public figures are subject to a higher requirement of showing clear and convincing evidence of actual malice—knowledge or reckless disregard for the possibility that the deep fakes were

174. See CITRON, HATE CRIMES IN CYBERSPACE, *supra* note 40, at 122 (exploring limits of civil law in redressing injuries resulting from cyber stalking).

175. Mike Masnick coined the phrase “the Streisand Effect” in *Techdirt* in 2005. Mike Masnick, *Since When Is It Illegal to Just Mention a Trademark Online?*, *TECHDIRT* (Jan. 5, 2005), https://www.techdirt.com/articles/20050105/0132239_F.shtml [<https://perma.cc/XR42-G9BX>].

176. See Derek E. Bambauer, *Exposed*, 98 *MINN. L. REV.* 2025, 2065–67 (2014) (discussing the removal of copyright-infringing material).

177. CITRON, HATE CRIMES IN CYBERSPACE, *supra* note 40, at 122 (explaining that someone can sue for copyright of their own image only if they took the photos themselves); see also Megan Farokhmanesh, *Is It Legal to Swap Someone’s Face Into Porn Without Consent?*, *VERGE* (Jan. 30, 2018), <https://www.theverge.com/2018/1/30/16945494/deepfakes-porn-face-swap-legal> [<https://perma.cc/TH4N-YUJV>] (quoting Eric Goldman).

178. Compare David Greene, *We Don’t Need New Laws for Faked Videos, We Already Have Them*, *EFF BLOG* (Feb. 13, 2018), <https://www.eff.org/deeplinks/2018/02/we-dont-need-new-laws-faked-videos-we-already-have-them> [<https://perma.cc/KEG4-73L3>] (noting that copyright claims may address deep fakes subject to fair use objections) with Jesse Lempel, *Combating Deep Fakes Through the Right of Publicity*, *LAWFARE* (Mar. 30, 2018), <https://www.lawfareblog.com/combating-deep-fakes-through-right-publicity> [<https://perma.cc/6TPH-98S9>].

179. See *Gertz v. Welch*, 418 U.S. 323, 343–46 (1974).

false.¹⁸⁰ In addition to defamation, the closely related tort of placing a person in a “false light”—or recklessly creating a harmful and false implication about someone in a public setting—has clear potential for the deep fake context.¹⁸¹

Victims may also sue in tort for intentional infliction of emotional distress. This requires proof of “extreme and outrageous conduct.”¹⁸² Creating and circulating humiliating content like deep-fake sex videos would likely amount to “extreme and outrageous conduct” because it falls outside the norms of decency by most accounts.¹⁸³

Another prospect is the “right of publicity” in tort law, which permits compensation for the misappropriation of someone’s likeness for commercial gain.¹⁸⁴ The commercial-gain element sharply limits the utility of this model: the harms associated with deep fakes do not typically generate direct financial gain for their creators.¹⁸⁵ This is likely true, for example, of deep fakes posted to harm rivals or ex-lovers. Only in core cases, such as a business using deep-fake technology to make it seem a particular person endorsed their product or service, might this approach prove useful in stemming abuse. Further, the expressive value of some deep fakes may constitute a further hurdle to liability; courts often dismiss right of publicity claims concerning newsworthy matters on free-speech grounds.¹⁸⁶

Other privacy-focused torts seem relevant at first blush, yet are a poor fit on close inspection.¹⁸⁷ The “public disclosure of private fact” tort, for example, allows individuals to recover for publication of private, “non-newsworthy” information that would highly offend the reasonable person.¹⁸⁸ While deep fakes may meet the offense standard, using a person’s face in a deep-fake video does not amount to the disclosure of *private* information if the source image was publicly available.¹⁸⁹ The “intrusion-on-seclusion” tort is likewise ill-suited to

180. See RESTATEMENT (SECOND) OF TORTS § 559 (AM. LAW INST. 1969); see also CITRON, HATE CRIMES IN CYBERSPACE, *supra* note 40, at 121, 132–34 (explaining the reach of defamation law in cases involving private individuals and public figures).

181. CITRON, HATE CRIMES IN CYBERSPACE, *supra* note 40, at 121, 132–34.

182. See CITRON, HATE CRIMES IN CYBERSPACE, *supra* note 40, at 133–34, 140–41 (explaining that emotional distress claims are warranted for online abuse that is targeted, cruel, and reliant on sensitive embarrassing information, including nude photos).

183. See Benjamin C. Zipursky, Snyder v. Phelps, *Outrageousness, and the Open Texture of Tort Law*, 60 DEPAUL L. REV. 473 (2011).

184. See generally JENNIFER F. ROTHMAN, RIGHT OF PUBLICITY: PRIVACY REIMAGINED FOR A PUBLIC WORLD (2018) (summarizing the history of the right of publicity tort).

185. See generally Lempel, *supra* note 178 (discussing how right to publicity claims would likely only succeed against misappropriations intended for commercial gain).

186. See generally ROTHMAN, *supra* note 184.

187. See generally Danielle Keats Citron, *Mainstreaming Privacy Torts*, 98 CALIF. L. REV. 1805, 1811–14 (2010) [hereinafter Citron, *Mainstreaming Privacy Torts*] (exploring the limited application of privacy torts to twenty-first century privacy harms).

188. DANIEL J. SOLOVE & PAUL M. SCHWARTZ, PRIVACY LAW FUNDAMENTALS 47 (4th ed. 2017).

189. See *id.* at 42, 49. One of us (Citron) has explored the limits of privacy torts in context of deep-fake sex videos. Citron, *Sexual Privacy*, *supra* note 93, at 1933–35.

the deep-fake scenario. It narrowly applies to defendants who “intruded into a private place, or . . . invaded a private seclusion that the plaintiff has thrown about his person or affairs.”¹⁹⁰ Deep-fakes usually will not involve invasions of spaces (either physical or conceptual like email inboxes) in which individuals have a reasonable expectation of privacy.

Therefore, current options for imposing liability on creators of deep fakes have mixed potential. Civil liability is most robust in relation to defamation, false light, and intentional infliction of emotional distress, with more limited prospects for copyright infringement and right of publicity claims.

c. Suing the Platforms

It will be challenging to achieve individualized accountability for harmful deep fakes, but creators are not the only parties that might bear responsibility. Given the key role that content platforms play in enabling the distribution of deep fakes, and the fact that creators of harmful deep fakes in some cases may be difficult to find and deter, the most efficient and effective way to mitigate harm may be to impose liability on platforms.¹⁹¹ In some contexts, this may be the only realistic possibility for deterrence and redress.

Online platforms already have an incentive to screen content, thanks to the impact of moral suasion, market dynamics, and political pressures.¹⁹² They do not currently face significant civil liability risk for user-generated content, however, for the reasons explained below.

In 1996, Congress provided platforms with a liability shield in the form of Section 230 of the Communications Decency Act (CDA). The law provided an immunity from liability to online platforms for hosting harmful content, albeit with an exception for content that violates federal criminal law, the Electronic Communications Privacy Act, and intellectual property law.¹⁹³

Section 230 protects platforms in important ways. First, consider a situation in which an online platform displays content that links to another source (such as a news article or blog post) or is user-generated (such as a customer review

190. RESTATEMENT (SECOND) OF TORTS § 652B, cmt. c (AM. LAW INST. 1969).

191. See Citron, *Mainstreaming Privacy Torts*, *supra* note 187, at 1839–40.

192. See Citron, *Extremist Speech*, *supra* note 46, at 1047–48; Citron, *Sexual Privacy*, *supra* note 93, at 1955–58 (examining Facebook’s developing strategy to address nonconsensual pornography in response to victims’ concerns brought to the company by advocacy groups such as the Cyber Civil Rights Initiative); Kate Klonick, *The New Governors: The People, Rules, and Processes Governing Online Speech*, 131 HARV. L. REV. 1598, 1616–30 (2018); see also CITRON, HATE CRIMES IN CYBERSPACE, *supra* note 40, at 227–30 (exploring how and why content platforms moderate harmful content); Danielle Keats Citron & Helen Norton, *Intermediaries and Hate Speech: Fostering Digital Citizenship For Our Information Age*, 91 B.U. L. REV. 1435, 1454–59 (2011) (describing varied steps platforms have taken to moderate digital hate, motivated by moral, business, and other instrumental concerns). One of us (Citron) is the Vice President of the Cyber Civil Rights Initiative and has advised social media platforms about concerns of cyber stalking victims for the past ten years, importantly without compensation.

193. 47 U.S.C. § 230(c)(1) (2012). See generally Citron & Wittes, *supra* note 46.

posted on Yelp). Now, imagine that the content is defamatory or otherwise actionable. Can the plaintiff sue the online platform that helped it see the light of day? Not under Section 230. Section 230(c)(1) expressly forbids treating the platform as a “publisher” or “speaker” of someone else’s problematic content. As courts have interpreted Section 230, online platforms enjoy immunity from liability for user-generated content even if they deliberately encouraged the posting of that content.¹⁹⁴

Next, consider a situation in which an online platform decides not to allow users to post whatever they wish, but to instead screen and block certain harmful content. Might the act of filtering become the basis of liability? If so, platforms might be loath to do any screening at all. Section 230(c)(2) was meant to remove the disincentive to self-regulation that liability otherwise might produce.¹⁹⁵ Simply put, it forbids civil suits against platforms based on the good-faith act of filtering to screen out offensive content, whether in the nature of obscenity, harassment, violence, or otherwise.¹⁹⁶

In crafting Section 230, the bill’s sponsors thought they were devising a safe harbor for online service providers that would enable the growth of the then-emerging “Internet.”¹⁹⁷ Representative Chris Cox, for example, became interested after reading about a trial court decision holding Prodigy, an online services company, liable as a publisher of defamatory comments because it tried but failed to filter profanity on its bulletin boards.¹⁹⁸ A key goal of the legislation

194. See Citron & Wittes, *supra* note 46, at 408–09 (laying out judicial decisions interpreting Section 230 that have produced sweeping immunity from liability for user-generated content, including for sites that encourage users to post illegal content and sites that knowingly and deliberately repost illegal content); see also CITRON & JURECIC, PLATFORM JUSTICE, *supra* note 46 (same). In one example, Michael Herrick sued Grindr, a dating app, after the site refused to remove a user who was impersonating him on the app, sharing his nude images, claiming he had rape fantasies, and providing his home address. *Herrick v. Grindr*, 306 F. Supp. 3d 579, 585–86 (S.D.N.Y. 2018). More than 1,000 men came to Herrick’s home demanding sex. *Id.* at 588. Grindr refused to address Herrick’s large number of complaints. *Id.* The district court dismissed the case on Section 230 grounds, which the Second Circuit affirmed in a summary order. *Id.*; *Herrick v. Grindr*, 765 Fed. Appx. 586 (2d Cir. 2019).

195. 47 U.S.C. § 230(c)(2); Citron & Wittes, *supra* note 46, at 406 (explaining that Section 230(c)(2) provides broad protections for good-faith over-screening of content).

196. See 47 U.S.C. § 230(c)(2) (“No provider or user of an interactive computer service shall be held liable on account of . . . any action voluntarily taken in good faith to restrict access to . . . material that the provide or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable . . .”).

197. Danielle Keats Citron, *Section 230’s Challenge to Civil Rights and Civil Liberties*, KNIGHT FIRST AMEND. INST. [hereinafter Citron, *Section 230’s Challenge*], <https://knightcolumbia.org/content/section-230s-challenge-civil-rights-and-civil-liberties> [<https://perma.cc/MHN7-JXZJ>] (describing history of § 230 and recent developments). See generally CITRON, HATE CRIMES IN CYBERSPACE, *supra* note 40, at 170. For an illuminating explanation of the cases that prompted the adoption of Section 230 and its broad interpretation, see generally JEFF KOSSEFF, THE TWENTY-SIX WORDS THAT CREATED THE INTERNET (2019).

198. The firm in question happens to have been the one that is the subject of the film *Wolf of Wall Street*. See Alina Selyukh, *Section 230: A Key Legal Shield for Facebook, Google is About to Change*, NPR MORNING EDITION (Mar. 21, 2018),

was to help “clean up” the Internet by making it easier for willing platforms to filter out offensive material, removing the risk that doing so would incur civil liability by casting them in a publisher’s role.¹⁹⁹

At the time, sponsors Senators James Exon and Slade Gorton sought to combat online pornography and make the “Internet” safe for kids.²⁰⁰ Representatives Cox and Ron Wyden, another sponsor, argued that, if “this amazing new thing—the Internet—[was] going to blossom,” companies should not be “punished for *trying* to keep things clean.”²⁰¹

This intent is clear in the language of Section 230(c)(2), which expressly concerns platforms engaged in “good faith” editorial activity involving the blocking and filtering of offensive user-posted content. The speaker and publisher liability provision of Section 230, however, lacks this narrowing language and has become a foundation for courts to interpret Section 230 immunity broadly.²⁰²

No doubt, Section 230’s immunity provision has been beneficial for digital expression and democratic culture. It has provided breathing room for the development of online services and innumerable opportunities for speech and discourse.²⁰³ Its supporters contend that without immunity, search engines, social networks, and microblogging services might not have emerged.²⁰⁴ We agree; the fear of publisher liability would likely have inhibited the Internet’s early growth.²⁰⁵

However, an overbroad reading of Section 230 has “given online platforms a free pass to ignore illegal activities, to deliberately repost illegal material, and to solicit unlawful activities while ensuring that abusers cannot be identified.”²⁰⁶ The permissive interpretation of Section 230 eliminates “incentives for better

<https://www.npr.org/sections/alltechconsidered/2018/03/21/591622450/section-230-a-key-legal-shield-for-facebook-google-is-about-to-change> [<https://perma.cc/S9K9-GX47>].

199. See Citron & Wittes, *supra* note 46, at 405–06.

200. See S. REP. NO. 104-23, at 59 (1995). Key provisions criminalized the transmission of indecent material to minors.

201. Selyukh, *supra* note 198 (quoting Cox); see CITRON, HATE CRIMES IN CYBERSPACE, *supra* note 40, at 170–72 (describing the original purpose of Section 230’s immunity provision).

202. See Citron, *Cyber Civil Rights*, *supra* note 46, at 121–23; Citron & Wittes, *supra* note 46, at 408–10. In the landmark *Reno v. ACLU* decision, the Supreme Court struck down the CDA’s blanket restrictions on Internet indecency under the First Amendment. See *Reno v. ACLU*, 521 U.S. 844 (1997). Online expression was too important to be limited to what government officials think is fit for children. *Id.* at 875. Section 230’s immunity provision, however, was left intact.

203. Citron & Wittes, *supra* note 46, at 413.

204. CITRON, HATE CRIMES IN CYBERSPACE, *supra* note 40, at 171. For some of the most insightful work on the significance of Section 230’s immunity provision, see the work of Daphne Keller, Jeff Kosseff, and Mike Godwin. See, e.g., MIKE GODWIN, CYBER RIGHTS: DEFENDING FREE SPEECH IN THE DIGITAL AGE 319–54 (2003); KOSSEFF, *supra* note 197; Daphne Keller, *Toward a Clearer Conversation about Platform Liability*, KNIGHT FIRST AMEND. INST., <https://knightcolumbia.org/content/toward-clearer-conversation-about-platform-liability> [<https://perma.cc/YSS5-WHJG>].

205. *Id.*

206. Citron & Wittes, *supra* note 46, at 413.

behavior by those in the best position to minimize harm.”²⁰⁷ The results have been two-fold. On one hand, the law has created an open environment for hosting and distributing user-generated online content. On the other, it has generated an environment in which it is exceptionally hard to hold providers accountable, even in egregious circumstances involving systematic disinformation and falsehoods.²⁰⁸

Courts have extended the immunity provision to a remarkable array of scenarios. They include instances where a provider republished content knowing it violated the law;²⁰⁹ solicited illegal content while ensuring that those responsible could not be identified;²¹⁰ altered its user interface to ensure that criminals could not be caught;²¹¹ and sold dangerous products.²¹² In this way, Section 230 has evolved into a super-immunity that, among other things, prevents the best-positioned entities to respond to most harmful content. This would have seemed absurd to the CDA’s drafters.²¹³ The law’s overbroad interpretation means that platforms have no liability-based reason to take down illicit material, and that victims have no legal leverage to insist otherwise.²¹⁴ Rebecca Tushnet aptly expressed it a decade ago: Section 230 ensures that platforms enjoy “power without responsibility.”²¹⁵

Unfortunately, platforms’ power now includes the ability to ignore the propagation of damaging deep fakes. To be sure, some platforms do not need civil liability exposure to take action against deep-fake generated harms; market pressures and morals are enough. In most cases, however, these forces are insufficient to spur response.

Should Section 230 be amended to extend liability to a wider-range of circumstances? In 2018, lawmakers modified the statute by enacting the Allow States and Victims to Fight Online Sex Trafficking Act (“FOSTA”) to address websites’ facilitation of sex trafficking.²¹⁶ FOSTA added a new exception to

207. Citron, *Cyber Civil Rights*, *supra* note 46, at 118.

208. See Tim Hwang, *Dealing with Disinformation: Evaluating the Case for CDA 230 Amendment* (Dec. 17, 2017) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3089442 [<https://perma.cc/MD3Q-MR92>].

209. *Phan v. Pham*, 182 Cal. App. 4th 323 (Cal. Ct. App. 2010); *Shiamili v. Real Est. Grp. of N.Y.*, 17 N.Y.3d 281 (N.Y. 2011).

210. *Jones v. Dirty World Enter. Recordings, LLC*, 755 F.3d 398 (6th Cir. 2014); *S.C. v. Dirty World, LLC*, No. 11–CV–00392–DW, 2012 WL 3335284 (W.D. Mo. Mar. 12, 2012).

211. *Doe v. Backpage.com, LLC*, 817 F.3d 12 (1st Cir. 2016).

212. *Hinton v. Amazon.com.dedc, LLC*, 72 F. Supp. 3d 685, 687 (S.D. Miss. 2014).

213. Cox recently said as much: “I’m afraid . . . the judge-made law has drifted away from the original purpose of the statute.” Selyukh, *supra* note 198. In his view, sites that solicit unlawful materials or have a connection to unlawful activity should not enjoy Section 230 immunity. *See id.*

214. See Citron, *Cyber Civil Rights*, *supra* note 46, at 118; Mark A. Lemley, *Rationalizing Internet Safe Harbors*, 6 J. TELECOMM. & HIGH TECH. L. 101 (2007); Doug Lichtman & Eric Posner, *Holding Internet Service Providers Accountable*, 14 SUP. CT. ECON. REV. 221 (2006).

215. Rebecca Tushnet, *Power Without Responsibility: Intermediaries and the First Amendment*, 76 GEO. WASH. L. REV. 986 (2008).

216. See Danielle Citron & Quinta Jurecic, *FOSTA: The New Anti-Sex-Trafficking Legislation May Not End the Internet, But It’s Not a Good Law Either*, LAWFARE (Mar. 28, 2018),

Section 230 immunity, similar to the provision preserving the ability to sue for intellectual property claims. Now, plaintiffs, including state attorneys general, acting on behalf of victims, may avoid Section 230 immunity when suing platforms for knowingly assisting, supporting, or facilitating sex trafficking offenses.

FOSTA did not become law without controversy. Some decried the erosion of Section 230 over concerns that greater liability exposure for online platforms would result in a decrease in outlets, and more self-censorship by those remaining.²¹⁷ Others criticized FOSTA's language as indeterminate, potentially resulting in less filtering rather than more.²¹⁸ On the other hand, the FOSTA debate also raises the question whether Congress instead erred by not going far enough in carving out exceptions to Section 230 immunity.

Section 230 should be amended to allow a limited degree of platform liability relating to deep fakes.²¹⁹ Building on prior work in which one of us (Citron) proposed a similar change in an article co-authored with Benjamin Wittes, we propose that Section 230(c)(1) protections to platforms be conditional rather than automatic.²²⁰ To qualify, an entity must demonstrate that it has taken "reasonable steps" to ensure that its platform is not being used for illegal ends. Platforms that meet this relatively-undemanding requirement will continue to enjoy the protections of Section 230, but others will not and hence may be treated as a publisher of user-generated content that they host.²²¹

To be sure, such an amendment would raise hard questions regarding the metes and bounds of reasonableness. The scope of the duty would need to track salient differences among online entities. For example, "ISPs and social networks with millions of postings a day cannot plausibly respond to complaints of abuse immediately, let alone within a day or two,"²²² yet "they may be able to deploy technologies to detect content previously deemed unlawful."²²³ Inevitably, the "duty of care will evolve as technology improves."²²⁴

This proposed amendment would be useful as a means to incentivize platforms to take reasonable steps to minimize the most-serious harms that might follow from user-posted or user-distributed deep fakes. If the reasonably

<https://www.lawfareblog.com/fosta-new-anti-sex-trafficking-legislation-may-not-end-Internet-its-not-good-law-either> [<https://perma.cc/2W8X-2KE9>] [hereinafter Citron & Jurecic, *FOSTA*].

217. See CITRON & JURECIC, PLATFORM JUSTICE, *supra* note 46, at 7 (cataloguing the arguments against FOSTA, including the fact that FOSTA raises the moderator's dilemma that animated the adoption of Section 230 and the risk—borne out—that sites will over-filter content related to sex in any way).

218. See, e.g., Citron & Jurecic, *FOSTA*, *supra* note 216 (arguing that FOSTA is both too narrow and too broad).

219. Citron & Wittes, *supra* note 46, at 419.

220. *Id.*

221. *Id.*

222. Citron, *Section 230's Challenge*, 197.

223. *Id.*

224. *Id.*

available technical and other means for detection and removal of harmful fakes are limited, so too will be the obligation on the part of the platform.²²⁵ But as those means improve, so would the incentive to use them.²²⁶

We recognize that this proposal runs risks, beyond the usual challenges associated with common law development of a novel standard of care. For example, opening the door to liability may over-deter platforms that are uncertain about the standard of care (and fearful of runaway juries imposing massive damages). This might drive sites to shutter (or to never emerge), and it might cause undue private censorship at the sites that remain. Free expression, innovation, and commerce all would suffer, on this view.

To ameliorate these concerns, this proposal can be cabined along several dimensions. First, the amendment to Section 230 could include a sunset provision paired with data-gathering requirements that would empower Congress to make an informed decision on renewal.²²⁷ Data-gathering should include the type and frequency of content removed by platforms as well as the extent to which platforms use automation to filter or block certain types of content. This would permit Congress to assess whether the law was resulting in overbroad private censorship, and acting as a Heckler's veto. Second, the amendment could include carefully tailored damages caps. Third, the amendment could be paired with a federal anti-SLAAP provision, which would deter frivolous lawsuits designed to silence protected speech. Last, the amendment could include an exhaustion-of-remedies provision pursuant to which plaintiffs, as a precondition to suit, must first provide notice to the platform regarding the allegedly improper content. The platform would have a specified window of time to examine and respond to the objection.

In sum, a reasonably calibrated standard of care combined with safeguards could reduce opportunities for abuses without interfering unduly with the further development of a vibrant Internet. It would also avoid unintentionally turning innocent platforms into involuntary insurers for those injured through their sites. Approaching the problem with the goal of setting an appropriate standard more readily allows differentiation between kinds of online actors, and a separate rule for websites designed to facilitate illegality in contrast to large ISPs linking millions to the Internet. That said, features used to control the scope of platform

225. What comes to mind is Facebook's effort to use hashing technology to detect and remove nonconsensual pornography that has been banned as terms-of-service violations. Citron, *Sexual Privacy*, *supra* note 93, at 1955–58. One of us (Citron) serves on a small task force advising Facebook about the use of screening tools to address the problem of nonconsensually posted intimate images.

226. Current screening technology is far more effective against some kinds of abusive material than others; progress may produce cost-effective means of defeating other attacks. With current technologies, it is difficult, if not impossible, to automate the detection of certain illegal activity. That is certainly true of deep fakes in this current technological environment.

227. We see an example of that approach at several points in the history of the "Section 702" surveillance program. Caroline Lynch, *The Virtue of Sunsets?*, LAWFARE (Feb. 28, 2017), <https://www.lawfareblog.com/virtue-sunsets> [<https://perma.cc/5FNL-495P>].

liability are only a partial solution to the deep-fakes challenge. Other policy responses will be necessary.

3. *Specific Categories of Criminal Liability*

Civil liability is not the only means through which the legal system can discourage the creation and distribution of harmful deep fakes. Criminal liability is another possibility. Can it close some of the gaps identified above?

Only to a limited extent. The criminal liability model in theory does have the capacity to overcome some of the most significant limits on the civil liability model. Being judgment proof might spare someone from fear of civil suit, for example, but it is no protection from being sent to prison and bearing the other consequences of criminal conviction.²²⁸ And whereas the identification and service of process on the creator or distributor of a harmful deep fake often will be beyond the practical reach of would-be private plaintiffs, law enforcement entities have greater investigative capacities (in addition to the ability to seek extradition). It is far from clear, though, that these notional advantages can be brought to bear effectively in practice.

To some extent, the capacity of criminal law is a question of setting law enforcement priorities and allocating resources accordingly. So far, law enforcement's track record is not promising. Notwithstanding notable exceptions, law enforcement, on the whole, has had a lackluster response to online abuse. In particular, state and local law enforcement agencies often fail to pursue cyberstalking complaints adequately because they lack training in the relevant laws and in the investigative techniques necessary to track down online abusers (federal prosecutors—including especially DOJ's Computer Crimes and Intellectual Property Section—have a much stronger record, but their capabilities do not scale easily).²²⁹ Although a wide range of deep fakes might warrant criminal charges, only the most extreme cases are likely to attract the attention of law enforcement.

Apart from questions of investigative and prosecutorial will, the prospects for criminal liability also depend on the scope of criminal laws themselves. To what extent do existing laws actually cover deep fakes, and to what extent might new ones do so?

A number of current criminal statutes—concerning cyber stalking, impersonation, and defamation—are potentially relevant. Posting deep fakes in connection with the targeting of individuals, for example, might violate the federal cyberstalking laws, 18 U.S.C. § 2261A, or analogous state statutes. Under federal law, it is a felony to use any “interactive computer service or electronic

228. CITRON, HATE CRIMES IN CYBERSPACE, *supra* note 40, at 123.

229. *Id.* at 144. Assistant US Attorney Mona Sedky is a shining example. See *The Lawfare Podcast: Mona Sedky on Prosecuting Sextortion*, LAWFARE (June 25, 2016), <https://www.lawfareblog.com/lawfare-podcast-mona-sedky-prosecutingsextortion> [<http://perma.cc/262G-KSLV>].

communication service” to “intimidate”²³⁰ a person in ways “reasonably expected to cause substantial emotional distress”²³¹ This reflects the fact that, even when cyberstalking victims do not fear bodily harm, “their lives are totally disrupted . . . in the most insidious and frightening ways.”²³² Defendants can be punished for up to five years in prison and fined up to \$250,000, with additional sentencing requirements for repeat offenders and for defendants whose offense violates a restraining order.²³³ Some deep fakes will fit this bill.

Impersonation crimes may be applicable as well. Several states make it a crime, for example, to knowingly and credibly impersonate another person online with intent to “harm[], intimidat[e], threaten[], or defraud[]” that person.²³⁴ And while the “harm, intimidate, threaten” portion of such statutes to some extent tracks the cyberstalking statute described above, its extension to “fraud” opens the door to a wider, though uncertain, range of potential applications. In certain jurisdictions, creators of deep fakes could also face charges for criminal defamation if they posted videos knowing that they were fake or if they were reckless as to their truth or falsity.²³⁵ Similarly, using someone’s face in a violent deep-fake sex video might support charges for both impersonation and defamation if the defendant intended to terrorize or harm the person and knew the video was fake.

230. 18 U.S.C. § 2261A(2) (2012).

231. 18 U.S.C. § 2261A(1)(B). The federal cyberstalking statute has state analogues in a significant number of states, though some state cyberstalking statutes are limited to online abuse sent directly to victims. CITRON, HATE CRIMES IN CYBERSPACE, *supra* note 40, at 124.

232. *Reauthorization of the Violence Against Women Act: Before the S. Comm. on the Judiciary*, 109th Congress 28 (2005) (statement of Mary Lou Leary, Executive Director of the National Center for Victims of Crime).

233. 18 U.S.C. § 2261A(2).

234. CAL. PENAL CODE § 528.5 (West 2009); *see also* HAW. REV. STAT. ANN. § 711-1106.6 (2019); LA. REV. STAT. § 14:73.10 (2019); MISS. CODE ANN. § 97-45-33 (2019); N.Y. PENAL LAW § 190.25 (2019); R.I. GEN. LAWS § 11-52-7.1 (2019); TEX. PENAL CODE § 33.07 (2019). The Texas impersonation statute withstood facial challenge in *Ex parte Bradshaw*, 501 S.W.3d 665, 674 (Tex. App. 2016) (explaining that the conduct regulated by the statute is “the act of assuming another person’s identity, without that person’s consent, and with intent to harm, defraud, intimidate, or threaten . . . by creating a webpage or posting . . .”). Arizona tried to pass a similar law, but the bill failed in the legislature. *See* H.B. 2489, 53 Leg., 1st Sess. (Ariz. 2017). It is a federal crime to impersonate a federal official, though its application may be limited to circumstances in which the defendant intends to defraud others of something of value. 18 U.S.C. § 912 (“Whoever falsely assumes or pretends to be an officer or employee acting under the authority of the United States or any department agency or officer thereof, and acts as such . . . shall be fined under this title or imprisoned.”). *Compare* United States v. Gayle, 967 F.2d 483 (11th Cir. 1992) (establishing that an indictment under Sec. 912 did not need to allege an intent to defraud, because such intent could be gathered from the alleged facts), *with* United States v. Pollard, 486 F.2d 190 (5th Cir. 1973) (establishing that failure to allege the intent to defraud is a fatal defect in an indictment under Sec. 912). *See also* United States v. Jones, 16-cr-0553 (AJN), 2018 U.S. Dist. LEXIS 31703 (S.D.N.Y. Feb 2, 2018) (explaining that indictment under § 912 does not include the element to defraud as part of the offense). The 1948 changes to § 912 specifically dropped the words “intent to defraud,” yet the Fifth Circuit is the only circuit that still reads the statute to include as an element the intent to defraud.

235. *See* Eugene Volokh, *One-to-One Speech Vs. One-to-Many Speech, Criminal Harassment Laws, and “Cyberstalking”*, 107 NW. U.L. REV. 731 (2013).

The foregoing examples concern harm to specific individuals, but some harms flowing from deep fakes will be distributed broadly across society. A pernicious example of the latter is a deep fake calculated to spur an audience to violence. Some platforms ban content calling for violence, but not all do.²³⁶ Could the creator of such a deep fake be prosecuted under a statute like 18 U.S.C. § 2101, which criminalizes the use of facilities of interstate commerce, such as the Internet, with intent to incite a riot? Incitement charges must comport with the First Amendment constraints identified in *Brandenburg*, including that the speech in question be likely to produce imminent lawless action.²³⁷ This leaves many deep fakes beyond the law's reach even though they may have played a role in violence.

Can criminal law be helpful in limiting harms from deep fakes in the particularly sensitive context of elections? Although lies have long plagued the democratic process, deep fakes present a troubling development. Some states have criminalized the intentional use of lies to impact elections.²³⁸ These experiments have run into constitutional hurdles, however.

Free speech scholar Helen Norton explains that while political candidates' lies "pose . . . harms to their listeners . . . and may also . . . undermine public confidence in the integrity of the political process," laws forbidding such lies "threaten significant First Amendment harms because they regulate expression in a context in which we especially fear government overreaching and partisan abuse."²³⁹ As the Court underscored in *Brown v. Hartlage*,²⁴⁰ the "State's fear that voters might make an ill-advised choice does not provide the State with a compelling justification for limiting speech."²⁴¹ Not surprisingly, courts therefore have struck down periodic attempts to ban election-related lies.²⁴² The entry of deep fakes into the mix may not change that result. As explored above,

236. YouTube, for example, barred incitement in 2008. See Peter Whoriskey, *YouTube Bans Videos That Incite Violence*, WASH. POST (Sept. 12, 2008), <http://www.washingtonpost.com/wp-dyn/content/article/2008/09/11/AR2008091103447.html> [<https://perma.cc/YVVR5-JGXV>].

237. Multiple states prescribe criminal penalties for those who engage in similar conduct. See, e.g., CAL. PENAL CODE § 404.6 (2019); FLA. STAT. ANN. § 870.01 (2019); MONT. CODE ANN. § 45-8-105 (2019); VA. CODE ANN. § 18.2-408 (2019). For an excellent overview of crimes of incitement in the digital age and the associated issues, see Margot E. Kaminski, *Incitement to Riot in the Age of Flash Mobs*, 81 U. CIN. L. REV. 1 (2012).

238. See Nat Stern, *Judicial Candidates' Right to Lie*, 77 MD. L. REV. 774 (2018).

239. Richard L. Hasen, *A Constitutional Right to Lie in Campaigns and Elections?*, 74 MONT. L. REV. 53, 69 (2013) ("[T]o survive constitutional review, any false campaign speech law would have to be narrow, targeted only at false speech made with actual malice . . ."); Helen Norton, *Lies and the Constitution*, 2012 SUP. CT. REV. 161, 199 (2012).

240. 456 U.S. 45, 46 (1982).

241. *Id.* at 60.

242. See, e.g., *Susan B. Anthony List v. Driehaus*, 814 F.3d 466 (6th Cir. 2016) (striking down an Ohio election-lies law as a content-based restriction of "core political speech" that lacked sufficient tailoring); *281 Care Comm. v. Arneson*, 766 F.3d 774, 785 (8th Cir. 2014) ("[N]o amount of narrow tailoring succeeds because [Minnesota's political false-statements law] is not necessary, is simultaneously overbroad and underinclusive, and is not the least restrictive means of achieving any stated goal.").

however, criminal laws banning the impersonation of government officials or candidates for office may overcome constitutional challenge.²⁴³

Ultimately, criminal liability is not likely to be a particularly effective tool against deep fakes that pertain to elections. The most capable actors with motive and means to deploy deep fakes in a high-impact manner in an election setting will include the intelligence services of foreign governments engaging in such activity as a form of covert action, as we saw with Russia in relation to the American election of 2016. The prospect of a criminal prosecution in the United States will mean little to foreign government agents involved in such activity so long as they are not likely to end up in US custody (though it might mean something more to private actors through whom those agencies sometimes choose to act, at least if they intend to travel abroad).²⁴⁴

C. Administrative Agency Solutions

The foregoing analysis suggests that prosecutors and private plaintiffs can and likely will play an important role in curbing harms from deep fakes, but also that this role has significant limitations. We therefore turn to consider the potential contributions of other actors, starting with administrative agencies.

Generally speaking, agencies can advance public policy goals through rulemaking, adjudication, or both.²⁴⁵ Agencies do not enjoy plenary jurisdiction to use these tools in relation to any subject they wish. Typically, their field of operation is defined—with varying degrees of specificity—by statute. And thus we might begin by asking which agencies have the most plausible grounds for addressing deep fakes.

At the federal level, three candidates stand out: the Federal Trade Commission (“FTC”), the Federal Communications Commission (“FCC”), and the Federal Election Commission (“FEC”). On close inspection, however, their potential roles appear quite limited.

1. The FTC

Consider the Federal Trade Commission and its charge to regulate and litigate in an effort to minimize deceptive or unfair commercial acts and practices.²⁴⁶ For that matter, consider the full range of state actors (often a state’s

243. See *supra* notes 170172 and accompanying text. For a thoughtful exploration of why deep fakes created and used in election context should be understood as proscribable fraud, see Green, *supra* note 108.

244. On the use of private actors by state agencies in the context of hacking, see TIM MAURER, *CYBER MERCENARIES: THE STATE, HACKERS, AND POWER* (2018). For an example of successful prosecution of such private actors, see *United States v. Baratov*, No. 3:17-CR-103 VC, 2018 WL 1978898 (N.D. Cal. Apr. 17, 2018) (five-year sentence for Canadian national who acted as a contractor involved in a hacking campaign directed by Russia’s FSB against companies including Yahoo!).

245. See Danielle Keats Citron, *Technological Due Process*, 85 WASH. U. L. REV. 1249, 1278 (2008).

246. 5 U.S.C. § 45(b) (2012).

Attorney General's Office) that play a similar role. Bearing that charge in mind, can these entities intervene in the deep fake context?

A review of current areas of FTC activity suggests limited possibilities. Most deep fakes will not take the form of advertising, but some will. That subset will implicate the FTC's role in protecting consumers from fraudulent advertising relating to "food, drugs, devices, services, or cosmetics."²⁴⁷ Some deep fakes will be in the nature of satire or parody, without intent or even effect of misleading consumers into believing a particular person (a celebrity or some other public figure) is endorsing the product or service in question. That line will be crossed in some instances, however. If such a case involves a public figure who is aware of the fraud and both inclined to and capable of suing on their own behalf for misappropriation of likeness, there is no need for the FTC or a state agency to become involved. Those conditions will not always be met, though, especially when the deep-fake element involves a fraudulent depiction of something other than a specific person's words or deeds; there would be no obvious private plaintiff. The FTC and state attorneys general (state AGs) can play an important role in that setting.

Beyond deceptive advertising, the FTC has authority to investigate unfair and deceptive commercial acts and practices under Section 5 of the Federal Trade Commission Act.²⁴⁸ Much like Section 5 of the Federal Trade Commission Act, state UDAP laws (enforced by state AGs) prohibit deceptive commercial acts and practices and unfair trade acts and practices whose costs exceed their benefits.²⁴⁹ UDAP laws empower attorneys general to seek civil penalties, injunctive relief, and attorneys' fees and costs.²⁵⁰

Acting in that capacity, for example, the FTC previously investigated and reached a settlement with Facebook regarding its treatment of user data—and is now doing so again in the aftermath of public furor over the Cambridge Analytica debacle.²⁵¹ In response to the problem of fake news in general and deep-fake news in particular, the FTC might contemplate asserting a role under

247. 5 U.S.C. § 52(a)(1)–(2).

248. See 15 U.S.C. § 45. For the crucial role that the FTC has played in the development of privacy policy, see CHRIS JAY HOOFNAGLE, *FEDERAL TRADE COMMISSION PRIVACY LAW AND POLICY* (2016); Woodrow Hartzog & Daniel J. Solove, *The Scope and Potential of FTC Data Protection*, 83 GEO. WASH. L. REV. 2230 (2015); Daniel J. Solove & Woodrow Hartzog, *The FTC and the New Common Law of Privacy*, 114 COLUM. L. REV. 583 (2014).

249. See generally Danielle Keats Citron, *The Privacy Policymaking of State Attorneys General*, 92 NOTRE DAME L. REV. 747, 755–57 (2016).

250. See, e.g., California Unfair Business Act, CAL. BUS. & PROF. CODE § 17206 (West 2016) (imposing \$ 2,500 per violation); Illinois Consumer Fraud Act, 815 ILL. COMP. STAT. ANN. 505/7 (West 2016) (allowing civil penalty of \$50,000 per unlawful act); see also Steven J. Cole, *State Enforcement Efforts Directed Against Unfair or Deceptive Practices*, 56 ANTITRUST L.J. 125, 128 (1987) (explaining that in states like Maryland the "consumer protection authority resides wholly within the Attorney General's Office").

251. Louise Matsakis, *The FTC is Officially Investigating Facebook's Data Practices*, WIRED (Mar. 26, 2018), <https://www.wired.com/story/ftc-facebook-data-privacy-investigation> [<https://perma.cc/GJX8-LQ27>].

the rubric of “unfair or deceptive acts or practices in or affecting commerce.”²⁵² Any such efforts would face several obstacles, however. First, Section 230 of the Communications Decency Act as currently written would shield platforms at least to some extent from liability for publishing users’ deep fakes. Second, it is not clear this would be a proper interpretation of the FTC’s jurisdiction. Professor David Vladeck, formerly head of the FTC’s Bureau of Consumer Protection, has expressed doubt about the FTC’s jurisdiction to regulate sites purveying fake news.²⁵³ Vladeck argues, “[f]ake news stories that get circulated or planted or tweeted around are not trying to induce someone to purchase a product; they’re trying to induce someone to believe an idea.”²⁵⁴ Finally, the prospect of a government entity attempting to distinguish real news from fake news—and suppressing the latter—raises the First Amendment concerns described above in relation to election-lies laws.

Might a different agency at least have a stronger jurisdictional claim to become involved in some settings? This brings us to the Federal Communications Commission.

2. *The FCC*

If any regulatory agency is to play a role policing against harms from deep fakes circulating online, the FCC at first blush might seem a natural fit. It has a long tradition of regulating the communications of broadcasters, and many have observed that the major social media platforms of the twenty-first century occupy a place in our information ecosystem similar to the central role that radio and television broadcasters enjoyed in the twentieth century.²⁵⁵ Similar thinking led the FCC in 2015 to break new ground by reclassifying Internet service providers as a “telecommunications service” rather than an “information service,” thus opening the door to more extensive regulation.²⁵⁶ Amidst intense controversy, however, the FCC in late 2017 reversed course on this position on ISPs,²⁵⁷ and in any event never asserted that so-called “edge providers” like Facebook also should be brought under the “telecommunications service” umbrella.²⁵⁸

252. Federal Trade Commission Act, 15 U.S.C. § 45(a)(1) (2012); see Callum Borchers, *How the Federal Trade Commission Could (Maybe) Crack Down on Fake News*, WASH. POST (Jan. 30, 2017), https://www.washingtonpost.com/news/the-fix/wp/2017/01/30/how-the-federal-trade-commission-could-maybe-crack-down-on-fake-news/?utm_term=.4ef8ece1baec [https://perma.cc/L2XD-T445].

253. *Id.*

254. *Id.*

255. See TIM WU, *THE MASTER SWITCH: THE RISE AND FALL OF INFORMATION EMPIRES* (2010).

256. See *Protecting and Promoting the Open Internet*, 80 Fed. Reg. 19,737 (F.C.C. Apr. 13, 2015) (declaratory ruling).

257. *Restoring Internet Freedom*, FCC 17-166 (2018).

258. *Consumer Watchdog Petition for Rulemaking to Require Edge Providers to Honor ‘Do Not Track’ Requests*, DA 15-1266 (2015).

As things stand, the FCC appears to lack jurisdiction (not to mention interest) over content circulated via social media. However, concern over fake news, incitement, radicalization, or any number of other hot-button issues might at some point tip the scales either for the FCC to reinterpret its own authority or for Congress to intervene. For the moment, however, this pathway appears closed, leaving the FCC's role in relation to deep fakes limited to potential efforts to deter their appearance on radio or television.

3. *The FEC*

A third federal agency with a plausible stake in the topic of deep fakes is the Federal Election Commission. Plainly, its jurisdiction would touch upon deep fakes only as they relate to elections—a narrow, but important, subfield. Whether and how the FEC might act in relation to deep fakes even in that setting, however, is unclear.

The FEC regulates campaign speech, but not in ways that would speak directly to the deep-fake scenario. In particular, the FEC does not purport to regulate the truth of campaign-related statements, nor is it likely to assert or receive such jurisdiction anytime soon for all the reasons discussed above in relation to the First Amendment obstacles, practical difficulty, and political sensitivity of such an enterprise. Instead, its central focus is financing, and the main thrust of its regulatory efforts relating to speech is to increase transparency regarding sponsorship and funding for political advertising.²⁵⁹

There might be room for a regulatory approach that requires deep fake creators to disclose the fact that the video or audio is a fake.²⁶⁰ The Court has upheld campaign speech regulations requiring truthful disclosure of the source of the communication.²⁶¹ And for good reason—listeners depend upon the source of speech to make decisions at the ballot box.²⁶²

Such an approach could have at least some positive impact on deep fakes in the electoral setting. For outlets within the FEC's jurisdiction, transparency obligations create elements of attribution and accountability for content creators that might, to some extent, deter resort to deep fakes in advertising. But note that major online social media platforms are not, currently, subject to FEC jurisdiction in this context: Facebook, Google, and other online advertising platforms have long-resisted imposition of the FEC's disclosure rules, often

259. For an interesting proposal for new regulations that the FEC might fruitfully pursue in this vein with respect to the general problem of misleading campaign advertising, see Abby K. Wood & Ann M. Ravel, *Fool Me Once: Regulating "Fake News" and Other Online Advertising*, 91 S. CAL. L. REV. 1223 (2018).

260. Blitz, *Deep Fakes and Other Non-Testimonial Falsehoods*, *supra* note 165.

261. Norton, *Lies to Manipulate*, *supra* note 169, at 165–67.

262. Michael S. Kang, *Democratizing Direct Democracy: Restoring Voter Competence Through Heuristic Cues and 'Disclosure Plus'*, 50 UCLA L. REV. 1141, 1158–59 (2003); Helen Norton, *Secrets, Lies, and Disclosure*, 27 J.L. & POL. 641, 644 (2012).

citing the practical difficulties that would follow for small screens displaying even smaller ads.

In the wake of the 2016 election, the FEC faces pressure to extend its reach to these platforms nonetheless, so that caveat might drop out at some point.²⁶³ Even so, this certainly would not resolve the threat to elections posed by deep fakes.

FEC regulation surely would not eliminate deep fakes' threat to elections. Some amount of fraudulent posting no doubt would continue simply because enforcement systems will not be perfect, and also because not all content about someone who is a candidate will be framed in ways that would appear to count as advertising. Deep fakes in particular are likely to take the form of just raw video or audio of some event that occurred, by no means necessarily embedded within any larger narrative or framing content. The FEC's disclosure rules in any event are candidate specific, and do not encompass generalized "issue ads" that express views on a topic but do not single out particular candidates.

D. Coercive Responses

The utility of civil suits, criminal prosecution, and regulatory actions will be limited when the source of the fake is a foreign entity that may lie beyond the reach of American judicial process (though it is not non-existent, as we have seen from time to time in the context of cybersecurity).²⁶⁴ Nevertheless, it is important to recall that the Government possesses other instruments that it can bring to bear in such contexts in order to impose significant costs on the perpetrators. We provide a brief discussion of three such scenarios here.

1. Military Responses

There is no doubt that deep fakes will play a role in future armed conflicts. Information operations of various kinds have long been an important aspect of warfare, as the contending parties attempt to influence the beliefs, will, and passions of a wide range of audiences (opposing forces and their commanders,

263. Google in 2006 obtained an exemption from disclosure obligations based on the practical argument that its online ad spaces were too small to accommodate the words. In the spring of 2018 the FEC began the process of changing this approach. See Alex Thompson, *The FEC Took a Tiny Step to Regulate Online Political Ads, But Not in Time for 2018 Elections*, VICE NEWS (Mar. 15, 2018), https://news.vice.com/en_us/article/neq88q/the-fec-took-a-tiny-step-to-regulate-online-political-ads-but-not-in-time-for-2018-elections [<https://perma.cc/E7QB-NXAW>].

264. For example, foreign nationals at times have been extradited to the United States to face criminal charges relating to hacking. See Press Release, U.S. Attorney's Office for the Southern District of New York, "Manhattan U.S. Attorney Announces Extradition Of Alleged Russian Hacker Responsible For Massive Network Intrusions At U.S. Financial Institutions, Brokerage Firms, A Major News Publication, And Other Companies" (Sept. 7, 2018), <https://www.justice.gov/usao-sdny/pr/manhattan-us-attorney-announces-extradition-alleged-russian-hacker-responsible-massive> [<https://perma.cc/2A36-LXDD>].

opposing politicians and electorates, local populations, allies, and so forth).²⁶⁵ Such effects are sought at every level from the tactical to the strategic, and with an eye towards effects ranging from the immediate to the long-term.

Deep-fake capacity will be useful in all such settings. Insurgents, for example, might inflame local opinion against US or allied forces by depicting those forces burning a Quran or killing a civilian. If deployed deftly enough, such fraud might also be used to advance a “lawfare” strategy, leveraging the good intentions of journalists and NGOs to generate distracting or even debilitating legal, political, and diplomatic friction. Insurgents also might deploy the technology to make their own leaders or personnel appear more admirable or brave than otherwise might be possible, to create the false impression that they were in a particular location at a particular time, or even to make it seem that a particular leader is still alive and free rather than dead or captured. The US military, for its part, might use deep fakes to undermine the credibility of an insurgent leader by making it appear that the person is secretly cooperating with the United States or engaging in immoral or otherwise hypocritical behavior. If the technology is robust enough, and deployed deftly enough, the opportunities for mischief—deadly mischief, in some cases—will be plentiful on both sides.

If and when adversaries of the United States do use deep fakes in connection with an armed conflict, the options for a military response would be no different than would be the case for any form of enemy information operation. This might entail penetration of the adversary’s computer networks, for purposes of both intelligence gathering, making it easier to prepare for or respond to a deep fake, and disruption operations, degrading or destroying the adversary’s capacity to produce them in the first place. It might entail a kinetic strike on facilities or individuals involved in the deep fake production process, subject of course to the law of armed conflict rules governing distinction, proportionality, and so forth.²⁶⁶ And it might entail the capture and detention of enemy personnel or supporters involved in such work.

265. The US military defines “information operations,” as the use of any and all information-related capabilities during the course of military operations in order “to influence, disrupt, corrupt, or usurp adversarial human and automated decision-making while protecting our own.” CHAIRMAN OF THE JOINT CHIEFS OF STAFF, JOINT PUBLICATION 3-13: PSYCHOLOGICAL OPERATIONS VI-5 (2010). Separately, it defines “psychological operations” as “planned operations to convey selected information and indicators to foreign audiences to influence their emotions, motives, objective reasoning, and ultimately the behavior of foreign governments, organizations, groups, and individuals” in a manner “favorable to the originator’s objectives.” *Id.* at GL-8. Until 2010, these activities were known as psychological operations, or psyops. In 2017, the Army re-adopted the psyops name. See *MISO Name Change—Back to Psychological Operations (PSYOP)*, SOF NEWS (Nov. 8, 2017), <http://www.sof.news/io/miso-name-change> [<https://perma.cc/79VX-XN8B>].

266. The possibility of targeting a person based solely on involvement in production of a deep-fake video supporting the enemy—as opposed to targeting them based on status as a combatant—would raise serious issues under the principle of distinction. Assuming, again, that the prospective target is best categorized as a civilian, he or she would be targetable only while directly participating in hostilities. Debates abound regarding the scope of direct participation, but most scenarios involving creation of media would appear to be indirect in nature. One can imagine a special case involving especially

The situation becomes more complicated insofar as the individuals or servers involved in creating deep fakes relating to an armed conflict are not actually located in theater. If either reside in third countries, the freedom of action for a military response of any kind may be sharply circumscribed both by policy and by legal considerations. This is a familiar challenge for the military in relation to non-deep-fake online propaganda activity conducted by and for the Islamic State using servers outside the Syria/Iraq theater, and the manner in which it would play out would be no different (for better or worse) if one introduces deep-fake technology to the mix.

2. *Covert Action*

Covert action might be used as a response to a foreign government's use of deep fakes. "Covert action" refers to government-sponsored activity that is meant to impact events overseas without the US government's role being apparent or acknowledged.²⁶⁷ That is a capacious definition, encompassing a wide-range of potential activities. Propaganda and other information operations, for example, can be and frequently are conducted as covert actions. And certainly we can expect to see the intelligence services of many countries making use of deep-fake technologies in that context in the future (the Russian covert action campaign that targeted the American election in 2016 was significant even without the aid of deep fakes, but one can certainly expect to see deep fakes used in such settings in the future). The point of mentioning covert action here is not to repeat the claim that states will use deep fakes on an unacknowledged basis in the future. Instead, the point is to underscore that the US government has the option of turning to covert action *in response* to a foreign government's use of deep fakes.

What, in particular, might this entail? First, it could be the basis for degrading or destroying the technical capacity of a foreign actor to produce deep fakes (for example, through a computer network operation designed to make subtle changes to a GAN). The military options described above also included such technical means, but covert action offers advantages over the military alternative. Most notably, covert action does not require any predicate circumstance of armed conflict; presidents may resort to it when they wish. Moreover, because covert action is not publicly acknowledged, the diplomatic and political friction that might otherwise make a particular action unattractive is reduced in comparison to overt alternatives (although not necessarily eliminated, for the activity may later become public). Further, covert action may be a particularly attractive option where the activity in question might violate international law. The statutory framework governing covert action requires

inflammatory deep fakes designed to cause an immediate violent response, though even there hard questions would arise about the likely gap in time between creation of such a video and its actual deployment.

267. See 50 U.S.C. § 3093(e) (2012).

compliance with the Constitution and statutes of the United States, but it is conspicuously silent about compliance with international law. Many have speculated that this is construed within the government as domestic-law justification for activities that violate international law.²⁶⁸

Covert action can take any number of other forms. Rather than directly disrupting a foreign target's capacity to produce deep fakes, for example, covert means might be used in a wide variety of ways to impose costs on the person, organization, or government at issue. Covert action, in other words, can be used to deter or punish foreign actors that employ deep fakes in ways harmful to the United States.²⁶⁹

Covert-action tools are not the only options the US government has with respect to imposing costs on foreign individuals or entities who may make harmful use of deep fakes. We turn now to a brief discussion of a leading example of an overt tool that can serve this same purpose quite effectively.

3. Sanctions

The economic might the United States developed over the past half-century has given the US Government considerable leverage over foreign governments, entities, and individuals. Congress, in turn, has empowered the executive branch to move quickly and largely at the president's discretion when it wishes to exploit that leverage to advance certain interests. Most notably for present purposes, the International Emergency Economic Powers Act ("IEEPA") establishes a framework for the executive branch to issue economic sanctions backed by criminal penalties.²⁷⁰

In order to bring this power to bear, IEEPA requires that the president first issue a public proclamation of a "national emergency" relating to an "unusual and extraordinary threat, which has its source in whole or substantial part outside the United States."²⁷¹ In order to deploy IEEPA sanctions as an overt response to foreign use of deep fakes, therefore, there needs to be either a relevant existing national-emergency proclamation or else plausible grounds for issuing a new one towards that end.

There is no current national-emergency proclamation that would apply generally to the problem of deep fakes. There are more than two-dozen currently active states of national emergency, as of the summer of 2018.²⁷² Most have little

268. See Robert M. Chesney, *Computer Network Operations and U.S. Domestic Law: An Overview*, 89 INT'L L. STUD. 218, 230–32 (2013).

269. Covert action cannot have this deterrent effect, however, if the targeted person or entity is unaware that the United States imposed those costs, and that it did so for a particular reason. This is a tricky (but by no means insurmountable) obstacle where the sponsoring role of the United States is not meant to be acknowledged publicly.

270. See 50 U.S.C. ch. 35.

271. 50 U.S.C. § 1701(a).

272. See Ryan Struyk, *Here are the 28 Active National Emergencies. Trump Won't Be Adding the Opioid Crisis to the List*, CNN POL. (Aug. 15, 2017),

possible relevance, but some relate broadly to particular threat actors or regions, and a deep-fake scenario conceivably might arise in ways that both implicate those actors or regions and involve actors not already subject to sanctions.

A particularly important question under this heading is whether any of these existing authorities would apply to a foreign entity employing deep fakes to impact American elections. The answer appears to be yes, though the matter is complicated.

In April 2015, President Obama's Executive Order 13964 proclaimed a national emergency with respect to "malicious cyber-enabled activities originating from, or directed by persons located . . . outside the United States."²⁷³ Then, in the aftermath of the 2016 election, Obama amended the order, expanding the prohibition to forbid foreign entities from using cyber-enabled means to "tamper[] with, alter[], or caus[e] a misappropriation of information with the purpose or effect of interfering with or undermining election processes or institutions"²⁷⁴ This was designed to allow for IEEPA sanctions against Russian entities that interfered in the 2016 election through means that included the DNC hack.

President Obama immediately used the authority to sanction Russia's FSB, GRU, and various other individuals and entities.²⁷⁵ But could the same be done to a foreign entity that had not engaged in hacking, and instead focused entirely on using social media platforms to propagate false information in ways meant to impact American politics?²⁷⁶

To the surprise of some observers, the Trump administration provided at least a degree of support for the broader interpretation in March 2018 when it issued sanctions against Russia's Internet Research Agency (IRA) under color

<https://www.cnn.com/2017/08/12/politics/national-emergencies-trump-opioid/index.html>

[<https://perma.cc/B9BW-PSAR>]; see also Catherine Padhi, *Emergencies Without End: A Primer on Federal States of Emergency*, LAWFARE (Dec. 8, 2017), <https://lawfareblog.com/emergencies-without-end-primer-federal-states-emergency> [<https://perma.cc/FW7X-PG75>].

273. Exec. Order No. 13694, 80 Fed. Reg. 18,077 (Apr. 1, 2015).

274. Exec. Order No. 13757, 82 Fed. Reg. 1 (Dec. 28, 2016).

275. See *Issuance of Amended Executive Order 13694; Cyber-Related Sanctions Designation*, U.S. DEP'T TREASURY (Dec. 29, 2016), <https://www.treasury.gov/resource-center/sanctions/OFAC-Enforcement/Pages/20161229.aspx> [<https://perma.cc/7A6G-NUVL>].

276. The Treasury Department has indicated that it will promulgate regulations defining "cyber-enabled activities," and in the meantime has offered a less-formal explanation of its view that emphasizes unauthorized access, yes, but also includes much broader language: "We anticipate that regulations to be promulgated will define 'cyber-enabled' activities to include *any act that is primarily accomplished through or facilitated by computers or other electronic devices*. For purposes of E.O. 13694, malicious cyber-enabled activities include deliberate activities accomplished through unauthorized access to a computer system, including by remote access; circumventing one or more protection measures, including by bypassing a firewall; or compromising the security of hardware or software in the supply chain. These activities are often the means through which the specific harms enumerated in the E.O. are achieved, including compromise to critical infrastructure, denial of service attacks, or massive loss of sensitive information, such as trade secrets and personal financial information." (emphasis added). *OFAC FAQs: Other Sanctions Programs*, U.S. DEP'T TREASURY, https://www.treasury.gov/resource-center/faqs/Sanctions/Pages/faq_other.aspx [<https://perma.cc/JPB9-W29J>].

of this framework.²⁷⁷ The IRA, infamously, had engaged in extensive efforts to propagate false information into the American political debate. When the Trump administration sanctioned it under color of the cyber executive order, this seemed to endorse the proposition that politically targeted information operations carried out online were enough, even without hacking, to trigger the IEEPA framework. A close read of the Treasury Department's explanation of IRA's inclusion, however, includes just enough reference to "misappropriation of information" and to illegal use of stolen personally identifiable information so as to muddy the precedent.²⁷⁸

Bearing this lingering uncertainty in mind, we recommend promulgation of a new national emergency specifically tailored to attempts by foreign entities to inject false information into America's political dialogue, without any need to show that such efforts at some point happened to involve hacking or any other "cyber-enabled" means. This would eliminate any doubt about the immediate availability of IEEPA-based sanctions. Attempts to employ deep fakes in aid of such efforts would, of course, be encompassed in such a regime.

E. Market Solutions

We anticipate two types of market-based reactions to the deep-fake threat. First, we expect the private sector to develop and sell services intended to protect customers from at least some forms of deep fake-based harms. Such innovations might build on the array of services that have emerged in recent years in response to customer anxieties about identity theft and the like. Second, we expect at least some social media companies to take steps on their own initiative to police against deep-fake harms on their platforms. They will do this not just because they perceive market advantage in doing so, of course, but also for reasons including policy preferences and, perhaps, concern over what legislative interventions, including amendments to Section 230 of the Communications Decency Act, might occur down the road if they take no action. Both prospects offer benefits, but there are both limits and risks as well.

277. Press Release, U.S. Dep't Treasury, Treasury Sanctions Russian Cyber Actors for Interference with the 2016 U.S. Elections and Malicious Cyber Attacks (Mar. 15, 2018) <https://home.treasury.gov/news/press-releases/sm0312> [<https://perma.cc/2YRG-68XQ>].

278. *See id.* ("The Internet Research Agency LLC (IRA) tampered with, altered, or caused a misappropriation of information with the purpose or effect of interfering with or undermining election processes and institutions. Specifically, the IRA tampered with or altered information in order to interfere with the 2016 U.S. election. The IRA created and managed a vast number of fake online personas that posed as legitimate U.S. persons to include grassroots organizations, interest groups, and a state political party on social media. Through this activity, the IRA posted thousands of ads that reached millions of people online. The IRA also organized and coordinated political rallies during the run-up to the 2016 election, all while hiding its Russian identity. Further, the IRA unlawfully utilized personally identifiable information from U.S. persons to open financial accounts to help fund IRA operations.")

1. *Immutable Life Logs as an Alibi Service*

Consider a worst-case scenario: a world in which it is cheap and easy to portray people as having done or said things they did not say or do, with inadequate technology to quickly and reliably expose fakes and inadequate law or policy tools to deter and punish them. In that environment, a person who cannot credibly demonstrate their real location, words, and deeds at a given moment will be at greater risk than those who can. Credible alibis will become increasingly valuable as a result; demand for new ways to secure them—for services that ensure that one can disprove a harmful fake—will grow, spurring innovation as companies see a revenue opportunity.

We predict the development of a profitable new service: immutable life logs or authentication trails that make it possible for a victim of a deep fake to produce a certified alibi credibly proving that he or she did not do or say the thing depicted.²⁷⁹

From a technical perspective, such services will be made possible by advances in a variety of technologies including wearable tech; encryption; remote sensing; data compression, transmission, and storage; and blockchain-based record-keeping. That last element will be particularly important, for a vendor hoping to provide such services could not succeed without earning a strong reputation for the immutability and comprehensiveness of its data; otherwise, the service would not have the desired effect when called upon in the face of an otherwise-devastating deep fake.

Providing access to a credible digital alibi would not be enough, however. The vendor also would need to be able to provide quick and effective dissemination of it; the victim alone often will be in a poor position to accomplish that, for the reasons discussed above in Part I. But it is possible that one or a few providers of an immutable life log service can accomplish this to no small degree. The key would be partnerships with a wide array of social media platforms, with arrangements made for those companies to rapidly and reliably coordinate with the provider when a complaint arises regarding possible deep-fake content on their site.

Obviously, not everyone would want such a service even if it could work reasonably effectively as a deep-fake defense mechanism. But some individuals (politicians, celebrities, and others whose fortunes depend to an unusual degree on fragile reputations) will have sufficient fear of suffering irreparable harm from deep fakes that they may be willing to agree to—and pay for—a service that comprehensively tracks and preserves their movements, surrounding visual circumstances, and perhaps in-person and electronic communications; although providers may be reluctant to include audio-recording capacity because some

279. This notion is by no means new. Indeed, Anita Allen presciently discussed this possibility in her work. See Anita L. Allen, *Dredging Up the Past: Lifelogging, Memory, Surveillance*, 75 U. CHI. L. REV. 47 (2008).

states criminalize the interception of electronic communications unless all parties to a communication consent to the interception.²⁸⁰

Of course, a subset of such a service—location verification—is available already, thanks to the ubiquity of phones with location tracking features as well as cell-site location records. But it is one thing to have theoretical access to a business record proving that a device (though not necessarily the person associated with it) was in some general location. It would be quite another to have ready and reliable access to proof—perhaps backed by video—that the person was in a very precise location and acting and speaking in particular ways. And if the provider of such a service manages to partner with major platforms in a way that facilitates not just reliable but rapid and efficient verification services, this could be a sizable advantage.

Even so, it may be that few individuals will want to surrender privacy in this way. We think it likely, though, that more than a few organizations will consider requiring use of tracking services by at least some employees at least some of the time. The protective rationale for the service will be a considerable incentive for the organization, but note that this interest might dovetail robustly with distinct managerial interests in deterring or catching employee misfeasance and malfeasance. This is much like the earlier wave of innovation that led to installation of dashboard cameras in police cars and the current wave involving the proliferation of body cameras on the officers themselves.

We urge caution in encouraging the emergence of such services. Whatever the benefits, the social cost (should such services emerge and prove popular) would be profound.

Proliferation of comprehensive life logging would have tremendous spillover impacts on privacy in general. Indeed, it risks what has been called the “unraveling of privacy”²⁸¹—the outright functional collapse of privacy via social consent despite legal protections intended to preserve it. Scott Peppet has warned that, as more people relinquish their privacy voluntarily, the remainder increasingly risks being subject to the inference that they have something to hide.²⁸² This dynamic might eventually overcome the reluctance of some holdouts. Worse, the holdouts in any event will lose much of their lingering privacy, as they find themselves increasingly surrounded by people engaged in life-logging.

Note the position of power in which this places the suppliers of these services. The scale and nature of the data they would host would be

280. See Danielle Keats Citron, *Spying Inc.*, 72 WASH. & LEE L. REV. 1243, 1263 (2015) (explaining that twelve states criminalize the interception of electronic communications unless all parties to the communication consent to the interception); Paul Ohm, *The Rise and Fall of Invasive ISP Surveillance*, 2009 U. ILL. L. REV. 1417, 1486 (2009). So long as one party to communications consent to interception, the remaining state laws—38—and federal law permit the practice.

281. Scott R. Peppet, *Unraveling Privacy: The Personal Prospectus and the Threat of a Full-Disclosure Future*, 105 NW. U. L. REV. 1153, 1159 (2015).

282. *Id.* at 1180.

extraordinary, both as to individual clients and more broadly across segments of society or even society as a whole. A given company might commit not to exploit that data for commercial or research purposes, hoping instead to draw revenue solely from customer subscriptions. But the temptation to engage in predictive marketing, or to sell access to the various slices of the data, would be considerable. The company would possess a database of human behavior of unprecedented depth and breadth, after all, or what Paul Ohm has called a “database of ruin.”²⁸³ The Cambridge Analytica/Facebook scandal might pale in comparison to the possibilities unleashed by such a database.

The existence of such a database would also raise privacy issues vis-à-vis government investigators. Certainly law enforcement entities would wish to access this rich trove of information in many cases.²⁸⁴ Whether they could do so without a warrant, however, is unclear at the current time. The Supreme Court’s 2018 decision in *Carpenter v. United States* unsettled the so-called “third-party doctrine” (i.e., the rule that the Fourth Amendment does not require a warrant for government access to records held by a third party).²⁸⁵ While *Carpenter* disclaimed any intent to abandon the third-party doctrine with respect to “conventional surveillance techniques and tools, such as security cameras,”²⁸⁶ the opinion suggests that a warrant likely would be required in the case of a police search of a database of the kind created by comprehensive life logging. Indeed, a life-logging database would enable precisely the sort of pervasive surveillance of someone’s life that triggered the warrant for access to cell-site location data.²⁸⁷ Congress or state legislatures might directly impose such a requirement by statute. But at any rate, the important point is that—once the right legal process is used—the government’s capacity to know all about a suspect would be unrivaled as a historical matter (especially as combined with other existing aggregations of data).

283. Paul Ohm, *Broken Promises of Privacy: Responding to the Surprising Failure of Anonymization*, 57 UCLA L. REV. 1701, 1748 (2010).

284. See Neil Richards, *The Third Party Doctrine and the Future of the Cloud*, 94 WASH. U. L. REV. 1441, 1444 (2017).

285. *Carpenter v. United States*, 138 S. Ct. 2206 (2018). For an insightful discussion of the *Carpenter* decision, see Paul Ohm, *The Many Revolutions of Carpenter*, 32 HARV. J. L. & TECH. 357 (2019).

286. *Carpenter*, 138 S. Ct. at 2220.

287. The *Carpenter* decision follows logically from the opinions articulated in *United States v. Jones*, 565 U.S. 400 (2012), which David Gray and one of us (Citron) argued amounted to the recognition of a right to quantitative privacy. See David Gray & Danielle Citron, *The Right to Quantitative Privacy*, 98 MINN. L. REV. 62, 64–65 (2013) (arguing that the Fourth Amendment erects protection against broad and indiscriminate surveillance that is tantamount to a general warrant). Though the third-party doctrine was not actually modified in *United States v. Jones*, five justices in that case expressed doubt about the wisdom of simply applying the third-party doctrine unaltered to circumstances involving novel information technologies that do not necessarily track the premises of the analog age that gave rise to that doctrine and that raise the spectre of a surveillance state. 565 U.S. at 89–92.

Despite helping to identify those guilty of crime and avoid mistaken prosecution of the innocent, this would produce unprecedented opportunities for government authorities to stumble across—and then pursue—*other* misdeeds, and not only those of the original suspect. Society may not be prepared to accept what might then be a sharp increase in the degree of detection and enforcement that would follow. Moreover, the situation also would expose investigators to a considerable amount of information that might not be inculpatory as such, but that might, nonetheless, provide important leverage over the suspect or others. Again, the resulting enhancement of prosecutorial capacity will be welcome in some quarters, but may cause an erosion of commitment to privacy and other values. At the very least, this would deserve careful consideration by policymakers and lawmakers.

Ultimately, a world with widespread life logging of this kind might yield more good than harm, particularly if paired with legislation guarding access to, use of, and security accorded such comprehensive databases. But it might not. For now, our aim is no more and no less than to identify the possibility that the rise of deep fakes will in turn give birth to such a service, and to flag the implications this will have for privacy. Enterprising businesses may seek to meet the pressing demand to counter deep fakes in this way, but it does not follow that society should welcome—or wholly accept—that development. Careful reflection is essential now, before *either* deep fakes *or* responsive services get too far ahead of us.

2. *Speech Policies of Platforms*

Our last set of observations concern what may prove to be the most salient response mechanism of them all: the content screening-and-removal policies of the platforms themselves, as expressed and established via their terms-of-service (TOS) agreements.

TOS agreements are the single most important documents governing digital speech in today's world, in contrast to prior ages where the First Amendment provided the road map for speech that was permissible in public discourse.²⁸⁸ Today's most important speech fora, for better or worse, are online platforms, not public fora like public parks or streets. TOS agreements of private companies determine if speech on the major platforms is visible, prominent, or viewed, or if instead it is hidden, muted, or never available at all.²⁸⁹ TOS agreements thus will be primary battlegrounds in the fight to minimize the harms that deep fakes may cause. The First Amendment has little to say about the choices that private companies make about what speech can and cannot appear on their services.

Some TOS agreements already ban certain categories of content. For instance, Twitter has long banned impersonation, without regard to the

288. See Citron & Richards, *supra* note 45, at 1362.

289. See Klonick, *supra* note 192, at 1630–38.

technology involved in making the impersonation persuasive.²⁹⁰ And Google's policy against non-consensual pornography now clearly applies to deep fakes of that kind. These are salutary developments, and other platforms can and should follow their lead even as all the platforms explore the question of what other variants of deep fakes likewise should be the subject of TOS prohibition.

As the platforms explore this question, though, they should explicitly commit themselves to what one of us (Citron) has called "technological due process."²⁹¹ Technological due process requires companies be transparent—not just notionally but in real practical terms—about their speech policies. Platforms should be clear, for example, about what precisely they mean when they ban impersonation generally and deep fakes specifically. In our view, platforms should recognize that some deep fakes are not on balance problematic and should remain online. Thus, TOS should specify that deep-fake ban would not cover satire, parody, art, or education, as explored above. In our view, such deep fakes should not normally be filtered, blocked, muted, or relegated to obscurity.

Platforms should provide accountability for their speech-suppression decisions, moreover. Users should be notified that their (alleged) deep-fake posts have been blocked, removed, or muted and given a meaningful chance to challenge the decision.²⁹² After all, as we noted above there is a significant risk that growing awareness of the deep fake threat will carry with it bad faith exploitation of that awareness on the part of those who seek to avoid accountability for their real words and actions via a well-timed allegation of fakery.

The subject of technological due process also draws attention to the challenge of just how platforms can and should identify and respond to content that may be fake. For now, platforms must rely on users and in-house content moderators to identify deep fakes. The choice between human decision-making and automation is crucial to technological due process.²⁹³ Exclusive reliance on automated filtering is not the answer, at least for now, because it is too likely to be plagued both by false positives and false negatives.²⁹⁴ It may have a useful

290. CITRON & JURECIC, PLATFORM JUSTICE, *supra* note 46 at 14; *see also* CITRON, HATE CRIMES IN CYBERSPACE, *supra* note 40, at 228–42 (calling for platforms to adopt speech rules and procedures that provide greater transparency and accountability).

291. Citron, *Technological Due Process*, *supra* note 245. Kate Klonick takes up this model in her groundbreaking work on the speech rules and practices of content platforms who she calls the "New Speech Governors." Klonick, *supra* note 192, at 1668–69.

292. Note that 17 U.S.C. § 512(g) (2012) (part of the Digital Millennium Copyright Act) includes a provision requiring notice where an entity removes content based on a copyright infringement concern. Our proposal is not limited to copyright-infringement takedowns and would apply to muting or other forms of suppression that reduce visibility without outright removal of the content. Crucially, we are also not suggesting that law require moderation practices that emulates technological due process. Instead, we invoke the concept as an analogy to commitments to transparency and accountability, one that would be adopted voluntarily in the market, not as a direct regulatory mandate.

293. *See* CITRON & JURECIC, PLATFORM JUSTICE, *supra* note 46, at 17.

294. *Cf.* Georgia Wells et al., *The Big Loophole that Left Facebook Vulnerable to Russia Propaganda*, WALL ST. J. (Feb. 22, 2018), <https://www.wsj.com/articles/the-big-loophole-that-left->

role to play in flagging specific content for further review by actual analysts, but normally should not serve as the last word or the basis for automatic speech-suppressive action (though an exception would be proper for situations in which content previously has been determined, with due care, to be fraudulent, and software detects that someone is attempting to post that identical content).

The good news—and we would like to end on such a note—is that some of the largest platforms do recognize the problem deep fakes present, and are beginning to take steps to respond. Facebook, for example, plans to emphasize video content to a growing degree and has stated that it will begin tracking fake videos.²⁹⁵ Also underway are efforts to emphasize videos from verified sources while also affirmatively deemphasizing ones that are not; this will not correspond perfectly with legitimate versus fake videos of course, but it might help to some degree, although at some cost to the ability of anonymous speakers to be heard via that platform.²⁹⁶ Much more will be needed, but the start is welcome.

CONCLUSION

Notwithstanding the adage about sticks-and-stones, words in the form of lies have always had the ability cause significant harm to individuals, organizations, and society at large. From that perspective, the rise of deep fakes might seem merely a technological twist to a long-standing social ill.

But another adage—that a picture is worth a thousand words—draws attention to what makes the deep-fake phenomenon more significant than that. Credible yet fraudulent audio and video will have a much-magnified impact, and today's social media-oriented information environment interacts with our cognitive biases in ways that exacerbate the effect still further. A host of costs and dangers will follow, and our legal and policy architectures are not optimally designed to respond. Our recommendations would help with that to some degree, but the problem to a considerable degree would still remain. A great deal of further creative thinking is needed. We hope to have spurred some of it by sounding this alarm.

facebook-vulnerable-to-russian-propaganda-1519314265 [https://perma.cc/3HU9-HYV7] (reporting that YouTube mistakenly promoted a conspiratorial video falsely accusing a teenage witness to the Parkland school shooting of being an actor).

295. *Id.*

296. *Id.*

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DEEFAKE PRIVACY: ATTITUDES AND REGULATION

Abstract--Using only a series of images of a person’s face and publicly available software, it is now possible to insert the person’s likeness into a video and show them saying or doing almost anything. This “deepfake” technology has permitted an explosion of political satire and, especially, fake pornography. Several states have already passed laws regulating deepfakes, and more are poised to do so. This Article presents three novel empirical studies that assess public attitudes toward this new technology. In our main study, a representative sample of the U.S. adult population perceived nonconsensually created pornographic deepfake videos as extremely harmful and overwhelmingly wanted to impose criminal sanctions on those creating them. Labeling pornographic deepfakes as fictional did not mitigate the videos’ perceived wrongfulness. In contrast, participants considered nonpornographic deepfakes substantially less wrongful when they were labeled as fictional or did not depict inherently defamatory conduct (such as illegal drug use). A follow-up study showed that people sought to impose both civil and criminal liability on deepfake creation. A second follow-up showed that people judge the creation and dissemination of deepfake pornography to be as harmful as the dissemination of traditional nonconsensual pornography--otherwise known as revenge pornography-- and to be slightly more morally blameworthy.

Based on the types of harms perceived in these studies, we argue that prohibitions on deepfake pornographic videos should receive the same treatment under the First Amendment as prohibitions on traditional nonconsensual pornography rather than being dealt with under the less-protective law of defamation. In contrast, nonpornographic deepfakes can likely only be dealt with via defamation law. Still, there may be reason to allow for enhanced penalties or other regulations based on the greater harm people perceive from a defamatory deepfake than a defamatory written story.

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*612 Introduction

In 2020, actress Kristen Bell was shocked to discover a pornographic video of herself online. The reason Bell was so surprised was that she had never filmed the video. In an interview with Vox, Bell stated, “We’re having this gigantic conversation about consent, and I don’t consent, so that’s why it’s not okay ... even if it’s labeled as, ‘This is not actually her,’ it’s hard to *613 think about that.”¹ The video was what is known as a “deepfake.” Deepfakes are videos that use machine-learning algorithms to digitally impose one person’s face and voice onto videos of other people.² The resulting doctored videos show people doing and saying things they never did or said. The number of videos like the one Kristen Bell found of herself is increasing. From July 2019 to June 2020, there was an increase of over 330% in the number of deepfake videos found online.³ And the deepfake of Bell is a typical example of the genre. Ninety-six percent of all deepfake videos online are pornographic, and those depicted in pornographic deepfakes are almost exclusively women.⁴ Nonpornographic deepfake videos have depicted politicians, corporate figures, and celebrities.⁵

As the opening example of Bell illustrates, many deepfake subjects feel harmed by their depictions in these false videos. The emerging scholarly literature on deepfakes discusses them causing two types of harm: dignitary harms to the individuals depicted in the videos (whether viewers believe the videos or not)⁶ and political and national security harms to society from successfully deceptive videos.⁷ Yet the literature has noted that there are few legal protections for deepfake subjects under traditional privacy law, and what law does exist—for example, the law of defamation--tends to target *614 only deception-related harms and not dignitary violations.⁸ The general problem is that the major privacy torts target those who obtain or publicize information that is both true and private. These torts are a poor match for the typical case of pornographic deepfakes, where that which is true (the person’s face) is not private, and that which is private (the sex act) is not true.⁹

Given that existing laws tend not to cover deepfake videos, several states have moved to create new regulations to address them. In 2019, California passed two measures: one creating a civil cause of action for those featured in pornographic deepfakes and the other prohibiting the dissemination of unlabeled altered videos containing political candidates in the weeks leading up to an election.¹⁰ Similarly, Virginia expanded its nonconsensual-pornography statute to cover morphed videos,¹¹ and Texas protected candidates in the lead-up to elections.¹² Notably, one Texas candidate has already attempted to avail himself of that law’s protection.¹³ New York has recently passed new legislation expanding its nonconsensual-pornography

law and providing limited protection against commercial uses of deepfakes.¹⁴ Many other states, as well as the federal government, have also considered action in recent months.¹⁵ As nonconsensual-pornography §615 laws proliferated greatly over the 2010s,¹⁶ deepfake laws seem poised to expand in the 2020s.

Yet deepfakes present a difficult and novel challenge for courts and lawmakers. They raise fundamental questions about the moral wrongfulness of new and unusual technological acts that may harm others. How wrong is it to use a publicly available photo of a person's face? Is it problematic to make a deepfake that is pornographic? What about one that is not? Is it still harmful if people know the deepfake is fake? Currently, there is very little data on how the public views deepfakes and, particularly, how the public may view different types of deepfakes.

This lack of understanding of public attitudes is a substantial problem. Legal scholars have argued that laws--especially criminal laws--should reflect the views of the society that they govern.¹⁷ Prior research has shown that both over- and under-criminalization can substantially degrade the law's legitimacy in the eyes of the public and reduce public compliance with legal rules.¹⁸ People reading news reports of unjust laws express a greater willingness to engage in illegal activities,¹⁹ they exhibit a greater inclination toward jury nullification in mock-juror studies,²⁰ and they are even more likely to cheat on experimental tasks and to steal pens.²¹ There are, therefore, high costs to what some authors have called "disillusionment" with the law.²² If we do not know how the public views the moral wrongfulness of deepfake production, then we cannot pass laws conforming to those beliefs.

Public perceptions also play a substantial role in parts of privacy law, further strengthening the case for researching deepfake attitudes. The language of several privacy and privacy-related causes of action explicitly references the attitudes of the community or the reasonable person. Two of the core privacy torts--intrusion upon seclusion and public disclosure of private facts--require that the privacy invasions or information disclosures §616 be "highly offensive to a reasonable person."²³ Public perceptions are similarly critical for understanding obscenity, which is often at issue in cases involving sexual content. The meaning of obscenity depends on "community standards," particularly in determining what is "patently offensive" within a community.²⁴ Everyday people often resolve these questions, embodying the judgment of their communities, via the jury system,²⁵ and previous empirical research has examined the degree of correspondence between actual community attitudes and jury decisions in obscenity cases.²⁶ The jury is used in a similar fashion to embody the community's views in defamation actions, in which the jury determines whether a given statement about a person would harm their reputation either in general or in the eyes of some relevant subset of their peers.²⁷

Outside the privacy tort context, many scholars have advocated using public opinion data to inform the Fourth Amendment's reasonable-expectations-of-privacy analysis.²⁸ Professors Christopher Slobogin and Joseph Schumacher pioneered this method by having respondents rate the intrusiveness of a variety of law enforcement information-gathering §617 techniques.²⁹ Similarly, Professors Christine Scott-Hayward, Henry F. Fradella, and Ryan G. Fischer and Professors Bernard Chao, Ian Farrell, Christopher Robertson, and Ms. Catherine Durso have investigated Americans' opinions and beliefs about forms of electronic surveillance, finding, for example, that people generally expect privacy in data, such as their cell phone location records.³⁰

There is therefore a rich tradition of considering the public's views both when setting the boundaries of criminal laws and when considering the scope of a person's privacy rights in civil actions. And there is some danger in setting policy in this area absent a better understanding of how people actually view deepfake videos. Yet, to date, the authors are aware of no other study that examines public opinion on different kinds of deepfakes. Two questions, in particular, are left unanswered. First, do people view deepfakes as wrongful even if they are labeled as fake (and thus are not deceptive)? Second, are nonpornographic deepfakes harmful if they do not depict defamatory conduct?

These questions are especially important given the First Amendment challenges of deepfake regulation. The government cannot prohibit speech merely because the speech is false; there must be some additional problem.³¹ Given that mere falsity is not enough, we look to two potential frameworks that would allow for regulation for deepfakes. One is a defamation-style framework. This approach would allow for the prohibition of deepfakes that (1) are false, (2) are intended for viewers to perceive as true, and (3) cause harm to the target's reputation or standing in the community.³² In such a framework, labeling the deepfake as fake would remove all liability; it would negate the second element. If people view labeled deepfakes as harmless, then they are implicitly taking this defamation-style approach.

Alternatively, one could take a privacy-violation approach to deepfake regulation. Drawing a parallel to the existing law of nonconsensual pornography, this approach would view the harm as coming from the ***618** appropriation of a person's identity and the depiction of them in a highly private position. Labeling the videos as fiction does not meaningfully remove this harm; the target's identity is still being appropriated. To the extent that people view the creation of pornographic deepfakes as highly harmful and this harm as not mitigated by labeling, it may be appropriate to assimilate pornographic deepfake regulation into the broader law of nonconsensual pornography. Though this is most likely to be an issue for pornographic deepfakes, people may also view the appropriation of people's identities in the nonpornographic context as highly offensive, shedding light on which framework is proper there as well.

This Article presents the findings from three experimental studies that asked people to evaluate the wrongfulness of creating both pornographic and nonpornographic deepfake videos. Part I explains the rise of deepfake technology and the current scholarship on deepfake harms. It also reviews the current legal status of deepfakes and how it fits into holes in existing privacy laws. Part II introduces the three empirical studies. The primary study explores four main domains: pornographic videos and nonpornographic videos, either labeled fictional or unlabeled. Within both the pornographic and nonpornographic contexts, the study examines public reactions to a range of scenarios. This diverse set of scenarios allows us to consider the correspondence between public attitudes and both existing and proposed legal regimes.

This study finds that people are extremely critical of deepfakes, with many participants seeking to criminalize all types of deepfakes. Participants viewed deepfake videos as more wrongful and harmful than written accounts describing the same conduct. Though people regarded the production of nonpornographic deepfakes--which we call "attitudinal" deepfakes--as less wrongful when the videos were clearly marked as fictional, this was not the case for pornographic deepfakes. In fact, 92% of participants wanted to criminalize the dissemination of a pornographic deepfake even if the label indicated that it was fake. Pornographic deepfakes featuring celebrities (as opposed to everyday people) or non-nude but sexualized conduct were also all but universally condemned. These reactions do not merely reflect common opposition to pornography in all its forms: Prior research has shown that significantly fewer people, only about 30% of the public, want to criminalize pornography more generally.³³ In contrast, participants considered attitudinal deepfakes substantially less wrongful if they did not depict inherently defamatory conduct, such as illegal drug use. But many ***619** participants still wished to assign criminal liability even for the creation of less obviously harmful attitudinal deepfake videos, such as one depicting a deceased scientist describing their life's work. A smaller follow-up study in Section II.D shows that participants generally support allowing for both civil and criminal causes of action against those who produce deepfakes. Finally, a second follow-up study reported in Section II.E shows that people judge pornographic deepfakes to be on par with traditional nonconsensual pornography. Specifically, they view the dissemination of a pornographic deepfake to be as harmful as the dissemination of traditional nonconsensual pornography, and they consider it marginally more morally blameworthy.

Part III considers the implications of these findings for legal reform. Whenever society seeks to regulate a new form of misconduct, one of its first tasks is to define what counts as wrong. Our data show that people are deeply skeptical of the involuntary sexualization that stems from pornographic deepfakes. They take a context-dependent view of the dignitary harms present in attitudinal deepfakes. The current civil and criminal regimes do not sufficiently reflect these moral intuitions. We proceed to explore whether attempts to bring the law into greater alignment with public attitudes would be constitutionally permissible under the First Amendment. Part III considers both the complexities of banning speech that is merely false as well as the kinds of harms that courts have recognized when considering cases involving nonconsensual pornography and morphed child pornography.³⁴ Ultimately, the fact that the harm perceived from pornographic deepfakes is not mitigated by labeling leads us to conclude that regulation of such videos should fall under the same First Amendment standards as regulation of nonconsensual pornography generally. The implications for nonpornographic deepfakes are less clear, and it may be proper to think of them primarily through the lens of defamation.

I. The Rise of Deepfakes and Theories of Deepfake Harms

Producing deepfake videos has gone from being extremely difficult to trivially easy in under five years.³⁵ This Part reviews the rise of deepfake technologies and then considers the kinds of societal and individual harms that may be caused by their increasing prevalence. It closes by reviewing the current legal status of deepfakes under various civil and criminal regimes.

****620 A. Deepfake Technology and the Rise of Consumer Use***

Deepfake videos are generally created using generative adversarial networks (GANs), a technology created by Ian Goodfellow in 2014.³⁶ GAN technology involves the use of two neural networks in a dynamic that “mimics the back-and-forth between a picture forger and an art detective who repeatedly try to outwit one another.”³⁷ The first network, known as the “generator,” creates fake outputs until the second network, known as the “discriminator,” cannot tell the difference between the generator’s outputs and an original data set.³⁸ The result is a realistic-looking video. Essentially, the technology takes an image, such as a face, learns it, and inserts it into a video such that the substituted face appears seamlessly.

The rise of deepfake videos and consumer use of deepfake technology started in 2017 on the website Reddit. A user named “deepfake” posted doctored pornography that swapped the faces of celebrities and public figures with people in pornographic videos.³⁹ This user’s posts became incredibly popular. A specialized Reddit page, known as a “subreddit,” was dedicated exclusively to deepfake videos and quickly reached 90,000 community members.⁴⁰

Although deepfake pornography has since been banned on Reddit,⁴¹ the prevalence of deepfake videos on the internet is growing rapidly. One study found that in July 2019, there were 14,678 deepfake videos online, representing a near-100% increase from seven months earlier in December 2018.⁴² As of June 2020, there were 49,081 deepfake videos online, representing an increase of over 330% in a year.⁴³ “Since December 2018, the number of deepfakes online is roughly doubling every six months, *621 confirming a continued exponential growth.”⁴⁴ While this increase in the prevalence of deepfake videos can be attributed to consumer access to deepfake technology, it may also be attributed to its media coverage in recent years. Indeed, the media has often had the effect of popularizing dark corners of the internet. Take, for example, the case of Silk Road, the online marketplace that operated as a black market for guns, drugs, and other illicit goods and services.⁴⁵ Eventually, a journalist at *Gawker* discovered the website and published an article about it.⁴⁶ Within days, discussion of the website became part of the national discourse, customers flocked to the site, and the previously unknown website caught the attention of Congress and the Department of Justice.⁴⁷

Some uses of deepfake technology have become mainstream. A simple Google search yields not only deepfake videos themselves, which are widely available on the internet, but also consumer access to the technology used to create these videos.⁴⁸ Independent phone applications can be downloaded to cell phones, where users can insert photos to create lifelike videos. Social media applications Snapchat and TikTok have integrated deepfake technology into their platforms as well.⁴⁹ For example, in December 2019, Snapchat announced a new tool called “Cameos,” which allows users to insert their own pictures into a video setting to create a deepfake video.⁵⁰ However, these features generally limit what users can do with the deepfake technology. For example, the Cameos feature allows users to “jump into” preset scenes and customize captions.⁵¹ These are generally intended to be fun or silly. One tutorial on Cameos shows how people can be inserted into *622 videos showing them doing extreme sports, wearing a cat costume, or dressed as a Wicked Witch.⁵²

Despite the growth of silly deepfakes through some more common applications, the overwhelming majority of deepfake videos on the internet are pornographic.⁵³ The majority of these deepfake videos are found on websites dedicated solely to deepfake pornography,⁵⁴ although deepfake videos are found on mainstream pornography websites as well.⁵⁵ One study found that 100% of these videos feature female subjects and that the majority depict famous women, such as actresses, musicians, and political figures,⁵⁶ but there are now pornographic deepfake videos that depict men as well.⁵⁷ Creators of pornographic deepfakes appear to be predominantly male, and pornographic deepfakes are sometimes used as a form of targeted harassment against women.⁵⁸ The use of deepfakes as a tool for harassment may explain why so many female political figures are the subjects of deepfakes.

In the nonpornographic context, the majority of deepfake videos depict famous people, such as those in the entertainment industry, politicians, and CEOs.⁵⁹ Often these nonpornographic deepfakes are intended to be satirical.⁶⁰ Unlike in the pornographic context, where the purpose of the video requires that the video appear realistic, the fact that a nonpornographic video is a deepfake can add to the joke. An oft-cited YouTube video of Bill Hader exemplifies the nature of these videos. The video shows a clip of Hader on the *Late Show with David Letterman* in 2008. Known for his celebrity impressions, Hader gives impressions of Tom Cruise and Seth Rogan, and each time he gives an impression, his face morphs into the face of the person he is impersonating.⁶¹ The video, posted by YouTuber Ctrl Shift *623 Face, has over eleven million views, and the title of the video labels it as a “[DeepFake],” meaning it is clearly labeled as fictional.⁶²

Though most deepfake videos are of public figures, private individuals are also sometimes targeted. Social media gives

deepfake producers access to images of private individuals in a way that was traditionally only true for celebrities.⁶³ This store of photos, coupled with the rise of consumer access to deepfake technology, makes the process of making deepfake videos of private individuals straightforward. There have already been a few cases of deepfake-facilitated harassment of private figures,⁶⁴ and nonconsensual deepfake pornography of private individuals is increasingly common.⁶⁵ Of course, people may create or consensually appear in deepfake videos in apparently innocuous contexts, such as through social media applications. In a relatively harmless case, a fifty-year-old man deepfaked himself as a young woman to increase the popularity of his video channel about motorbikes.⁶⁶

B. Harms

The rising number of deepfake videos online has led to increased interest in the potential negative effects on deepfake subjects and society at large. The new scholarship on deepfakes has generally focused on two categories of harm associated with deepfake videos: individual harms to a deepfake subject's dignity and emotional well-being, and wider societal harms involving threats to national security and democratic institutions. Scholars have also sometimes discussed the macro-level implications of deepfakes and their contribution to the spread of misinformation.

****624 I. Individual Harms***

The potential for deepfakes to cause dignitary harms to deepfake subjects has almost exclusively been explored in the context of nonconsensual deepfake pornography.⁶⁷ These individual harms include both the harms associated with the video itself as well as the downstream emotional and reputational harm stemming from subsequent uses of the video and society's response to the person depicted. On the harms associated with the video itself, Professors Bobby Chesney and Danielle Citron highlight the intangible damage caused by the videos, which can "exploit an individual's sexual identity for other's gratification."⁶⁸

As with other forms of nonconsensual pornography, nonconsensual deepfake pornography directly affects the sexual autonomy of the subjects it depicts. Citron notes that "[s]exual privacy concerns the social norms governing the management of boundaries around intimate life" and "involves the extent to which others have access to and information about people's naked bodies (notably the parts of the body associated with sex and gender); their sexual desires, fantasies, and thoughts; communications related to their sex, sexuality, and gender; and intimate activities (including, but not limited, to sexual intercourse)."⁶⁹ Although deepfakes do not depict the naked bodies of the deepfake subject--only the subject's face is taken--they still impinge on sexual autonomy by repurposing the subject's identity.

The core issue of nonconsensual pornography is consent, and deepfake pornography adds an additional layer because the individual depicted did not actually engage in the sexual behavior she is depicted as doing. Like the nonconsensual disclosure of pornography that depicts an individual engaging in activities they actually did, nonconsensual deepfake pornography is "an affront to the sense that people's intimate identities are their own to share or to keep to themselves."⁷⁰

Sexual-privacy invasions can have profound effects. Victims report experiencing significant psychological impacts such as anxiety, depression, *625 loss of appetite, and suicidal ideation.⁷¹ Although these impacts have not been widely studied, qualitative research on the psychological effects of nonconsensual pornography generally is consistent with these accounts and underscores their potential severity.⁷² Further, victims of nonconsensual pornography experience harms in the form of societal reactions. For example, victims of nonconsensual pornography have reported experiencing job loss and barriers to employment as a result of appearing in these videos.⁷³ These secondary harms also exist in the deepfake context. In addition to the psychological impact caused by the creation of nonconsensual deepfake pornography, it has been used to threaten and harass victims.⁷⁴

As Citron notes, "[w]hen the nude images of women and sexual minorities are posted online without consent, these individuals may be stigmatized."⁷⁵ This may be true even in the deepfake context, in which the images do not depict the actual bodies of the subjects, and the question remains whether labeling a deepfake video as fake ameliorates the harm to deepfake pornography victims. Public opinion data can shed light on the attitudes of everyday people toward these videos, and it can capture the reactions people have to videos even when they are labeled as fake. In Section II.E we explicitly contrast views toward deepfake pornography with views toward traditional nonconsensual pornography.

There does not appear to be any writing on the individual dignitary harms associated with nonpornographic deepfakes. Nevertheless, it is easy to imagine having a visceral negative reaction to seeing oneself depicted saying a string of racial slurs, endorsing a terrorist group, or doing cocaine when one has not done so, for instance, and such videos could also cause downstream effects on employability. We seek to fill this gap in the literature by exploring views of different types of nonpornographic deepfakes in Part II.

***626 2. Societal Harms**

In contrast to the limited consideration of nonpornographic deepfakes in the domain of individual dignity, there has been a great deal of concern about the potential of political deepfake videos to interfere with elections, harm national security, and undermine democratic institutions. Hypotheticals are routinely proposed, including the possibility of the release of deepfake videos the night before an election, a deepfake video depicting a government official declaring war, or a deepfake video confirming a rumor about a politician.⁷⁶ Chesney and Citron note that deepfake videos could jeopardize national security in myriad ways, including their use in military operations and to distract intelligence agencies.⁷⁷

Though we have yet to see a sophisticated deepfake informational campaign, deepfake videos of political figures have already been made. In April 2018, director Jordan Peele and BuzzFeed CEO Jonah Peretti released a deepfake video depicting President Barack Obama saying outrageous things, such as “Ben Carson is in the sunken place,” and “Stay woke, bitches.”⁷⁸ Of course, President Obama has not said those things publicly, and the video ultimately reveals Jordan Peele as the voice actor. The video serves as a public service announcement to viewers about being “more vigilant with what we trust from the internet.”⁷⁹ A similar video was created of Prime Minister Boris Johnson that depicted him endorsing his then-political opponent. As with the Obama deepfake video, the deepfaked version of Boris Johnson reveals the video is a deepfake and warns viewers that “the unregulated power of technologies like this risk fueling misinformation, eroding trust, and compromising democracy.”⁸⁰

***627** Deepfake videos depicting politicians have generally remained satirical and have yet to undermine an American election,⁸¹ but there have been instances when doctored videos have been the subject of national news. For example, a doctored video of House Speaker Nancy Pelosi emerged online in May 2019.⁸² Also known as a “shallowfake,” this video was slightly altered to depict Pelosi slurring her words.⁸³ While the video was identified as altered by media outlets, its release and subsequent reporting highlighted the implications of deepfake technology.⁸⁴

At the core of the concern for deepfake technology is the spread of misinformation. Scholars have highlighted the acute issue this poses for journalists.⁸⁵ Chesney and Citron note that news organizations may encounter challenges to authenticating evidence, which leads to a chilling effect on news reporting.⁸⁶ Professor Nina Brown highlights a broader effect of deepfake technology: erosion of public trust.⁸⁷ She suggests that when people can no longer believe what they see, people will “deny actual events captured on video” and “be disinclined to trust *any* video evidence, whether offered as part of a news story, or as evidence in a courtroom.”⁸⁸ Similarly, Professor Regina Rini argues “that backstop crises triggered by contested deepfakes will lead to erosion of the reliability that recordings provide to our testimonial practices.”⁸⁹ Americans are already reported to mistrust the media,⁹⁰ so the rise in deepfake technology may exacerbate this mistrust. ***628** Professors Jessica Silbey and Woodrow Hartzog actually refer to this as an “upside” of deepfakes in that they expose the existing rot in our journalistic and electoral institutions and may stimulate broader reforms.⁹¹

C. Existing Civil and Criminal Frameworks

Despite this growing discussion of deepfake harms, there are few remedies under current law. This Section reviews the various civil remedies that might be available to victims of deepfakes, paying specific attention to unlabeled deepfakes because falsity is often determinative in privacy law.

Traditional tort and privacy law causes of action such as public disclosure of private fact and intrusion upon seclusion are generally not applicable in the deepfake context. Public disclosure of private fact involves the disclosure of a private matter that is “highly offensive to a reasonable person” and “not of legitimate concern to the public.”⁹² But deepfakes are not facts—they are entirely made up—so they cannot be private facts. Intrusion upon seclusion claims involve an intentional

intrusion, “physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns” that “would be highly offensive to a reasonable person.”⁹³ When distributors create deepfake videos using photographs found on the internet, no intrusion is required.⁹⁴ This is even clearer in the celebrity context, where a deepfake creator need commit no fresh intrusion to repurpose internet photographs taken by paparazzi or posted on social media.⁹⁵ From a privacy-as-information standpoint, there is not even a privacy intrusion: all that is being used is a person’s face, which is generally not private.⁹⁶

*629 Victims of nonconsensual deepfake videos may have more success with defamation or false light claims *if it is unclear that the videos are fake*. Defamation requires the publication of a false fact that harms the reputation of another.⁹⁷ False light is a similar cause of action that requires one to be portrayed falsely in a manner that is “highly offensive to a reasonable person.”⁹⁸ So there could easily be liability if a convincing deepfake showed a person committing a crime or engaging in disreputable conduct. Courts are also likely to find unlabeled pornographic deepfakes defamatory given the reputational harms of being in a pornographic video.⁹⁹ Similarly, courts may uphold a false light claim by concluding that falsely depicting a person as engaging in sexual conduct is highly offensive to a reasonable person.¹⁰⁰ Though public figures generally face additional burdens under defamation law, these barriers likely will not pose substantial obstacles here.¹⁰¹

Private citizens and public figures may therefore be successful in bringing defamation or false light claims for unlabeled pornographic deepfakes and unlabeled nonpornographic deepfakes that depict disreputable conduct. Most likely, the dispute in a particular case would be over whether the deepfake video was presented as if it were real. However, satirical deepfakes are likely more challenging cases. Though deepfake videos that depict a person engaging in illegal or extreme behavior are more likely to harm a person’s reputation-- qualifying for defamation liability--parody or satirical deepfake videos that depict an individual engaging in merely embarrassing behavior likely do not inflict the same reputational harm.

A final tort possibility is intentional infliction of emotional distress.¹⁰² This tort is generally difficult to satisfy--because it requires extremely *630 outrageous conduct--and it faces substantial First Amendment problems when applied to public figures or speech on public issues. In *Hustler Magazine, Inc. v. Falwell*, for example, the famous pastor Jerry Falwell sued *Hustler Magazine* for, among other things, intentional infliction of emotional distress for publishing what might be considered the written equivalent of a deepfake--a parody advertisement that said Falwell had engaged in sexual conduct with his mother in an outhouse.¹⁰³ Noting that the advertisement in question was a departure from traditional caricatures of political figures, the Court nevertheless protected the speech to avoid chilling political dialogue.¹⁰⁴ Similarly, extreme anti-gay-rights protests adjacent to a military funeral were held to not give rise to intentional infliction of emotional distress because they concerned a major public issue and violated no other laws.¹⁰⁵ This tort would therefore be a hard sell in any politically charged case.

Consequently, tort law provides little protection against deepfakes unless the deepfakes purport to be accurate depictions of facts. A deepfake that announces itself as fake is immune to the major privacy torts, fails the test for defamation, and is unlikely to be extreme enough to qualify for intentional infliction of emotional distress. Some states may provide some relief through right-of-publicity laws, but these often protect against the exploitation of a person’s likeness in advertising and commerce, rather than in general.¹⁰⁶ A minority of states provide broader protection here, however, that may apply to deepfakes.¹⁰⁷

Statutory protection under nonconsensual-pornography laws is little better in almost all states. State laws that do not explicitly address deepfakes seldom apply to deepfakes. For example, Texas’s nonconsensual-pornography statute criminalizes the nonconsensual disclosure of “visual material depicting another person with *the person’s* intimate parts exposed or engaged in sexual conduct.”¹⁰⁸ Statutes written in this manner likely do not apply to deepfake pornography because those videos usually do not depict the real body of the victim. Some states statutes, for example, North Dakota’s, are broader and prohibit the dissemination of a “visual depiction” *631 or “any intimate image” that depicts nudity or sexual conduct.¹⁰⁹ A deepfake pornographic video fits under that definition. The North Dakota statute, however, further requires that the dissemination of the image or video be in violation of a reasonable expectation of privacy.¹¹⁰ Although there are inherent privacy concerns with deepfake pornography, deepfake pornography is often made without the victim’s knowledge, so statutes requiring that the victim intended that an image be kept private do not translate to the deepfake context. This type of requirement is common in nonconsensual-pornography statutes. New York’s statute includes as an element that the “still or video image was taken under circumstances when the person depicted had a reasonable expectation that the image would remain private and the actor knew or reasonably should have known the person depicted intended for the still or video image

to remain private.”¹¹¹ Similarly, Connecticut’s statute requires that an image be disseminated with the knowledge that the person depicted “understood that the image would not be so disseminated.”¹¹² A recent analysis by Professors Jonathan Sales and Jessica Magaldi found that thirty nonconsensual-pornography statutes have a similar expectation of privacy requirements.¹¹³

Several new laws specifically targeting deepfakes were passed in 2019 and 2020. These laws are highly targeted and still few in number. Virginia, for example, amended its nonconsensual-pornography statute to address deepfakes specifically.¹¹⁴ [Section 1708.86 of the California Civil Code](#) provides a civil cause of action for an individual who is depicted in a pornographic deepfake video without their consent. The statute imposes civil liability on anyone who either creates and distributes the deepfake or who distributes the deepfake knowing it was created without consent.¹¹⁵ The statute carves out exceptions to liability, including when the deepfake is “[a] matter of legitimate public concern” or “[a] work of political or newsworthy value or similar work.”¹¹⁶ Notably, that the deepfake video is labeled as fake ***632** is not a permissible defense.¹¹⁷ A victim has the option to recover either economic and non-economic damages caused by the deepfake video or substantial statutory damages.¹¹⁸ The statutory damages range from \$1,500 to \$30,000 unless the distributor acted with malice, in which case a victim can recover up to \$150,000.¹¹⁹ A victim may also recover punitive damages and attorneys’ fees, as well as receive injunctive relief.¹²⁰

[Section 20010 of the California Elections Code](#) creates a civil cause of action for a political candidate who appears in a deepfake video. The statute prohibits the distribution of unlabeled “materially deceptive audio or visual media” featuring “a candidate for elective office [who] will appear on the ballot” with “the intent to injure the candidate’s reputation or to deceive a voter” within sixty days of an election.¹²¹ The statute defines “materially deceptive audio or visual media” as any audio or video of a candidate that has been intentionally manipulated so that it appears authentic to a reasonable person and causes “a reasonable person to have a fundamentally different understanding or impression of the expressive content” than if they were to hear or see the unedited image, audio, or video.¹²² However, the statute permits distribution if the media constitutes parody or satire¹²³ or is labeled with the following message: “This [image, video, or audio] has been manipulated.”¹²⁴ A candidate appearing in the manipulated media may seek injunctive relief to stop the distribution.¹²⁵ Texas has passed a similar provision that protects candidates in the lead-up to elections.¹²⁶ Neither of these statutes provides any protection to the common citizen against nonpornographic deepfakes, however. In contrast with the law of defamation--where public figures are disadvantaged compared to private figures¹²⁷--here, only public figures are protected and only in a particular time frame.

***633** One of the most recent state laws on deepfakes was passed in New York on November 30, 2020.¹²⁸ This action provided two new protections against deepfake videos. First, it expanded the New York right-of-publicity law to cover digitally manipulated likenesses and allow for protection to run for forty years after the depicted person’s death. But this right-of-publicity statute, like most others, only applies to limited commercial uses. Specifically, it bars uses in advertising or on products.¹²⁹ This would cover very few current deepfakes, as most existing deepfakes are either satirical or pornographic, rather than commercial. The statute also provides limited protection against the use of unauthorized deepfakes in audiovisual works unless the works include a conspicuous disclaimer.¹³⁰

The second form of new protection provided by New York is against pornographic deepfakes. These are prohibited in language similar to that of the new California statute: it is a violation to distribute unauthorized deepfakes of a person showing them “nude, meaning with an unclothed or exposed intimate part ... or appearing to engage in, or being subjected to, sexual conduct.”¹³¹ This provision specifically says that a disclaimer saying the representation is fake is not a defense against liability.¹³² Interestingly, this statute further provides that consent to appear in deepfake pornography is valid only if obtained through a rigorous process, with substantial notice to the subject and a right to revoke consent.¹³³

Looking at the variations across these new deepfake laws gives a sense of the broad range of options that will confront legislatures over the next several years. Depending on which harms, and which victims, most concern a state, the state could ban deepfake pornography, deepfake election interference, deepfake commercial exploitation, or all three. This range of possibilities highlights the need to determine which deepfakes are viewed as morally wrong and practically harmful by the public. Part II begins to answer those questions.

***634 II. Three Studies of Deepfake Attitudes**

Given the possibility of substantial future legislative activity in this area and the unsettled literature on deepfake harms, it is

essential to better understand how the public views deepfakes. Are all deepfakes problematic, or only ones that are pornographic or depict certain kinds of conduct? Are deepfakes of all people problematic, or only ones of people who are not politicians and celebrities? One can easily see how pornographic deepfakes, or Nazi-promoting attitudinal deepfakes, can harm the dignity of those depicted. But not all deepfakes are of that sort. If someone creates a deepfake of the president doing Fortnite dances, is that similarly an affront to dignity? After all, Jordan Peele was not widely condemned for participating in the creation of a comedic deepfake of President Barack Obama.¹³⁴

Further, American law places great faith in the marketplace of ideas. False claims about a person can lead to liability, but American law recognizes that public figures do not have a right to avoid being the subjects of satire, however little they may enjoy the experience.¹³⁵ Likewise, the publication of a publicly taken photograph of a person generally does not run afoul of state privacy laws.¹³⁶ Before creating what may amount to a new privacy right, we should first carefully mark the boundaries of what we seek to protect.

Very little is known about the attitudes of everyday people toward deepfakes. One nonacademic survey of an unrepresentative sample showed that people thought that deepfakes would do more harm than good and that a majority wanted to criminalize deepfakes.¹³⁷ Yet this study did not address any of the above questions about how different deepfakes would be viewed.¹³⁸ It did not ask about differences between pornographic and nonpornographic deepfakes or bring up the idea of labeling deepfakes as fake-- which appear to be the two main distinctions discussed by current legislative proposals. Therefore, it provides little guidance for future legislation.

To fill this gap and explore how everyday people view different kinds of deepfake videos, we conducted a study with a representative sample of the U.S. adult population. This Part discusses the design and methodology of the study, our sample, and findings from the study.

To conduct our primary study, we wrote scenarios that captured attitudes toward deepfake videos in the pornographic and nonpornographic contexts independently. Further, we wrote a range of scenarios for each context, sampling broadly from the universe of possible uses of deepfakes. One of our main goals was to determine if labeling the deepfake as fake mattered. The question of labeling is particularly important in this context because some proposals would only ban unlabeled deepfake videos.¹³⁹ Further, whether a deepfake video is labeled has implications for a victim's ability to seek redress under theories of defamation, false light, or intentional infliction of emotional distress.¹⁴⁰

We also included scenarios that depicted the victims as either public figures or private individuals. Public figures are treated differently under various tort laws, and courts have provided substantial protection for speech concerning them.¹⁴¹ The question remains whether the same considerations are consistent in the context of visual deepfake depictions.

For this study, a sample of American adults were recruited by Dynata, an online survey firm with an established panel of respondents.¹⁴² The demographics of the sample were set to match the U.S. Census proportions on the dimensions of age, sex, region, education, race, and ethnicity. Full demographics are reported in Appendix A. The final sample contained 1,141 individuals.¹⁴³ The study was conducted in October 2020 through Qualtrics. Respondents received an email from Dynata inviting them to participate in the survey. If they clicked on the provided link, then they were routed to a Qualtrics survey hosted by Northwestern University. By monitoring the demographics of those completing the survey, Dynata targeted waves of survey invitations to create a final sample consistent with the desired quotas.

This study had two basic parts. The first part presented participants with vignettes that described people making deepfake videos of various types. Participants were asked to rate these scenarios on several dimensions and decide whether it should be possible to criminally punish the person making the video. The purpose of using vignettes in this part was to introduce participants to deepfakes, a concept with which many of them might have been unfamiliar, and to give them examples of how deepfake technology could be used. This reduced the chance that participants would imagine drastically different conduct when thinking about deepfakes. The second part of the study asked a series of questions about the harmfulness of deepfakes, more generally, outside the context of a particular set of facts.

Study participants were randomly assigned to receive vignettes about one of four different types of deepfake videos: pornographic or attitudinal deepfakes that were either labeled as fake or not. The pornographic vignettes all included sexualized content, with the deepfake subject depicted either having sex or engaged in sexual behavior. By contrast, the

deepfakes we called attitudinal incorporated a range of different contents--from the silly to the defamatory to the totally mundane. We termed these attitudinal because the key behavior in the videos was often expressive--the deepfake subject was made to convey attitudes or facts.

In addition to being pornographic or attitudinal in content, the videos were either labeled or unlabeled. Labeled videos were described as clearly identified as fake by the video maker. For unlabeled videos, in contrast, it was clearly stated that the video creator did not indicate the video was fake. The following was the default unlabeled pornographic deepfake scenario:

***637** Imagine Jane is a friend of Will. Will finds a series of photos of Jane online. Will takes the photos and uses an app to merge her face onto a pornographic video. The final video shows Jane's face on the body of a naked woman having sex with a man. The video shows the entirety of the naked woman's body. Jane's face is clearly identifiable in the video. Will posts the video online publicly, and he includes Jane's first and last name. Though this video is made up, a viewer cannot easily tell that it has been altered. Will does not indicate that it is fake when he posts it.

The scenario makes it clear that the deepfake video used publicly available photos of the video subject, that it included graphic sex, that it looked genuine, and that it was posted publicly in a way that made it easily linked to the real identity of the video subject. The labeled version replaced the last sentence with, "In the video title and as a caption on the video, Will writes 'This is fake' to show that it is fake." This disclaimer was intended to be completely unambiguous and as permanent as any digital watermark could reasonably be. Each participant received only one type of vignette. For example, every vignette read by Participant A was about pornographic deepfakes that were labeled, and every vignette read by Participant B was about attitudinal deepfakes that were unlabeled. The full text of the unlabeled scenarios is available in Appendix B. In each case, the labeled version differed only in the last sentence, as in the above example.

Within each of these four conditions, participants rated multiple scenarios in a random order. For each scenario, the participant answered three questions:

- (1) How morally blameworthy was the video maker's conduct (1: Not at All to 6: Very Much)?;
- (2) How harmful was this to the deepfake video subject (same scale)?; and
- (3) How, if at all, should it be possible to punish the person making the video?

This last question was answered on the following scale:

- (1) It should not be possible to punish him; this should not be a crime;
- (2) It should be punished with a fine (less than \$500);
- (3) It should be punished like a minor crime (a year or less in jail); and

(4) It should be punished like a major crime (up to 10 years in jail).

We will review the results for the pornographic deepfakes before turning to the attitudinal deepfakes and closing with the overall questions about deepfake harmfulness. Table 1 shows the full list of scenarios used in the study. Participants received either the pornographic or attitudinal scenarios (if attitudinal, they saw both “private” and “politician” videos) that *638 were either labeled as fake or not. In total, 283 participants received the unlabeled attitudinal scenarios, 281 the labeled attitudinal scenarios, 287 the unlabeled pornographic scenarios, and 290 the labeled pornographic scenarios.

Table 1: Full List of Scenarios Used in the Study

TYPE	SCENARIO
Pornographic	Written Pornographic Story, Friend
	Deepfake (DF) Pornographic Video, Friend (Default Condition)
	DF Pornographic Video, Celebrity
	DF Pornographic Video, Sexualized Voice
	DF Pornographic Video, No Nudity, BDSM
	DF Pornographic Video, Personal Use, No Consent, Friend
	DF Pornographic Video, Personal Use, Consent, Friend
Attitudinal, Private	Written Cocaine-Use Story
	DF Cocaine-Use Video
	DF Self-Insult
	DF Scientist Biography, Dead
	DF Scientist Biography, Living
Attitudinal, Politician	Written Handshake-with-Child-Molester Story
	DF Handshake-with-Child-Molester Video
	DF Terror Endorsement
	DF Silly Song, No Consent

	DF Silly Song, Consent
	DF Polling Place, No Consent
	DF Polling Place, Consent

Analyses for these results took the form of a series of Analysis of Variance (ANOVA) tests on each of the dependent measures. ANOVAs test whether scores from two or more samples differ systematically enough that the samples are likely to be statistically distinct. Comparisons across labeling condition, looking at the effect of labeled versus not, were between-subject because different people saw the labeled and unlabeled vignettes. Comparisons across different labeled scenarios--such as comparing the default pornography deepfake condition to several of the other pornographic variants--were within-subject: the same people rated each of the labeled pornographic scenarios. Most of the analyses that follow are therefore mixed ANOVAs. For example, the first analysis below is a mixed 2x2 ANOVA that looks at the difference between a pornographic deepfake video and a pornographic written story (within-subject comparison, the same people saw both) and the difference between those scenarios being labeled as fake or not labeled as fake (a between-subject comparison with different people seeing *639 each possibility), as well as their interaction term. So this ANOVA tests whether the written story is different than the deepfake video (the main effect of video), whether labeled stories or videos are different than unlabeled stories or videos (the main effect of labeling), and whether the effect of labeling differs for stories and videos (the interaction between labeling and video).

A. Impressions of Pornographic Deepfakes

The default deepfake pornographic condition--in which our protagonist makes a deepfake video of a female friend that depicts the friend having sexual intercourse with a man, without labeling it as fake, and posts the video online--was viewed as highly blameworthy, extremely harmful to the person depicted, and deserving of substantial punishment (see Table 2). The first analysis here contrasts the protagonist making a deepfake pornographic video about his friend with the protagonist creating a written story describing the same conduct. Though writing and posting a pornographic story featuring the same conduct was viewed as less blameworthy, harmful, and deserving of punishment,¹⁴⁴ that act was also rated as quite serious, with only 10.5% not wanting to punish it criminally accompanied by relatively high blameworthiness and harm scores (Table 2).

Table 2: Comparison of Deepfake Pornographic Video to Written Story

		UNLABELED		LABELED	
Deepfake Pornographic Video, Friend	Blameworthy	5.44	(1.25)	5.36	(1.27)
	Harm	5.43	(1.20)	5.43	(1.14)
	Punishment	3.08	(0.94)	2.91	(0.92)
	Percentage not a crime	7.3%		8.0%	
Written Pornographic Story, Friend	Blameworthy	5.31	(1.33)	4.96	(1.54)
	Harm	5.29	(1.20)	5.08	(1.41)
	Punishment	2.78	(0.95)	2.45	(0.99)
	Percentage not a crime	10.5%		18.3%	

Note. Means (standard deviations in parentheses). Blameworthiness and harmfulness were rated on 6-point scales. Punishment was on a 4-point scale. The proportion of respondents choosing the lowest punishment option, “It should not be possible to punish him; this should not be a crime,” is reported in the bottom row for each scenario.

***640** The effect of labeling this story or video as fake depended on whether the content was written or a deepfake video.¹⁴⁵ Labeling helped significantly for the written story--causing participants to view it as less harmful, less wrongful, and deserving of less punishment--but mattered much less for the video. Labeling the video produced only a small significant effect on punishment, and that effect was one-third the size of the effect for the written story.¹⁴⁶ There was no significant effect of labeling on the perceived harmfulness or blameworthiness of the video.

The remaining deepfake pornographic cases were then compared to this default friend deepfake video case (see Table 3).¹⁴⁷ In one, the deepfake was of a celebrity rather than a friend. Everything else was the same: the video was still posted online and still clearly identified the celebrity. Targeting a celebrity rather than a friend was viewed as mitigating on each of the three dependent measures, but only very slightly. A full 90.2% of the sample still wanted to criminalize this conduct in the unlabeled condition. Two other variants that included sexualized behavior but no nudity--spanking in one and seductive speaking in the other--were also viewed only slightly more leniently than the default case.

***641 Table 3: Comparison of Variants to Default Deepfake Pornographic Video**

		UNLABELED		LABELED		COMPARED TO DEFAULT CONDITION (COLLAPSING ACROSS LABELING CATEGORIES)
Deepfake Pornographic Video, Celebrity	Blameworthy	5.30	(1.37)	5.31	(1.36)	F(1, 571) = 4.51* $\eta^2 = 0.01$
	Harm	5.27	(1.29)	5.21	(1.36)	F(1, 571) = 15.58*** $\eta^2 = 0.03$
	Punishment	2.94	(0.99)	2.89	(0.91)	F(1, 571) = 6.18* $\eta^2 = 0.01$
	Pct. not a crime	9.8%		9.0%		
Deepfake Pornographic Video, No Nudity, BDSM	Blameworthy	5.35	(1.27)	5.32	(1.24)	F(1, 571) = 2.06 $\eta^2 = 0.00$
	Harm	5.35	(1.20)	5.22	(1.26)	F(1, 571) = 17.07*** $\eta^2 = 0.03$
	Punishment	2.85	(0.93)	2.63	(0.89)	F(1, 571) = 56.62*** $\eta^2 = 0.09$
	Pct. not a crime	8.4%		10.0%		
Deepfake Pornographic Video, Sexualized Voice	Blameworthy	5.29	(1.39)	5.26	(1.34)	F(1, 570) = 6.86** $\eta^2 = 0.01$
	Harm	5.21	(1.30)	5.19	(1.34)	F(1, 570) = 24.31*** $\eta^2 = 0.04$
	Punishment	2.86	(0.97)	2.60	(0.93)	F(1, 570) = 58.02*** $\eta^2 = 0.09$
	Pct. not a crime	10.1%		12.8%		
Deepfake Pornographic Video, Personal Use, No Consent	Blameworthy	5.47	(1.07)	5.01	(1.56)	F(1, 270) = 4.77* $\eta^2 = 0.02$
	Harm	5.14	(1.37)	4.71	(1.67)	F(1, 270) = 29.22*** $\eta^2 = 0.10$
	Punishment	2.77	(1.04)	2.48	(1.09)	F(1, 270) = 41.68*** $\eta^2 = 0.13$
	Pct. not a crime	15.1%		23.8%		

						Compared to No Consent
Deepfake Pornographic Video, Personal Use, Consent ¹⁴⁸	Blameworthy	3.86	(2.13)	3.86	(2.09)	F(1, 567) = 85.88*** $\eta^2 = 0.13$
	Harm	3.78	(2.05)	3.91	(2.01)	F(1, 567) = 50.85*** $\eta^2 = 0.08$
	Punishment	2.08	(1.13)	1.96	(1.13)	F(1, 567) = 43.91*** $\eta^2 = 0.07$
	Pct. not a crime	43.6%		51.2%		

Note. Means (standard deviations in parentheses). Blameworthiness and harmfulness were rated on 6-point scales. Punishment was on a 4-point scale. Statistical significance is indicated as * p < 0.05, ** p < 0.01, *** p < 0.001. The proportion of respondents choosing the lowest punishment option, “It should not be possible to punish him; this should not be a crime,” is reported in the bottom row for each scenario.¹⁴⁹

These two no-nudity scenarios address a question that arises under the current California statute on pornographic deepfakes. This statute prohibits videos depicting individuals who are “nude” or engaging in “sexual conduct.”¹⁵⁰ Sexual conduct is in turn described as masturbation, several *642 different kinds of sexual intercourse, sexual penetration of the vagina or rectum, ejaculation on a person, and “[s]adomasochistic abuse involving the depicted individual.”¹⁵¹ A spanking scene would likely qualify under this last prong, despite the lack of penetration or nudity. The sexualized-voice scene does not depict the speaker engaging in any of those forms of sexual conduct, and therefore would be outside the scope of the statute. Participants, however, viewed all of these as equivalently problematic. Though there are slight statistical differences between these and the default scenario, they are quite small. All of the scenarios received blameworthiness and harm ratings of above 5 on a 6-point scale. All earned criminalization ratings of above 85%.

The largest difference in preference for punishment, across all these pornographic scenarios, was for the final scenario: where the maker of the deepfake did not distribute it but instead kept it for his own personal use. But that was still criminalized by 84.9% of respondents in the unlabeled nonconsensual case and viewed as extremely blameworthy and harmful. This undistributed creation would *not* fall within the scope of the California or New York statutes, as they target only the disclosure of deepfake videos.¹⁵²

In an additional wrinkle, half of the participants evaluating this personal-use variant were presented with a version in which the maker of the deepfake asked for and received the consent of the deepfake subject. The other half was presented with a version in which the deepfake subject was not asked for consent, consistent with the other pornographic scenarios. This consent manipulation mattered a great deal. Ratings on all three measures were significantly lower in the consent condition than in the condition where consent was not mentioned (and the video was still unpublished): 43.6% of participants in the unlabeled condition and 51.2% of participants in the labeled condition did not seek to criminalize or punish this conduct when consent was obtained (Table 3). Further, the distribution of blameworthiness responses was markedly different here than in the other conditions. In the default pornographic deepfake condition, only 4.3% chose the lowest blameworthiness option. In the nonconsensual personal-use condition, 4.0% chose that option. In the consensual personal-use condition, the distribution is bimodal: 28.6% chose the lowest option, indicating that they believed the protagonist did not do something morally wrong, and 38.9% chose the worst option, with the remainder irregularly scattered between.

As discussed in Section I.C, the law of defamation would have little difficulty punishing a statement that was false, looked as if it were meant to *643 be taken as true, and caused harm to a person’s reputation. Labeling that account as false would generally prevent liability, however. But this kind of labeling does not have much effect on the perceived blameworthiness and harmfulness of pornographic deepfake videos. Across all scenarios, labeling mattered very little. In the four main variants (default friend, celebrity, spanking, and speaking), there were no significant effects on labeling in the analysis on harm or blameworthiness, and only an inconsistent mitigation effect on punishment.¹⁵³

Overall, then, people view the pornographic deepfake scenarios as extremely blameworthy, harmful, and deserving of punishment. The written stories, especially the written story labeled as fiction, are viewed more leniently on each dimension than the videos. People still find them troubling, however. Among the deepfake videos, three of the four variants (celebrity, spanking, and sexualized voice) were barely different than the baseline scenario in which the actor made a pornographic deepfake of a friend. Making the victim a celebrity did not have a substantial mitigating effect, nor did the two variants that excluded nudity but included sexualized content. Also, across all of these scenarios, labeling only intermittently mattered.

Even deepfakes labeled as deepfakes were viewed as blameworthy, harmful, and deserving of punishment.

B. Impressions of Attitudinal Deepfakes

In addition to the pornographic deepfake scenarios, we also asked about attitudinal scenarios. These varied greatly in content. Some depicted the deepfake subject doing something morally questionable, some of them doing something silly, and some neither. None included sex or sexualized conduct, however.

The main scenarios here depicted an everyday person or a politician doing something morally blameworthy. The everyday person, described as a friend, was depicted as doing cocaine. The politician was depicted as shaking hands with a convicted child molester. Again, our first analysis here contrasts the deepfake videos with written stories describing the same content (Table 4). Two major patterns emerged. First, the videos were significantly worse *644 on blameworthiness, harm, and punishment than the written stories regardless of whether they were labeled.¹⁵⁴ Second, and in contrast to the pornographic scenarios, here, there was a significant labeling effect on each of the three dependent measures, with labeling lowering the severity on each for both written and video variants.¹⁵⁵

Table 4: Reactions to Main Attitudinal Scenarios

			UNLABELED		LABELED	
Private, Cocaine Use	Video	Blameworthy	5.05	(1.48)	4.83	(1.46)
		Harm	5.14	(1.35)	4.92	(1.36)
		Punishment	2.73	(0.95)	2.44	(0.94)
		Percentage not a crime	12.0%		16.0%	
	Written	Blameworthy	5.03	(1.37)	4.64	(1.52)
		Harm	5.11	(1.32)	4.69	(1.43)
		Punishment	2.58	(0.98)	2.23	(0.93)
		Percentage not a crime	16.6%		24.7%	
Politician, Handshake with Child Molester	Video	Blameworthy	4.93	(1.58)	4.71	(1.49)
		Harm	5.08	(1.34)	4.77	(1.43)
		Punishment	2.66	(1.00)	2.34	(0.97)
		Percentage not a crime	14.6%		21.8%	
	Written	Blameworthy	4.98	(1.52)	4.58	(1.56)
		Harm	5.03	(1.43)	4.71	(1.45)
		Punishment	2.66	(1.00)	2.29	(0.94)
		Percentage not a crime	16.3%		21.4%	

Note. Means (standard deviations in parentheses). Blameworthiness and harmfulness were rated on 6-point scales. Punishment was on a 4-point scale. The proportion of respondents choosing the lowest punishment option, “It should not be possible to punish him; this should not be a crime,” is reported in the bottom row for each scenario.

There were very few other significant effects in this first analysis. It was slightly less blameworthy to write a story about or make a deepfake of a politician than an everyday person; though, here, whether the person was a *645 politician was confounded with the type of morally questionable conduct depicted.¹⁵⁶ Whether the content was video or written mattered less for punishment in the politician case than it did for the everyday person, though the base rate was high: more than 85% of people wanted to criminalize the unlabeled politician video.¹⁵⁷

Two additional scenarios concerned everyday people. In one, our protagonist makes a deepfake of his friend calling herself a jerk.¹⁵⁸ This self-insult variant was viewed as less blameworthy, less harmful, and deserving of less punishment than the default cocaine scenario but was still generally criminalized (see Table 5).¹⁵⁹ Comparing labeled and unlabeled self-insult condition, labeling again helped.¹⁶⁰

Table 5: Reactions to Further Nonconsensual Deepfakes

		UNLABELED		LABELED	
Self-Insult	Blameworthy	4.82	(1.49)	4.44	(1.61)
	Harm	4.70	(1.43)	4.36	(1.56)
	Punishment	2.41	(0.97)	2.11	(0.92)
	Percentage not a crime	19.9%		28.5%	
Scientist (Living and Dead Combined)	Blameworthy	4.70	(1.54)	4.31	(1.69)
	Harm	4.35	(1.61)	4.04	(1.75)
	Punishment	2.29	(1.00)	2.11	(0.97)
	Percentage not a crime	25.5%		31.7%	
Politician, Terror Endorsement	Blameworthy	5.06	(1.48)	4.74	(1.54)
	Harm	5.12	(1.34)	4.87	(1.38)
	Punishment	2.80	(1.02)	2.48	(0.99)
	Percentage not a crime	13.8%		18.1%	

Note. Means (standard deviations in parentheses). Blameworthiness and harmfulness were rated on 6-point scales. Punishment was on a 4-point scale. The percent choosing the lowest punishment option, “It should not be possible to punish him; this should not be a crime,” is reported in the bottom row for each scenario.

The second everyday-person scenario described our protagonist running a science-enthusiast website. As part of this website, they created a video of a scientist describing their own life and accomplishments. This was intended to push the boundaries of deepfake harm by making the video as inoffensive as possible. Though this was viewed as less problematic on each measure than the default cocaine video,¹⁶¹ most people still sought to criminalize it (see Table 5). Comparing labeled and unlabeled scientist condition, labeling again helped.¹⁶² In a further variant, the scientist in question was either described as having died ten years earlier or having just recently retired; participants in the attitudinal condition saw one variant or the other of this vignette. This was intended to keep constant the approximate recency of the scientist--the scientist is not Newton or Einstein and also not still active--while manipulating whether the scientist is still alive, a factor *646 which matters a great deal elsewhere in privacy law.¹⁶³ This manipulation had no effect on any measure, so the Table 5 analysis combines these two conditions.¹⁶⁴

For everyday people, then, there is substantial opposition to deepfakes of all sorts. There is substantially less opposition to

more satirical deepfakes than ones depicting obviously blameworthy conduct (illegal drug use), and this difference is further helped by labeling. But most participants still sought to prohibit even the most harmless deepfake that we could design--the scientist saying true facts about their own life.

Because of the emphasis in the literature on election interference, and the California and Texas statutes specifically targeting deepfakes of politicians,¹⁶⁵ we included a second scenario that misrepresented a politician behaving in a morally questionable way. In this vignette, the politician is *647 represented as “saying they support a known terrorist organization.”¹⁶⁶ Compared to the politician-handshake case, this was viewed as more morally blameworthy and deserving of more punishment, but not significantly more harmful (see Table 5).¹⁶⁷ Comparing labeled and unlabeled politician endorsement condition, labeling again helped.¹⁶⁸

Finally, there were two additional politician scenarios. As with the scientist, here we sought to present less overtly harmful fact patterns. For one, the video of the politician told people where their local polling places were. The study was conducted in advance of the 2020 general election, so this scenario was timely. The other scenario was of a politician singing an unspecified silly song.

In each case, we manipulated whether the politician had given general consent to produce the deepfake. For the polling-place scenario, the consensual vignette began, “Imagine a state-level politician has invited her constituents to make and share videos of her telling people the location of their local polling place.” The consensual version of the silly song vignette was similar, “Imagine a state-level politician has invited her constituents to make and share silly videos of her for her campaign.” Each participant in an attitudinal condition received either the consensual or nonconsensual version of each of these vignettes.

This consent was not as explicit and specific as it could have been. In general, one could easily imagine a politician consenting to have their image used in personalized get-out-the-vote messaging. Former President Barack Obama, for instance, phone-banked on behalf of Joseph Biden in the 2020 general election.¹⁶⁹ It would not be that great a stretch to imagine him working with the national party committee to produce personalized messages. A former president, however, likely would have been leery of *648 granting their supporters as broad a license to make deepfake videos as did our hypothetical politician. The president would presumably want some editorial control to ensure quality and appropriateness. Here, we glossed over that issue.

As can be seen in Table 6, consent greatly reduced the perceived wrongfulness and harmfulness, as well as the desire to punish, for both scenarios.¹⁷⁰ Labeling was somewhat effective at alleviating concerns in the polling-place scenario, though the effect was not significant on every *649 measure for the silly-song scenario.¹⁷¹ Nevertheless, people were still often willing to criminalize these deepfakes.

Table 6: Reactions to Consensual Attitudinal Politician Deepfakes

		UNLABELED		LABELED	
Polling Place, No Consent	Blameworthy	4.49	(1.66)	4.13	(1.77)
	Harm	4.26	(1.74)	3.92	(1.80)
	Punishment	2.39	(1.08)	2.07	(0.94)
	Percentage not a crime	26.1%		31.6%	
Polling Place, Consent	Blameworthy	4.05	(1.84)	3.48	(1.83)
	Harm	3.78	(1.87)	3.32	(1.85)
	Punishment	2.07	(1.12)	1.84	(1.00)

	Percentage not a crime	43.4%		50.0%	
Silly Song, No Consent	Blameworthy	4.65	(1.67)	4.24	(1.73)
	Harm	4.41	(1.63)	3.91	(1.78)
	Punishment	2.23	(0.99)	2.09	(1.02)
	Percentage not a crime	27.8%		34.4%	
Silly Song, Consent	Blameworthy	3.74	(1.90)	3.57	(1.83)
	Harm	3.83	(1.84)	3.54	(1.77)
	Punishment	2.01	(1.05)	1.90	(0.95)
	Percentage not a crime	42.4%		43.6%	

Note. Means (standard deviations in parentheses). Blameworthiness and harmfulness were rated on 6-point scales. Punishment was on a 4-point scale. The percent choosing the lowest punishment option, “It should not be possible to punish him; this should not be a crime,” is reported in the bottom row for each scenario.

As with the consensual personal-use scenario, the consensual voting-announcement and silly-song videos also increased the proportion of people viewing the deepfakes as not wrongful at all. The consensual voting announcement was viewed as minimally blameworthy by 18.6% of respondents (11.4% for nonconsensual), and the consensual song video by 20.1% (9.7% for nonconsensual).

Figure 1 summarizes the main cross-scenario differences by showing the perceived harmfulness of each. The overall differences are stark. The consensual scenarios attract much lower harmfulness scores, and the nonconsensual pornographic videos attract particularly high scores. Attitudinal deepfakes worry a great many people, but this worry is reduced in the cases that are more satirical or somewhat harmless and by labeling. Pornographic deepfakes, however, are seen as very harmful by almost everyone. Labeling has a minimal effect--generally no effect--and no amount of variation in the scenarios matters much, even the ones that did not depict nudity.

Figure 1: Perceived Harmfulness of Each Type of Deepfake

TABULAR OR GRAPHIC MATERIAL SET FORTH AT THIS POINT IS NOT DISPLAYABLE

The role of consent in these scenarios is somewhat unexpected. Consent always helped substantially, but it did not reduce the perceived harmfulness to nothing. There could be many reasons for this. For one, perhaps participants were not clear on the scope of consent--did the deepfake subject truly understand and agree to what actually happened? We comment further on the psychology of consent in this context in Part III.

*651 C. Views on Deepfake Policies and Gender

Following the vignettes, these same participants were asked a series of policy-style questions. These questions explicitly defined deepfake videos and asked participants to think about the kinds of deepfake videos discussed in the scenarios they just read.¹⁷² For example, in the unlabeled pornographic condition, participants were told:

Think about **pornographic deepfake videos** that show people saying and doing things they did not say or do. These are the types of videos referred to earlier in the study. **So these are videos that include people nude, having sex, or engaged in sexual activities.** How harmful do you think this kind of video is **if the viewers think the video is real?**

Given that participants had just finished working through the scenarios reported in the preceding section, it was likely that

these instructions were interpreted in terms of the use cases they had read.

The first question asked participants to make an overall assessment of harm for deepfake videos in their category on a 0-100 scale. As can be seen in Figure 2, pornographic videos were viewed as significantly more harmful than attitudinal videos; additionally, labeled videos--videos the viewer would know were false-- were less harmful than unlabeled ones.¹⁷³ There was also a marginally significant interaction between attitudinal versus pornographic and labeling.¹⁷⁴ Consistent with the scenario results, labeling reduced perceived harmfulness more for the attitudinal scenarios.¹⁷⁵

***652 Figure 2: Perceptions of Harm for Each Type of Deepfake Scenario by Gender**

TABULAR OR GRAPHIC MATERIAL SET FORTH AT THIS POINT IS NOT DISPLAYABLE

There was also a significant effect of gender--women thought that deepfake videos were more harmful--but this was entirely driven by the pornographic deepfakes; there was a gender effect in the pornographic condition but not the attitudinal.¹⁷⁶ This gender pattern was also observed in the main pornographic and attitudinal scenarios. The female participants viewed the baseline pornographic scenario as more blameworthy, harmful, and deserving of punishment than the male participants did. However, there were no significant effects of gender for the baseline attitudinal scenario.¹⁷⁷ Previous research has observed that support for criminalizing nonconsensual *653 pornography also differs by gender,¹⁷⁸ so it is not surprising that we observed this pattern of gender difference here.

This study did not include extensive measures of study participants' individual differences. The basic demographic questions on political orientation and educational attainment did not significantly relate to perceptions of overall harmfulness in any condition.¹⁷⁹

Participants were also asked to rate the extent to which they thought each kind of video would cause particular kinds of harm. Specifically, they were asked to rate whether the videos would interfere with the video subjects' prospects for employment, cause them emotional harm, hurt their reputation, or damage their election chances. On each of these questions, participants rating pornographic scenarios assigned higher scores (between 5 and 5.5 out of 6 for each question) than did those participants rating nonpornographic scenarios (between 4.7 and 5).¹⁸⁰ Based on their responses, participants expected labeling to help somewhat on employment and, nonsignificantly, on election chances, but labeling had no effect on emotional harm or reputation.¹⁸¹ Further, female participants thought all deepfake scenarios were more likely to cause these negative effects than did male participants.¹⁸²

*654 Overall, then, participants felt that deepfake scenarios were quite harmful. This was especially true for pornographic scenarios and unlabeled attitudinal scenarios, but even labeled attitudinal scenarios were believed to cause harm (64 points out of 100) (see Figure 2). In terms of the kinds of harm that might result from these scenarios, people endorsed all of them to a high degree (approximately 5 out of 6 on all measures across all conditions). Deepfake views are also gendered, as women believe that pornographic deepfakes are more harmful than men do, though even men rate them as extremely harmful.

D. Follow-Up Study: Deepfakes and the Civil-Criminal Divide

Some states that have laws addressing nonconsensual pornography allow for both government-administered criminal punishment as well as private civil lawsuits.¹⁸³ One limitation of the primary study is that it focused on the criminal justice system. Participants who sought to punish deepfakes could only do so by suggesting a criminal sanction; there was no civil alternative. This design may have obscured a willingness among our participants to impose a less-than-criminal (or at least different-than-criminal) punishment.

Based on the results of the primary study, there is reason to think that participants would have been inclined to allow for both civil and criminal remedies in most cases. In general, criminal law is intended to punish morally blameworthy conduct, whereas the civil system is intended to compensate victims for wrongful injuries.¹⁸⁴ The questions in the first study, asking participants to rate the moral blameworthiness of the acts and their potential for causing harm, implicitly reflect these two

related goals. Prior work has shown that people's preference for retributive punishment tracks the perceived wrongfulness of a transgression, whereas preference for compensatory damages is affected primarily by the amount of harm caused *655 by the transgression.¹⁸⁵ Based on the blameworthiness and harm ratings from the first study, therefore, one would expect people to be seeking to both punish the video creator criminally as well as allow for civil compensatory recovery by the deepfake target.

Nevertheless, the first study does not provide firm evidence on whether people would have a strong preference between the civil and criminal systems. We therefore conducted a second study to specifically answer the question of whether people would prefer to deal with deepfake wrongs through the civil regime, the criminal regime, or both. This study employed only a subset of the scenarios employed in the first study, allowing us to ask this more complicated question without exhausting participant attention.

A sample of American adults was recruited in January 2021 by CloudResearch, another online survey firm with an established panel.¹⁸⁶ The demographics of the sample were set to match U.S. Census proportions on the dimensions of age and sex, but race, ethnicity, and educational attainment could freely vary.¹⁸⁷ This produced a sample that was somewhat more white, less Hispanic, and more educated than in the first study. The sample was, however, as politically neutral and gender- and age-balanced as the representative data collection in the primary study. Full demographics are reported in Appendix A. The final sample contained 395 individuals.¹⁸⁸ The changes in sample size and provider were aimed at reducing the cost of the survey.

The procedure for this study mirrored that of the first. After completing the demographic questions, participants were told that they would be asked to rate four scenarios. To test a range of different possibilities, we set up four scenarios: one pornographic (friend video), one attitudinal and defamatory (cocaine video), one attitudinal and non-defamatory (living-scientist video), *656 and one defamatory and political (politician-terror-endorsement video).¹⁸⁹ Participants saw these four scenarios in a random order. As in the first study, participants were told that the protagonist, Will, had either labeled all his videos as fake or that he had done nothing to show the videos were not genuine. Following each scenario, the key new question asked:

How, if at all, should it be possible to punish Will for making and distributing the video?

(A) Will should not be punished.

(B) [Deepfake subject] should be able to sue Will, have the video taken down, and get money in compensation for any harm they/she might suffer from the video.

(C) It should be a crime for Will to do this, meaning that the government should be able to prosecute him. This might result in having the video taken down, a fine, and/or a prison sentence.

(D) Both B and C (Will may be sued by [deepfake subject] and be criminally prosecuted).

Both the civil and criminal options here left open the possibility of a remedial injunction: removing the video. The main differences between the two are who is bringing the action (the state or the victim) and whether a prison sentence is possible. For simplicity, participants were not asked to give a magnitude judgment for either the criminal or civil punishment.

As can be seen in Table 7, participants generally wished to allow for both civil and criminal punishments. Providing participants with the option of a civil remedy had the effect of slightly lowering the percentage of *657 participants opting for

criminalization and substantially lowered the percentage opting for no punishment as compared to the first study. In the unlabeled pornographic case, for instance, 92.7% of the respondents in the first study wished to criminalize the conduct, and 7.3% wished to assign no punishment. Here, 84.3% wished to criminalize (criminal punishment or both civil and criminal), and only 0.5% wished to assign no punishment, with the rest offering an exclusive civil remedy. There was a similar pattern for the labeled video of the scientist. In the first study, 69.6% of the sample wished to criminalize the conduct, and 30.4% wished to assign no punishment.¹⁹⁰ Here, 54.6% wished to criminalize (criminal punishment or both civil and criminal), and only 12.2% wished to assign no punishment, with the rest offering an exclusive civil remedy.

Table 7: Preference for Civil and Criminal Remedies for Nonconsensual Deepfakes

	PORNOGRAPHIC, FRIEND		COCAINE USE, FRIEND		SCIENTIST, LIVING		POLITICIAN, TERROR ENDORSEMENT	
	Labeled	Not	Labeled	Not	Labeled	Not	Labeled	Not
No Punishment	3.6%	0.5%	3.1%	0.5%	12.2%	6.6%	7.1%	3.0%
Civil Punishment	17.3%	15.2%	26.5%	18.2%	33.2%	20.7%	18.9%	13.6%
Criminal Punishment	8.7%	10.1%	8.7%	10.1%	10.7%	13.1%	12.8%	10.6%
Both Civil and Criminal	70.4%	74.2%	61.7%	71.2%	43.9%	59.6%	61.2%	72.7%

Note. Values reflect the percentage of participants choosing each punishment option.

These results suggest that a small portion of those wishing to punish the creation and dissemination of deepfake videos would be satisfied with a civil rather than criminal remedy. Comparing the ratings here to those from the first study shows that the decline in desire to criminalize is, on average, 8.8 percentage points.¹⁹¹ Conversely, the portion of the sample opting for no punishment also declines sharply, with only a single participant in the pornographic unlabeled condition opting to forgo any remedy.¹⁹²

E. Follow-Up Study: Explicit Comparison to Traditional Nonconsensual Pornography

The prior two studies have shown substantial condemnation of pornographic deepfakes, whether labeled as fake or not, but they have not allowed an explicit comparison to traditional nonconsensual pornography where a picture or video showing someone's nude body is shared without their permission. Since so many states have laws prohibiting nonconsensual pornography, it would be helpful to know whether people view deepfake pornography as being on par with this already-regulated practice.

A short follow-up study was therefore conducted in July 2021. The sample for this study was also recruited by CloudResearch. The demographics of the sample were set to match U.S. Census proportions on the dimensions of age and sex, but race, ethnicity, and educational attainment *658 could freely vary. Again, this produced a sample that was reasonably but not perfectly representative. Full demographics are reported in Appendix A. The final sample contained 417 individuals.¹⁹³

The procedure for this study mirrored that of the first and second. After completing the demographic questions, participants were told that they would be asked to rate two scenarios. These were a modified version of the friend deepfake and a comparable traditional nonconsensual-pornography scenario. Participants saw these two scenarios in a random order. As in the second study, participants had the option of punishing the actor civilly or criminally if they so wished. They also rated the blameworthiness and harmfulness of the video.

The changes in the deepfake condition were relatively minor. The deepfake subject was described as a former romantic partner rather than as a friend, and the deepfake video was of the subject masturbating rather than having sexual intercourse.¹⁹⁴ The deepfake creator was said to have made and posted the video after the end of the romantic relationship. To

maintain consistency with the other scenario, the video was not said to be labeled as fake. In the traditional nonconsensual-pornography condition, a woman, Mary, had sent her romantic partner, James, a video of herself masturbating. James was said to have requested this video and promised to keep it private. Again, the former partner posted the video online after the breakup. This condition was intended to fall within the scope of many nonconsensual-pornography laws by explicitly noting the expectation of confidentiality.¹⁹⁵ The text of both scenarios is included in Appendix C.

*659 As can be seen in Table 8, the deepfake and traditional nonconsensual-pornographic video were both viewed as highly morally blameworthy.¹⁹⁶ Posting the deepfake video was viewed as slightly more blameworthy, though, given the high scores, this difference may not be practically important.¹⁹⁷ There was no significant difference in the perceived harmfulness of each, though, again, both means are quite high.¹⁹⁸ In terms of desired remedy, the median participant would have allowed for both civil and criminal enforcement for each. Approximately equal proportions of participants wished to allow for civil and criminal remedies in each case. Slightly more participants wanted to allow for criminal sanctions in the deepfake case than in the traditional nonconsensual-pornography case, however.¹⁹⁹ Overall, there is somewhat less reliance on criminal remedies in this study than in the previous one. This may be due to using an ex-romantic partner as the deepfake subject rather than a friend or stranger.

Table 8: Preference for Civil and Criminal Remedies

	DEEFAKE OF EX-PARTNER		TRADITIONAL NONCONSENSUAL PORNOGRAPHY OF EX-PARTNER	
Blameworthy	5.51	(1.13)	5.35	(1.25)
Harmful	5.48	(1.14)	5.49	(1.06)
No Punishment	5.8%		7.2%	
Civil Punishment	20.6%		26.6%	
Criminal Punishment	12.9%		12.0%	
Both Civil and Criminal	60.7%		54.2%	

Note. For blameworthiness and harm: means (standard deviations in parentheses). On the punishment question, each row is reporting the proportion of the sample choosing that option.

Our participants, therefore, tended to view deepfake pornography as on par with traditional nonconsensual pornography. Compared to traditional nonconsensual pornography, creating and posting deepfake pornography *660 was viewed as marginally more morally blameworthy, approximately as harmful, and slightly more likely to be deserving the attention of the criminal justice system. It is unclear why some participants appear to have viewed deepfakes as worse. This may be a result of victim-blaming in the traditional nonconsensual-pornography condition, but it could also be due to many other factors. For instance, greater effort is involved in fabricating a fake video rather than posting an already-available real one.

III. Fitting Deepfake Attitudes into the Law

The consistent message of these surveys is that people overwhelmingly find pornographic and attitudinal deepfakes to be very harmful. Clearly labeling the deepfake as fake mitigated the harm for attitudinal deepfakes but not for pornographic ones. And respondents were nearly unanimous in wishing to allow for civil punishment, criminal punishment, or both of those making pornographic deepfakes. Our final study shows that people were inclined to treat pornographic deepfakes much like traditional nonconsensual pornography.

Thinking back to the relatively limited legal options for deepfake subjects discussed in Section I.C, there is a remarkable divergence between the moral expectations of our sample and the remedies available under privacy tort law. Our participants believe that pornographic deepfakes cause substantial injuries. These videos were believed to affect employment chances,

emotional well-being, and general reputation.²⁰⁰ Participants are almost definitionally correct in their belief that depiction in these deepfakes causes harm to a person's dignity: if people believe something is demeaning-- "[c]ausing someone to lose their dignity and the respect of others"²⁰¹--then it is. These findings would therefore substantially support the argument that being unwillingly featured in a pornographic deepfake is "highly offensive to a reasonable person." But even success on this argument would be of only limited help; the other elements of each of the key privacy torts of intrusion upon seclusion and public disclosure of private facts are not satisfied.²⁰²

Defamation and false light claims are also not helpful in supporting the moral intuitions of the sample. The survey respondents rated *labeled* deepfake videos--especially pornographic ones--as incredibly harmful. Yet ***661** both causes of action require a falsity,²⁰³ and victims will not be able to pursue either claim when the video is obviously fake, such as when it is labeled as fake or uploaded to a website dedicated to deepfake videos. This returns us to our opening example of Kristen Bell. She explained that labeling a pornographic deepfake of her as fake did not cure her harm; the issue was that she had not consented.²⁰⁴

Statutory causes of action are similarly unhelpful in most states; deepfakes are beyond the reach of most current nonconsensual-pornography statutes.²⁰⁵ But this is likely to be the subject of legislative consideration over the next several years. This Part, therefore, does two things. First, it attempts to understand the psychology behind some of the more puzzling findings from Part II. Second, it considers how the empirical results from Part II should inform our understanding of the First Amendment's limitations on deepfake regulation.

A. Contextualizing Deepfake Punitiveness

Across all scenarios, people were extremely willing to punish those who made and distributed deepfake videos. Somewhat surprisingly, many survey respondents viewed as blameworthy and harmful even deepfakes made with consent or deepfakes that did not create obvious harm, such as a deepfake depicting a scientist talking about their life's work or a deepfake depicting a politician singing a silly song. This Section considers how these puzzling results of the main study can be understood within two frameworks: moral psychology and feminist legal scholarship. The moral-psychology approach will explore how the condemnation of consensual deepfakes may be an explicable judgment error. The feminist-legal-scholarship approach will explore how condemnation of consensual deepfakes may be a sensible view given the bare-bones consent process described in our scenarios.

1. Moral Psychology: From Disgust to Harm

Though it is easy to justify the moral wrongfulness of the core deepfake cases, it is somewhat harder to explain how a consensual deepfake can be morally blameworthy. If the problem with a pornographic deepfake is that it ***662** takes away the agency of the person depicted, then consent should remove that as a concern.

One possible explanation is that this is a kind of moral-judgment error. The person believes that deepfakes are bad, perhaps thinking of the nonconsensual pornographic deepfakes of celebrities. When confronted with a deepfake that is consensual and nonpornographic, the person may still have a negative feeling about the deepfake due to cognitive bleed over from the more common and more distasteful example. If this is occurring, it may be an example of what is called moral dumbfounding.²⁰⁶ Moral dumbfounding can generally be defined as "the stubborn and puzzled maintenance of a judgment without supporting reasons."²⁰⁷ The quintessential moral-dumbfounding study takes something that almost everyone believes is wrong (cannibalism, incest, or bestiality) and removes by fiat all of the factors that one would normally use to argue that the conduct is harmful.²⁰⁸ For example, Professors Jonathan Haidt, Fredrik Björklund, and Scott Murphy asked survey participants to evaluate a scenario in which a medical research assistant eats a human cadaver that has been donated to a medical lab and will be incinerated the next day.²⁰⁹ Moral dumbfounding occurs when people cannot articulate a reason for why cannibalism is wrong in that context but still maintain that it is morally objectionable.²¹⁰ Haidt and colleagues believe that this type of dumbfounding is common and that it shows that people often leap from intuitive feelings of disgust to judgments of moral wrongfulness without stopping to consider coherent philosophical theories of harm.²¹¹ A moral-dumbfounding account of deepfake attitudes would suggest that people have an intuitive negative reaction to deepfakes generally, based on a number of factors, and that they fail to sufficiently correct their understandings when some of those factors are no longer present.

Perhaps contributing to this negative “gut reaction” against the idea of *any* deepfake videos is the novelty of the technology. Deepfake technology is relatively new, and the concept of inserting someone’s face into a video to *663 make them do or say something is strange and unusual. Research by Professors Kurt Gray and Jonathan Keeney has shown that people view morally questionable acts as more morally wrongful and as indicative of worse character if the person performing them engages in weird but morally irrelevant conduct (in this study, painting themselves red and putting on a hair cape).²¹² Whether it is morally acceptable to make a deepfake pornographic video of a friend, or a deepfake biopic of a scientist, it is certainly uncommon. Put another way, “who does that?”

Both moral dumbfounding and this weirdness effect are part of a general literature in moral-psychology research that links moral judgment to perceptions of harm and feelings of disgust.²¹³ Within this literature, there are two general sorts of theories of how disgust, harm, and moral judgment are linked. Professors Jonathan Haidt and Matthew A. Hersh’s direct disgust model, which grows out of work on moral dumbfounding, suggests that “[m]oral judgment (at least in the domain of sexual morality) is better predicted by affective reactions than by informational assumptions about harm.”²¹⁴ These “affective reactions such as disgust and discomfort ... are later cloaked by harm-based rationalizations.”²¹⁵ Under this approach, anything that makes people uncomfortable will come to be viewed as wrong, and people will then generate theories of harm to justify their reactions post hoc. The theories of harm are, therefore, somewhat inconsequential; what actually matters is the initial gut reaction.

A competing theory--the theory of dyadic morality--takes the theories of harm far more seriously. Psychologists Chelsea Schein and Kurt Gray suggest two principles that explain moral judgment: “what seems harmful seems wrong” and “what seems wrong seems harmful.”²¹⁶ Schein and Gray suggest that these two principles interact to create a dyadic feedback loop, amplifying the perceived harmfulness and wrongfulness of certain issues.²¹⁷ Rather than theories of harm being irrelevant justifications for visceral reactions, under this approach, they play a substantial independent role. That *664 which feels disgusting will initially be viewed as wrongful, but this feeling may either deepen or depart depending on whether the person can construct a theory of harm to justify their initial reaction. Similarly, that which appears initially harmful may come to be seen as disgusting.

This feedback cycle may further help explain our survey results. Survey respondents clearly viewed deepfake videos as harmful, which may have led them to view the behavior as blameworthy. The dyadic framework suggests that if individuals have an “inkling of an intuition of harm” in a given context, they will view it as “somewhat immoral,” which will then cause them to perceive more harm,²¹⁸ which might culminate in “deepening moral judgments.”²¹⁹ The harm perceived in the more blatantly harmful deepfake videos may therefore have “deepen[ed] and expand[ed] to related concepts,”²²⁰ such as the less blatantly harmful deepfake videos. In short, participants may have been so persuaded by the generally problematic nature of deepfakes that they neglected to fully discount their feelings of disgust in the presence of consent.

2. *Scope of Consent and Feminist Legal Scholarship*

There are also philosophical arguments that support viewing even consensual deepfakes as harmful. Here it is helpful to consider the perspective of antipornography feminism. Traditionally, antipornography feminists have condemned pornography based on its perceived harmful impact on women. Professor A. W. Eaton describes this “harm hypothesis” of antipornography feminist theory, noting that traditional antipornography feminism connects pornography to harm through both the production and the postproduction of pornography.²²¹ Essentially, this “harm hypothesis” concludes that “by harnessing representations of women’s subordination to a ubiquitous and weighty pleasure, pornography is especially effective at getting its audience to internalize its inegalitarian views.”²²²

Deepfakes often depict pornography, and although the product does not subject the depicted woman to physical exploitation in the same way that making live pornography might, the final product still depicts a woman’s likeness. Recall that the scenarios in the study were intentionally written to reflect the current trends in pornographic deepfakes: men created the videos, and in the pornographic-deepfake context, all of the videos created were of women. Even when the woman has consented, the survey respondents might *665 be uncomfortable with another having control over a woman’s likeness to create sexualized depictions. This would be consistent with prior scholarship that critiques the genuineness of consent in a patriarchal society.²²³ It also reflects a potential view that the protagonist should not have even wanted to produce the video.

One need not accept this particular brand of feminist critique to have concerns about the consent depicted in these deepfake

scenarios. As we mentioned in Part II, it might not have been clear to the survey respondents that the people consenting to deepfake creation were making a free and informed choice. The scenarios are silent on whether the participant consented to the specific contents of the videos or even knew how deepfakes worked. One could easily imagine a participant having genuine concerns that the allegedly consenting party did not know to what they were agreeing. Also, given the high harmfulness scores for pornographic deepfakes, survey respondents might be concerned with the postproduction consequences of the deepfakes. Neither the deepfake subject nor the deepfake creator has full control over the distribution of a video once it has been publicly posted.

Indeed, scholars have raised a similar concern about the genuineness of consent in the privacy context more generally. Professor Daniel Solove, for example, notes that although consent is at the core of privacy self-management, individuals often do not meaningfully consent to the collection, use, and disclosure of their data due to flawed decision-making and structural problems, such as the vast number of entities collecting data and the unanticipated impacts of aggregated data.²²⁴ Survey respondents may hold similar concerns about deepfakes. The consent-skeptical responses of survey respondents are therefore not entirely unreasonable, even if we would be slow to endorse them as a policy matter.

Notably, one existing deepfake statute already contains provisions responsive to a consent-skeptical view. The recently passed New York deepfake statute says that a person may only consent to the creation or dissemination of pornographic deepfake “by knowingly and voluntarily signing an agreement written in plain language that includes a general description of the sexually explicit material and the audiovisual work in which it will be incorporated.”²²⁵ This consent process is more detailed than ***666** that in our scenarios and would result in more thorough notice to the deepfake subject.

B. Deepfakes and the First Amendment

Because current law often does not vindicate the privacy interests identified by our subjects--except to a degree in states like California and New York--it is important to consider whether an expansion of current law could do so. The most substantial area where our subjects would wish to grant new protection is in the context of labeled pornographic deepfakes. We analyze existing First Amendment doctrine in the context of falsity, nonconsensual pornography, and morphed child pornography to understand how courts might approach expanded deepfake laws that seek to give protection in this area.

1. The Current First Amendment Framework

The Supreme Court has defined categories of speech that fall outside First Amendment protection--speech “likely[] to incite imminent lawless action,” obscenity, defamation, “speech integral to criminal conduct,” fighting words, child pornography, fraud, threats, and “speech presenting some grave and imminent threat the government has the power to prevent.”²²⁶ Deepfake videos as a whole do not fall within these categories, although specific deepfake videos can depict content that does. So, the fact that a video is a deepfake does not make it obscene, but a deepfake might depict obscenity. Because of this, any statute that bans deepfake videos outside these categories will likely have to be narrowly tailored to serve a compelling state interest to withstand strict scrutiny.²²⁷

Against this backdrop, banning deepfake videos will not be without challenges. Deepfake videos cannot be banned merely because they are false in nature. In *United States v. Alvarez*, the Supreme Court struck down the Stolen Valor Act, which made it a crime to make false statements about receiving military decorations or medals.²²⁸ The Court reasoned that it had ***667** never held that falsity alone was outside First Amendment protection.²²⁹ Rather, false statements fall outside First Amendment protection when there are additional considerations, such as “some other legally cognizable harm associated with [the] false statement”²³⁰ or “[w]here false claims are made to effect a fraud or secure moneys or other valuable considerations, say, offers of employment.”²³¹

In the deepfake context, *Alvarez* would prohibit an outright ban on all deepfake videos and also a ban on deepfake videos that have no cognizable harms associated with them. Notably, the participants in the study wanted to criminalize unlabeled attitudinal deepfakes, but under *Alvarez*, unlabeled attitudinal deepfakes cannot be prohibited for merely promoting falsehoods.²³² For example, a deepfake of a politician singing a silly song could not be prohibited unless there was some problem with it beyond mere falsity.²³³ Survey respondents seemed to associate all deepfake videos with harm, rating both labeled and unlabeled deepfakes as incredibly harmful and indicating a belief that both labeled and unlabeled deepfakes could

interfere with the subject's employment prospects, cause emotional and reputational harm, and, where applicable, interfere with the subject's election chances. However, regulations on deepfake videos can likely not be this expansive.²³⁴ The kind of election-proximity protection offered to candidates in California and Texas may be constitutional based on prior case law that limits §668 electioneering near polling places,²³⁵ but that would provide far more narrowly tailored protection than most participants are seeking.

One type of falsity-related deepfake regulation that is on firmer constitutional ground is a labeling requirement for any deepfake video that is defamatory in nature. Since participants were somewhat less concerned about labeled deepfakes in the nonpornographic context, such a policy would be consistent with public views. Given that defamation is one of the categories excluded from First Amendment protection, this would likely survive scrutiny. Though such videos would violate existing defamation law--arguably making such a provision superfluous--the added emotional impact of a defamatory deepfake video may be reason to grant enhanced protection against deepfake defamation.

2. Nonconsensual Pornography

Though a labeling requirement might deal with some of the harms from attitudinal deepfakes, our study shows that the harm of pornographic deepfakes is unmitigated by such an intervention. Further, participants in our final study treated deepfake pornography as on par with traditional nonconsensual pornography, which is already widely prohibited. These findings raise the question of whether it is possible to ban even labeled nonconsensual pornographic deepfakes. No court has directly addressed this issue, but there is parallel case law on nonconsensual pornography and doctored videos that depict child pornography. Based on this case law and the survey responses, we believe there is a strong case for viewing the regulation of deepfake pornography as a compelling state interest.

Nonconsensual pornography, sometimes called revenge pornography, refers to sexually graphic images and videos that are generally made with consent by the depicted subjects and then nonconsensually made public.²³⁶ Unlike deepfake pornography, nonconsensual pornography is not altered and depicts no falsity. As of November 2021, forty-eight jurisdictions have criminalized nonconsensual pornography,²³⁷ and those statutes have been challenged in state courts on First Amendment grounds in seven states.²³⁸ The highest courts of only four states, those in Vermont (*State v. VanBuren*), §669 Illinois (*People v. Austen*), Minnesota (*State v. Casillas*), and Texas (*Ex parte Jones*), have reviewed the constitutionality of their respective state's nonconsensual pornography statutes.²³⁹

Although much of the First Amendment analysis in these cases focuses on the language of the statutes, all of the state supreme courts specifically note the harm associated with nonconsensual pornography and find the state's interest in protecting victims of nonconsensual pornography compelling, substantial, or important.²⁴⁰ The opinions variously cited privacy, reputational, and psychological harms; the perpetration of domestic violence; and the subsequent harassment and threats victims experience after the dissemination of the images or videos.²⁴¹ For example, the Vermont court wrote that prior U.S. Supreme Court statements suggest that "the government may regulate speech about purely private matters that implicates privacy and reputational interests."²⁴² The courts further acknowledged that victims have been fired and have difficulty finding employment.²⁴³ The Vermont Supreme Court specifically underscored the emotional and reputational harms of nonconsensual pornography, stating, "The personal consequences of such profound personal violation and humiliation generally include, at a minimum, extreme emotional distress."²⁴⁴ And the Texas court also recognized that "[v]ictims of revenge porn cannot counterspeak their way out of a violation of their most private affairs and bodily autonomy nor the serious harms that may accompany that violation."²⁴⁵ It noted that this lack §670 of a counterspeech remedy makes nonconsensual pornography different than other categories of harmful expression.²⁴⁶

There are substantial similarities between the privacy-related harms contained within deepfake pornography and nonconsensual pornography. As with nonconsensual pornography, victims of deepfake pornography report various harms, including harassment and threats.²⁴⁷ The survey responses are also consistent with the notion that deepfake pornography, both labeled and unlabeled, is extremely harmful and an affront to the dignity of the person depicted. In *VanBuren*, the court relied heavily on prior case law that determined the state has a compelling interest in the regulation of purely private matters such as intimate images of a person.²⁴⁸ The court in *Austin* relied on a similar privacy rationale, at times borrowing from *VanBuren*.²⁴⁹ Deepfake pornography, like nonconsensual pornography generally, concerns the dignitary privacy one has over her likeness. Nonconsensual pornography and deepfake pornography both involve a type of dignitary harm that stems from one's ability to control information about oneself.²⁵⁰ Nonconsensual pornography involves disclosure of personal information, which "can

severely inhibit a person's autonomy and self-development."²⁵¹ Deepfake pornography creates similar harm as a "distortion" that manipulates "the way a person is perceived and judged by others, and involves the victim being inaccurately exposed to the public."²⁵² Much like the painful accuracy of nonconsensually disclosed pornography, the misrepresentation of deepfake pornography impacts one's ability to control their sexual identity.²⁵³ As noted by the court in *VanBuren*, "In the constellation of privacy interests, it is difficult to imagine something more private than images depicting an individual engaging in sexual conduct"²⁵⁴

*671 Though each of the four states to rule on these statutes has upheld them, the constitutionality of nonconsensual-pornography laws is disputed.²⁵⁵ To the extent nonconsensual pornography can be criminalized, however, it follows that deepfake pornography can also be criminalized. Our participants appear to have viewed pornographic deepfakes as a dignitary violation rather than as a defamatory message because they were not substantially reassured by the prospect that the videos could be labeled as fake. This finding makes us comfortable categorizing pornographic deepfakes as speech that implicates sexual privacy, the protection of which has consistently been considered a substantial or compelling government interest.²⁵⁶

3. **Morphed Pornography**

The question of whether deepfake pornographic videos are effectively the same as real pornographic videos has arisen before in the context of child pornography. Child pornography law differentiates between virtual child pornography, which does not depict actual children, and morphed child pornography, which inserts the face of a real child onto the body of an adult in a pornographic picture or video. These are, effectively, deepfakes before deepfakes. Fully virtual child pornography cannot be criminalized under the Supreme Court's decision *Ashcroft v. Free Speech Coalition*,²⁵⁷ but that case specifically left open the question of morphed child pornography.²⁵⁸

All circuits addressing the question of morphed child pornography have held that it is permissible to criminalize **morphed pornography** that uses the face of a real child.²⁵⁹ The Fifth Circuit case was the most recent. In agreeing with the Second and Sixth Circuits that morphed child pornography is not *672 protected speech, the court noted, "By using identifiable images of real children, these courts conclude, morphed child pornography implicates the reputational and emotional harm to children that has long been a justification for excluding real child pornography from the First Amendment."²⁶⁰ In effect, fake child pornography that appears to feature a real child can be criminalized for a subset of the same reasons that real child pornography featuring that child can be criminalized.

It is tempting to directly apply the same rationale to nonconsensual adult pornography and nonconsensual adult deepfake pornography. In each case, the fact that the video is morphed rather than genuine fails to prevent the harm to dignity and the risk of concrete consequences to employment. Historically, however, child pornography has been treated differently than adult pornography. In *New York v. Ferber*, the Supreme Court upheld a ban on child pornography, holding that the state has a compelling interest in the well-being of minors and that child pornography relates to the sexual abuse of children in two ways.²⁶¹ "First, the materials produced are a permanent record of the children's participation and the harm to the child is exacerbated by their circulation."²⁶² Second, to combat the sexual exploitation necessarily involved in the production of child pornography, the distribution networks must be closed.²⁶³ Almost a decade later, the Court upheld an Ohio statute banning the possession and viewing of child pornography.²⁶⁴ There, the Court reasoned that the statute encouraged the destruction of child pornography, which otherwise creates a permanent recording of child victims and their abuse and is used to coerce children into engaging in sexual conduct.²⁶⁵

The protection of children, therefore, is an especially compelling state interest. Courts may be less willing to grant expansive protection against abuses perpetrated on adults with morphed images and videos than they are in the case of children because, historically, courts have "sustained legislation aimed at protecting the physical and emotional well-being of youth even when the laws have operated in the sensitive area of constitutionally protected rights."²⁶⁶ This means that courts could justifiably distinguish here between the importance of morphing in the child and adult contexts. Recall that the *Ashcroft* Court extended protection to fully virtual *673 child pornography in part because it did not require harming real children to make it.²⁶⁷ One could imagine a court using similar language regarding deepfake pornography of adults.

Nevertheless, the reputational and emotional harms credited by courts in the context of morphed child pornography are similar to those reported by adults depicted in nonconsensual deepfake pornography. Indeed, our survey respondents acknowledged that those depicted in pornographic deepfakes would experience such harm. The results of our studies,

therefore, reinforce the logic of the morphed child pornography cases and their application to deepfake adult pornography.

Conclusion

If a person has a supply of good pictures of a target, they can make a video of that target saying or doing almost anything. This revolution in video-morphing technology has caused deepfake videos to explode in prevalence over the last several years. Our studies show that there is a strong moral consensus that the creation of nonconsensual deepfakes is wrongful and causes extensive harm. Further, the studies show that pornographic deepfake videos—which are the majority of deepfake videos on the internet—are considered especially harmful. Though the public has divided views about some attitudinal deepfakes, even sexualized videos lacking nudity were almost universally condemned.

Labeling a deepfake as fake mitigates the harm for attitudinal deepfakes but not for pornographic deepfakes. Though there are sharp constitutional limits on whether it is possible to prohibit the creation of labeled attitudinal deepfakes, it is likely possible to prohibit the creation of pornographic deepfakes given the existing First Amendment case law on nonconsensual pornography. The public attitudes captured here provide strong support for doing so and should be taken seriously by courts and policymakers grappling with this new technology.

The case of deepfake technology further points to an emerging problem in the privacy landscape. Privacy in this context is about dignity, autonomy, and identity expression—about people losing control of their public identities. To appropriately understand the dangers associated with deepfakes and the unauthorized use of one’s likeness, courts and policymakers must take seriously the kinds of dignitary harms associated with these new kinds of privacy invasions.

*674 Appendix A: Demographics of the Samples

The sample for Study 1 was recruited by Dynata. The samples for Studies 2 and 3, reported in Sections II.D and II.E, respectively, were recruited by CloudResearch.

Table A1: Demographic Data for Each Survey

	STUDY 1	STUDY 2	STUDY 3	CENSUS ²⁶⁸
Gender				
Female	52.1%	50.9%	55.2%	50.8%
Male	47.9%	49.1%	44.4%	49.2%
Other	0.0%	0.0%	0.5%	
Age (Years)				
Median	48	47	45 ²⁶⁹	
Mean	47.81 (17.50)	49.18 (15.55)	44.81 (15.80)	
Political Orientation (1-7)²⁷⁰	4.12 (1.80)	4.10 (1.79)	3.97 (1.78)	
Race and Ethnicity				
White	79.1%	84.1%	76.5%	76.3%
Black or African American	11.1%	9.6%	16.1%	13.4%

American Indian or Native American	0.7%	1.3%	1.4%	1.3%
Asian American	5.6%	4.1%	1.2%	5.9%
Hawaiian or Pacific Islander	0.3%	0.0%	1.9%	0.2%
Multiracial or Other	3.2%	1.1%	2.9%	2.8%
Hispanic (of Any Race)	16.0%	8.1%	10.6%	18.5%
Educational Attainment				
Less Than High School Diploma	7.8%	1.8%	4.3%	10.9%
High School Diploma or GED	31.2%	18.7%	30.9%	28.6%
Two-Year or Some College	28.8%	38.2%	38.1%	28.2%
Four-Year College	20.8%	25.1%	18.9%	20.6%
Graduate Degree	11.4%	16.2%	7.7%	11.6%
<i>Note.</i> For age and political orientation: means (standard deviations in parentheses). Hispanic identity was assessed in a separate question than racial identity.				

***675 Appendix B: Unlabeled Variants of All Scenarios from Primary Study**

These are the unlabeled scenario variants used in the studies. The labeled variants were adapted from these by replacing the final sentences as described on page 637.

A. Pornographic Scenarios

Written Pornographic Story, Friend

Imagine Jane is a friend of Will. Will has written a story about Jane. In Will’s story, he describes what Jane really looks like and depicts her having graphic sex with a man. The story is very detailed. Will posts his story online publicly, and he includes Jane’s first and last name. Though this story is made up, a reader cannot easily tell. Will does not indicate that it is fake when he posts it.

Deepfake Pornographic Video, Friend

Imagine Jane is a friend of Will. Will finds a series of photos of Jane online. Will takes the photos and uses an app to merge her face onto a pornographic video. The final video shows Jane’s face on the body of a naked woman having sex with a man. The video shows the entirety of the naked woman’s body. Jane’s face is clearly identifiable in the video. Will posts the video online publicly, and he includes Jane’s first and last name. Though this video is made up, a viewer cannot easily tell that it has been altered. Will does not indicate that it is fake when he posts it.

Deepfake Pornographic Video, Celebrity

Imagine Will finds a series of photos of a famous female celebrity online. Will finds a series of photos of the celebrity online. Will takes the photos and uses an app to merge her face onto a pornographic video. The final video shows the celebrity's face on the body of a naked woman having sex with a man. The video shows the entirety of the naked woman's body. The celebrity's face is clearly identifiable in the video. Will posts the video online publicly, and he includes the celebrity's first and last name. Though this video is made up, a viewer cannot easily tell that it has been altered. Will does not indicate that it is fake when he posts it.

Deepfake Pornographic Video, Sexualized Voice

Imagine Jane is a friend of Will. Will finds a series of photos of Jane online. Will takes the photos and uses an app to merge her face onto a video. The final video shows Jane's face on the body of a woman who is wearing revealing clothing. The woman is not nude. The video depicts Jane speaking *676 seductively about having sex. Jane's face is clearly identifiable in the video. Will has also used software to simulate Jane's voice, so the voice in the video sounds exactly like Jane's real voice. Will posts the video online publicly, and he includes Jane's first and last name. Though this video is made up, a viewer cannot easily tell that it has been altered. Will does not indicate that it is fake when he posts it.

Deepfake Pornographic Video, No Nudity, BDSM

Imagine Jane is a friend of Will. Will finds a series of photos of Jane online. Will takes the photos and uses an app to merge her face onto a video. The final video shows Jane's face on the body of a woman who is spanking a man. The woman is dressed in a revealing leather outfit. Jane's face is clearly identifiable in the video. Will posts the video online publicly, and he includes Jane's first and last name. Though this video is made up, a viewer cannot easily tell that it has been altered. Will does not indicate that it is fake when he posts it.

Deepfake Pornographic Video, Personal Use, No Consent

Imagine Jenny is a friend of Will. Will has created a video of Jenny. Will finds a series of photos of Jenny online. Will takes the photos and uses an app to merge her face onto a pornographic video. The final video shows Jenny's face on the body of a naked woman having sex with a man. The video shows the entirety of the nude woman's body. Jenny's face is clearly identifiable in the video. Though this video is made up, a viewer cannot easily tell that it has been altered. Will keeps the video for himself and never shares it with anyone.

Deepfake Pornographic Video, Personal Use, Consent

Imagine Jenny is a friend of Will. Will asks Jenny if he can edit her face into a pornographic video that he will not show to anyone else. Jenny says yes. Will finds a series of photos of Jenny online. Will takes the photos and uses an app to merge her face onto a pornographic video. The final video shows Jenny's face on the body of a naked woman having sex with a man. The video shows the entirety of the nude woman's body. Jenny's face is clearly identifiable in the video. Though this video is made up, a viewer cannot easily tell that it has been altered. Will keeps the video for himself and never shares it with anyone.

****677 B. Private Attitudinal Scenarios***

Written Cocaine-Use Story

Imagine Jane is a friend of Will. Will has written a story about Jane. In Will's story, he describes what Jane really looks like

and depicts Jane using cocaine. The story is very detailed. Will posts his story online publicly, and he includes Jane's first and last name. Though this story is made up, a reader cannot easily tell. Will does not indicate that it is fake when he posts it.

Deepfake Cocaine-Use Video

Imagine Jane is a friend of Will. Will finds a series of photos of Jane online. Will takes the photos and uses an app to merge Jane's face onto a video of someone else. The final video shows Jane's face on the body of a woman who is using cocaine. Jane's face is clearly identifiable in the video. Will decides to post the video online, and he includes Jane's first and last name. Though this video is made up, a viewer cannot easily tell that it has been altered. Will does not indicate that it is fake when he posts it.

Deepfake Self-Insult

Imagine Jane is a friend of Will. Will finds a series of photos of Jane online. Will takes the photos and uses an app to merge Jane's face onto a video of someone else. The final video depicts Jane calling herself a jerk. Jane's face is clearly identifiable in the video. Will has also used software to simulate Jane's voice, so the voice in the video sounds exactly like Jane's real voice. Will decides to post the video online, and he includes Jane's first and last name. Though this video is made up, a viewer cannot easily tell that it has been altered. Will does not indicate that it is fake when he posts it.

Deepfake Scientist Biography, Dead

Imagine Will runs an enthusiast's website about science. Will finds a series of photos of a famous scientist online. The scientist died ten years ago. Will takes the photos and uses an app to merge the scientist's face onto a video of someone else. The final video depicts the scientist talking about their life and accomplishments. The scientist's face is clearly identifiable in the video. Will has also used software to simulate the scientist's voice, so the voice in the video sounds exactly like the scientist's real voice. Will decides to post the video online, and he includes the scientist's first and last name. Though this video is made up, a viewer cannot easily tell that it has been altered. Will does not indicate that it is fake when he posts it.

****678 Deepfake Scientist Biography, Living***

Imagine Will runs an enthusiast's website about science. Will finds a series of photos of a famous scientist online. The scientist has just recently retired. Will takes the photos and uses an app to merge the scientist's face onto a video of someone else. The final video depicts the scientist talking about their life and accomplishments. The scientist's face is clearly identifiable in the video. Will has also used software to simulate the scientist's voice, so the voice in the video sounds exactly like the scientist's real voice. Will decides to post the video online, and he includes the scientist's first and last name. Though this video is made up, a viewer cannot easily tell that it has been altered. Will does not indicate that it is fake when he posts it.

C. Politician Attitudinal Scenarios

Written Handshake-with-Child-Molester Story

Imagine Will has written a story about a politician. In Will's story, he states that the politician is friends with a convicted child molester. The story is very detailed. Will posts his story online publicly, and he includes the politician's first and last name. Though this story is made up, a reader cannot easily tell. Will does not indicate that it is fake when he posts it.

Deepfake Handshake-with-Child-Molester Video

Imagine Will finds a series of photos of a politician online. Will takes the photos and uses an app to merge the politician's face onto a video of someone else. The final video shows the politician's face on the body of a person who is shaking hands with a convicted child molester. The politician's face is clearly identifiable in the video. Will decides to post the video online, and he includes the politician's first and last name. Though this video is made up, a viewer cannot easily tell that it has been altered. Will does not indicate that it is fake when he posts it.

Deepfake Terror Endorsement

Imagine Will finds a series of photos of a politician online. Will takes the photos and uses an app to merge the politician's face onto a video of someone else. The final video shows the politician saying they support a known terrorist organization. The politician's face is clearly identifiable in the video. Will has also used software to simulate the politician's voice, so the voice in the video sounds exactly like the politician's real voice. Will decides to post the video online, and he includes the politician's first and last name. Though this video is made up, a viewer cannot easily tell that it has been altered. Will does not indicate that it is fake when he posts it.

****679 Deepfake Silly Song, No Consent***

Imagine Will finds a series of photos of a state-level politician online. Will takes the photos and uses an app to merge the politician's face onto a video of someone else. The final video shows the politician singing a silly song. The politician's face is clearly identifiable in the video. Will has also used software to simulate the politician's voice, so the voice in the video sounds exactly like the politician's real voice. Will decides to post the video online, and he includes the politician's first and last name. Though this video is made up, a viewer cannot easily tell that it has been altered. Will does not indicate that it is fake when he posts it.

Deepfake Silly Song, Consent

Imagine a state-level politician has invited her constituents to make and share silly videos of her for her campaign. This politician represents Will. Will finds a series of photos of the politician online. Will takes the photos and uses an app to merge the politician's face onto a video of someone else. The final video shows the politician singing a silly song. The politician's face is clearly identifiable in the video. Will has also used software to simulate the politician's voice, so the voice in the video sounds exactly like her real voice. The politician has consented to Will making the video. Will decides to post the video online, and he includes the politician's first and last name. Though this video is made up, a viewer cannot easily tell that it has been altered. Will does not indicate that it is fake when he posts it.

Deepfake Polling Place, No Consent

Imagine Will finds a series of photos of a politician online. Will takes the photos and uses an app to merge the politician's face onto a video of someone else. The final video shows the politician telling people where their local polling places are. The politician's face is clearly identifiable in the video. Will has also used software to simulate the politician's voice, so the voice in the video sounds exactly like the politician's real voice. Will decides to post the video online, and he includes the politician's first and last name. Though this video is made up, a viewer cannot easily tell that it has been altered. Will does not indicate that it is fake when he posts it.

Deepfake Polling Place, Consent

Imagine a state-level politician has invited her constituents to make and share videos of her telling people the location of their local polling place. This politician represents Will. Will finds a series of photos of the politician online. Will takes the photos and uses an app to merge the politician's face onto a video of someone else. The final video depicts the politician telling *680 people where their local polling places are. The politician's face is clearly identifiable in the video. Will has also used software to simulate the politician's voice, so the voice in the video sounds exactly like her real voice. The politician has consented to Will making the video. Will decides to post the video online, and he includes the politician's first and last name. Though this video is made up, a viewer cannot easily tell that it has been altered. Will does not indicate that it is fake when he posts it.

Appendix C: Variants Contrasting Deepfakes with Traditional Nonconsensual Pornography

The purpose of this study was to compare nonconsensual deepfake pornography with traditional nonconsensual pornography. The deepfake video scenario below was therefore modified from that used in the prior studies to better mirror the newly created traditional nonconsensual-pornography scenario.

Deepfake Pornographic Video, Ex-Romantic Partner

Imagine Jane used to date her friend Will. After they break-up, Will finds a series of photos of Jane online. Will takes the photos and uses an app to merge her face onto a pornographic video. The final video shows Jane's face on the body of a naked woman masturbating. Jane's face is clearly identifiable in the video, and the video shows the entirety of the naked woman's body. Will posts the video online publicly, and he includes Jane's first and last name. Though this video is made up, a viewer cannot easily tell that it has been altered. Will does not indicate that it is fake when he posts it.

Traditional Nonconsensual Pornography, Ex-Romantic Partner

Imagine Mary used to date her friend James. While they were dating, Mary sent James a video of herself masturbating. James had asked for the video and had promised to keep it private. Mary's face is clearly identifiable in the video, and the video shows the entirety of her naked body. After they break-up, James posts the video online publicly, and he includes Mary's first and last name.

Footnotes

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- ² Bobby Chesney & Danielle Citron, *Deep Fakes: A Looming Challenge for Privacy, Democracy, and National Security*, 107 Calif. L. Rev. 1753, 1758 (2019).
- ³ Henry Ajder, *Deepfake Threat Intelligence: A Statistics Snapshot from June 2020*, Sensity (July 3, 2020), <https://sensity.ai/deepfake-threat-intelligence-a-statistics-snapshot-from-june-2020/> [<https://perma.cc/ZHW5-53U7>]; *see also* Henry Ajder, Giorgio Patrini, Francesco Cavalli & Laurence Cullen, *Deeprace, The State of Deepfakes: Landscape, Threats, and Impact 1* (2019) [hereinafter *Deeprace*] (reviewing the current landscape and describing the rise over the last several years).
- ⁴ *Deeprace*, *supra* note 3, at 1-2. Although one study found that 100% of pornographic deepfake videos targeted women, *see id.* at 2, there are some pornographic deepfake videos of male celebrities, though these male videos are comparatively rare. Such videos do exist, however. MrDeepFakes.com has a small “Gay” section that features male celebrities such as Chris Pratt, Chris Evans, and Tom Holland. Notably, the category has only ninety-five videos as of June 2021, whereas many of the other categories have three- or four-digit video counts.
- ⁵ *Id.* at 2.
- ⁶ *See, e.g.*, Danielle Keats Citron, *Sexual Privacy*, 128 Yale L.J. 1870, 1886, 1925 (2019) (describing human dignity as encompassing the ability to manage access to one’s “naked body and intimate information”).
- ⁷ *See, e.g.*, Chesney & Citron, *supra* note 2, at 1783-84 (“[D]eep fakes have utility as a form of disinformation supporting strategic, operational, or even tactical deception.”).
- ⁸ *See, e.g., id.* at 1793-94 (discussing defamation as a remedy); Kareem Gibson, Note, *Deepfakes and Involuntary Pornography: Can Our Current Legal Framework Address This Technology?*, 66 Wayne L. Rev. 259, 272-282 (2020) (discussing the limitations of various tort actions as a remedy); Russell Spivak, “Deepfakes”: *The Newest Way to Commit One of the Oldest Crimes*, 3 Geo. L. Tech. Rev. 339, 368-83 (2019) (analyzing the viability of various tort actions); Rebecca A. Delfino, *Pornographic Deepfakes: The Case for Federal Criminalization of Revenge Porn’s Next Tragic Act*, 88 Fordham L. Rev. 887, 918-21 (2019) (discussing the inadequacy of current criminal laws in addressing deepfakes).
- ⁹ *See* Citron, *supra* note 6, at 1939.
- ¹⁰ Cal. Civ. Code § 1708.86 (West 2020) (creating a civil cause of action for those nonconsensually depicted in altered videos that show them engaging in sexually explicit conduct); Cal. Elec. Code § 20010 (West 2020) (prohibiting unlabeled, altered videos featuring political candidates in the weeks prior to an election).
- ¹¹ Va. Code Ann. § 18.2-386.2 (West 2019).
- ¹² Tex. Elec. Code Ann. § 255.004(d) (West 2019).
- ¹³ Jasper Scherer, *Sylvester Turner Calls for Investigation into Tony Buzbee Ad, Citing ‘Deep Fake’ Law*, Hous. Chron. (Oct. 18, 2019, 8:44 PM), <https://www.houstonchronicle.com/news/houston-texas/houston/article/Sylvester-Turner-calls-for-investigation-into-14545665.php> [<https://perma.cc/42XX-V49Q>] (“Mayor Sylvester Turner has called for the district attorney to open a criminal investigation into Tony Buzbee’s campaign over a television ad that appears to show edited photos of Turner and an allegedly fake text between the mayor and a 31-year-old intern who works at the airport.”).
- ¹⁴ N.Y. Civ. Rights Law §§ 50-F, 52-C (McKinney 2021).

- ¹⁵ See, e.g., David Ruiz, *Deepfakes Laws and Proposals Flood US*, Malwarebytes Labs (Jan. 23, 2020), <https://blog.malwarebytes.com/artificial-intelligence/2020/01/deepfakes-laws-and-proposals-flood-us/> [<https://perma.cc/ZE73-DV8A>] (describing current legislative efforts).
- ¹⁶ See generally Mary Anne Franks, “*Revenge Porn*” Reform: A View from the Front Lines, 69 Fla. L. Rev. 1251 (2017) (reviewing the rapid expansion of nonconsensual-pornography laws from 2013 to 2017).
- ¹⁷ See, e.g., Tom R. Tyler & John M. Darley, *Building a Law-Abiding Society: Taking Public Views About Morality and the Legitimacy of Legal Authorities into Account When Formulating Substantive Law*, 28 Hofstra L. Rev. 707, 719-22 (2000) (“To sustain its moral authority, the law must be experienced as consistent with people’s sense of morality.”).
- ¹⁸ See Janice Nadler, *Flouting the Law*, 83 Tex. L. Rev. 1399, 1415-16 (2005); Paul H. Robinson, Geoffrey P. Goodwin & Michael D. Reising, *The Disutility of Injustice*, 85 N.Y.U. L. Rev. 1940, 2005-06 (2010).
- ¹⁹ Nadler, *supra* note 18, at 1415-16.
- ²⁰ *Id.* at 1424-25.
- ²¹ Elizabeth Mullen & Janice Nadler, *Moral Spillovers: The Effect of Moral Violations on Deviant Behavior*, 44 J. Experimental Soc. Psych. 1239, 1239-45 (2008).
- ²² Robinson et al., *supra* note 18, at 2005.
- ²³ Restatement (Second) of Torts §§ 652B, 652D (Am. L. Inst. 1977).
- ²⁴ *Miller v. California*, 413 U.S. 15, 23-24 (1973); Daniel Linz, Edward Donnerstein, Kenneth C. Land, Patricia L. McCall, Joseph Scott, Bradley J. Shafer, Lee J. Klein & Larry Lance, *Estimating Community Standards: The Use of Social Science Evidence in an Obscenity Prosecution*, 55 Pub. Op. Q. 80, 82 (1991).
- ²⁵ This issue is not generally a matter for expert testimony. See, e.g., *St. John v. N.C. Parole Comm’n*, 764 F. Supp. 403, 408-10 (W.D.N.C. 1991) (citing cases that establish that expert testimony need not be introduced in obscenity cases). Instead, the jury is expected to fulfill this role. See, e.g., *Piepenburg v. Cutler*, 649 F.2d 783, 792 (10th Cir. 1981) (noting that “when the material itself is introduced into evidence, the jury may judge for itself, using its own sense of community standards, whether the material is obscene; that is, the jury brings to the trial the community standard and no evidence is necessary to establish it”).
- ²⁶ See Linz et al., *supra* note 24, at 80-82; see also Daniel Linz, Kenneth C. Land, Bradley J. Shafer, Arthur C. Graesser, Edward Donnerstein & Patricia L. McCall, *Discrepancies Between the Legal Code and Community Standards for Sex and Violence: An Empirical Challenge to Traditional Assumptions in Obscenity Law*, 29 Law & Soc’y Rev. 127, 134 (1995) (discussing the “prosecution-induced intolerance” phenomenon, whereby jurors may assume that the community is less tolerant to sexually explicit material because of law enforcement’s intolerance towards those materials).
- ²⁷ See, e.g., Lyrisa Barnett Lidsky, *Defamation, Reputation, and the Myth of Community*, 71 Wash. L. Rev. 1, 6-8 (1996) (expressing skepticism about this idea of a community while at the same time recognizing its ubiquity in the doctrinal discussion). A defendant in a defamation case may also seek to show that a plaintiff is a public figure--which changes the required *mens rea*-- and one way of doing that is surveying the local community to determine their level of recognition. *Waldbaum v. Fairchild Publ’ns, Inc.*, 627 F.2d 1287, 1295 (D.C. Cir. 1980) (“The judge can examine statistical surveys, if presented, that concern the plaintiff’s name recognition.”).

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- ³⁰ Christine S. Scott-Hayward, Henry F. Fradella & Ryan G. Fischer, *Does Privacy Require Secrecy? Societal Expectations of Privacy in the Digital Age*, 43 Am. J. Crim. L. 19, 45-58 (2015); Bernard Chao, Catherine Durso, Ian Farrell & Christopher Robertson, *Why Courts Fail to Protect Privacy: Race, Age, Bias, and Technology*, 106 Calif. L. Rev. 263, 301 (2018).
- ³¹ See *infra* notes 228-233 and accompanying text.
- ³² See *infra* notes 97-101 and accompanying text.
- ³³ Charles Fain Lehman, *What Do Americans Think About Banning Porn?*, Inst. for Fam. Stud. (Dec. 18, 2019), <https://ifstudies.org/blog/what-do-americans-think-about-banning-porn> [<https://perma.cc/XUP9-DBCN>].
- ³⁴ For definitions of these terms, see *infra* text accompanying note 236 (nonconsensual pornography), and *infra* text accompanying note 257 (morphed child pornography).
- ³⁵ For one indicator of the prevalence of generative adversarial networks (GANs), described below, see Deepttrace, *supra* note 3, at 3 (showing that a mere three academic papers mentioned GANs in their titles or abstracts in 2014 and over one thousand did so in 2019).
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⁶⁷ E.g., Chesney & Citron, *supra* note 2, at 1772-75 (exploring the emotional consequences of sexually exploitative deepfakes but focusing on the practical and monetary harms of other deepfakes); see also, e.g., Nina I. Brown, *Deepfakes and the Weaponization of Disinformation*, 23 Va. J.L. & Tech. 1, 9 (2020) (noting that potential abuses of nonpornographic deepfakes could include depicting a president in such a way that interferes with an election or causes mass panic, but making no mention of the dignitary harms the individuals depicted could experience).

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⁶⁹ Citron, *supra* note 6, at 1880.

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- ⁷⁵ Citron, *supra* note 6, at 1925.
- ⁷⁶ Brown, *supra* note 67, at 9.
- ⁷⁷ Chesney & Citron, *supra* note 2, at 1777 (identifying seven dimensions of societal harms, including “distortion of democratic discourse on important policy questions; manipulation of elections; erosion of trust in significant public and private institutions; enhancement and exploitation of social divisions; harm to specific military or intelligence operations or capabilities; threats to the economy; and damage to international relations”).
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92 Restatement (Second) of Torts § 652D (Am. L. Inst. 1977).

93 *Id.* § 652B.

94 Chesney & Citron, *supra* note 2, at 1795 (“Deep-fakes usually will not involve invasions of spaces (either physical or conceptual like email inboxes) in which individuals have a reasonable expectation of privacy.”); see also *Nader v. Gen. Motors Corp.*, 255 N.E.2d 765, 770 (N.Y. 1970) (discussing how some acts are not intrusions upon seclusion because they are not done to obtain information).

95 Spivak, *supra* note 8, at 379 (“In many (though not all) cases, the deepfake subject has either put the photos into the public by posting them online or consented to their collection by posing for paparazzi. Deepfakers have not violated anyone’s personal space to obtain the necessary information to create and publish their work.”).

96 See, e.g., *United States v. Dionisio*, 410 U.S. 1, 14 (1972) (“No person can have a reasonable expectation that others will not know the sound of his voice, any more than he can reasonably expect that his face will be a mystery to the world.”).

97 Restatement (Second) of Torts §§ 558-59.

98 *Id.* § 652E.

99 Chesney & Citron, *supra* note 2, at 1772-75 (describing how being depicted in fake pornography videos may be expected to have collateral consequences for future social and employment prospects given existing research on nonconsensual pornography).

100 See Kareem Gibson, Note, *Deepfakes and Involuntary Pornography: Can Our Current Legal Framework Address This*

Technology?, 66 Wayne L. Rev. 259, 278 (2020).

- ¹⁰¹ In *New York Times Co. v. Sullivan*, the Supreme Court held that public figures must prove a heightened *mens rea* of “actual malice”—that the statement was made “with knowledge that it was false or with reckless disregard of whether it was false or not.” 376 U.S. 254, 279-80 (1964). But the creator of a deepfake knows it is fake, so this requirement would generally be satisfied. Unlike with defamation, the Supreme Court has not decided whether the heightened standard applies to false light claims, but some jurisdictions have concluded that it does. *See, e.g., West v. Media Gen. Convergence, Inc.*, 53 S.W.3d 640, 647 (Tenn. 2001) (“We hold that actual malice is the appropriate standard for false light claims when the plaintiff is a public official or public figure, or when the claim is asserted by a private individual about a matter of public concern.”).
- ¹⁰² *See Restatement (Second) of Torts* § 46 (“One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm.”).
- ¹⁰³ 485 U.S. 46, 48 (1988).
- ¹⁰⁴ *Id.* at 55-57.
- ¹⁰⁵ *Snyder v. Phelps*, 562 U.S. 443, 454-58 (2011).
- ¹⁰⁶ *See, e.g.,* 765 Ill. Comp. Stat. 1075/5, /35 (requiring a use for “a commercial purpose”); Va. Code Ann. § 8.01-40 (2021) (requiring use “for advertising purposes or for the purposes of trade”); Cal. Civ. Code § 3344 (West 2021) (requiring use “for purposes of advertising or selling, or soliciting purchases of, products, merchandise, goods or services”).
- ¹⁰⁷ *See, for example,* Okla. Stat. tit. 12, § 1450 (2021), an anti-catfishing statute that allows for a cause of action against those who engage in impersonation online with an intent to harass.
- ¹⁰⁸ Tex. Penal Code Ann. § 21.16 (West 2019) (emphasis added).
- ¹⁰⁹ N.D. Cent. Code § 12.1-17-07.2 (2015).
- ¹¹⁰ *Id.*
- ¹¹¹ N.Y. Penal Law § 245.15 (McKinney 2019).
- ¹¹² Conn. Gen. Stat. § 53a-189c (2021).
- ¹¹³ Jonathan S. Sales & Jessica A. Magaldi, *Deconstructing the Statutory Landscape of “Revenge Porn”: An Evaluation of the Elements that Make an Effective Nonconsensual Pornography Statute*, 57 Am. Crim. L. Rev. 1499, 1524 (2020).
- ¹¹⁴ *See* Va. Code Ann. § 18.2-386.2 (West 2019). In 2019, Virginia amended its revenge pornography statute to include “any videographic or still image created by any means whatsoever that depicts another person.” *Id.*
- ¹¹⁵ Cal. Civ. Code § 1708.86(b)(1)-(2) (West 2020).
- ¹¹⁶ *Id.* § 1708.86(c)(1)(B)(i)-(ii).

117 *Id.* § 1708.86(d).

118 *Id.* § 1708.86(e)(1)(B)(i)-(ii).

119 *Id.* § 1708.86(e)(1)(B)(ii)(I)-(II).

120 *Id.* § 1708.86(e)(1)(C)-(E).

121 Cal. Elec. Code § 20010(a) (West 2020).

122 *Id.* § 20010(e)(1)-(2).

123 *Id.* § 20010(d)(5).

124 *Id.* § 20010(b)(1).

125 *Id.* § 20010(c)(1).

126 Tex. Elec. Code Ann. § 255.004(d) (West 2019).

127 *See, e.g.,* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964) (requiring elevated *mens rea* for a person to be liable for defamation of a public figure).

128 *Governor Cuomo Signs Legislation Establishing a “Right to Publicity” for Deceased Individuals to Protect Against the Commercial Exploitation of Their Name or Likeness*, N.Y. State (Nov. 30, 2020), <https://www.governor.ny.gov/news/governor-cuomo-signs-legislation-establishing-right-publicity-deceased-individuals-protect> [<https://perma.cc/PAJ7-EG9A>].

129 N.Y. Civ. Rights Law § 50-f(2)(a) (McKinney 2021).

130 *Id.* § 50-f(2)(b) (prohibiting use “in a scripted audiovisual work as a fictional character or for the live performance of a musical work ... if the use is likely to deceive the public into thinking it was authorized by the person [or their representatives]” and clarifying that “[a] use shall not be considered likely to deceive the public ... if the person making such use provides a conspicuous disclaimer in the credits”).

131 *Id.* § 52-c(1)(e).

132 *Id.* § 52-c(2)(b).

133 *Id.* § 52-c(3)(a)-(b).

134 Most reporting on this took a very matter-of-fact approach. For an example of a matter-of-fact tone used in reporting on the comedic deepfake of President Obama, see James Vincent, *Watch Jordan Peele Use AI to Make Barack Obama Deliver a PSA*

About Fake News, Verge (Apr. 17, 2018, 1:14 PM), <https://www.theverge.com/tldr/2018/4/17/17247334/ai-fake-news-video-barack-obama-jordan-peelee-buzzfeed> [<https://perma.cc/QMA2-BQST>]. The authors have not found any articles describing the creation as inappropriate.

- ¹³⁵ See, e.g., *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 55-57 (1988) (holding that a public figure cannot sustain a claim of intentional infliction of emotional distress against the publisher of a parody depicting the plaintiff because the “outrageous” standard of conduct as applied to political cartoons would invite juries to impose their own “tastes or views” in violation of the First Amendment).
- ¹³⁶ See, e.g., *Gill v. Hearst Pub. Co.*, 253 P.2d 441, 444-45 (Cal. 1953) (holding that plaintiffs waived their right to privacy by “expos[ing] themselves to public gaze in a pose open to the view of any persons who might then be at or near” them, and therefore publication of their photograph did not invade their right of privacy).
- ¹³⁷ Toni Allen, *Dodging Deception & Seeking Truth Online [Survey Results]*, Who IsHosting This (Sept. 19, 2019), <https://www.whoishostingthis.com/blog/2019/09/02/seeking-trust-online/> [<https://perma.cc/2LJN-D3UP>]. The survey was conducted of 981 “internet users,” from whom few demographics were reported. *Id.*
- ¹³⁸ The study provided a brief description of deepfakes, saying that they were AI-produced videos depicting people saying or doing things that they did not say or do. It then asked, “Do you believe deepfaking someone without consent should be illegal or legal?” *Id.* The study does not appear to have provided subjects with any particular examples of deepfakes.
- ¹³⁹ See, e.g., Cal. Elec.Code § 20010(b)(1) (West 2020) (providing no liability for labeled videos); Ruiz, *supra* note 15 (noting one federal bill would require a deepfake “watermark” label).
- ¹⁴⁰ See *supra* Section I.C.
- ¹⁴¹ See, e.g., *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 54-56 (1988) (“From the viewpoint of history it is clear that our political discourse would have been considerably poorer without [satirical cartoons.]”); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279-81 (1964) (“The importance to the state and to society of [discussing the character and qualifications of candidates for their suffrages] is so vast, and the advantages derived are so great, that they more than counterbalance the inconvenience of private persons whose conduct may be involved” (quoting *Coleman v. MacLennan*, 98 P. 281, 286 (Kan. 1908))).
- ¹⁴² Dynata, Panel Book 5-6 (2020).
- ¹⁴³ Inattentive participants were screened from the final sample based on two criteria. First, participants who did not give the appropriate response to an attention-check question--a question asking participants to give a particular response--or a CAPTCHA item were unable to complete the study. Second, participants were screened from the final sample if they finished the study in less than one-third of the time taken by the median participant or if they wrote gibberish in a comment box. Of the participants who completed the study, 3.7% were screened on the basis of time or gibberish. For a discussion of attention checks in legal surveys, see Matthew B. Kugler & R. Charles Henn, *Internet Surveys in Trademark Cases: Benefits, Challenges, and Solutions*, in *Trademark and Deceptive Advertising Surveys* (Shari Seidman Diamond & Jerre B. Swann eds., 2d ed. forthcoming 2021).
- ¹⁴⁴ A 2x2 ANOVA test (video or written as a within-subjects factor, labeled versus not as a between-subjects factor) revealed a significant main effect for the content being a video on each of the three measures. Blameworthiness: $F(1, 571) = 23.36, p < 0.001, \eta^2 = 0.04$. Harm: $F(1, 571) = 22.24, p < 0.001, \eta^2 = 0.04$. Punishment: $F(1, 571) = 108.79, p < 0.001, \eta^2 = 0.16$.
- ¹⁴⁵ The mixed ANOVA tests revealed an interaction effect between labeling and content type. Blameworthiness: $F(1, 571) = 6.54, p < 0.05, \eta^2 = 0.01$. Harm: $F(1, 571) = 4.30, p < 0.05, \eta^2 = 0.01$. Punishment: $F(1, 571) = 5.03, p < 0.05, \eta^2 = 0.01$.

- ¹⁴⁶ A simple effects analysis looking at the effect of labeling for the written and video scenarios separately revealed significant effects of labeling on the written scenario: $F(1, 571) = 8.61, p < 0.001, \eta^2 = 0.02$. Harm: $F(1, 571) = 3.67, p = 0.05, \eta^2 = 0.01$. Punishment: $F(1, 571) = 16.58, p < 0.001, \eta^2 = 0.03$. But only a significant effect on punishment for the video: $F(1, 571) = 0.55, ns$. Harm: $F(1, 571) = 0.00, ns$. Punishment: $F(1, 571) = 4.65, p < 0.05, \eta^2 = 0.01$.
- ¹⁴⁷ This was a series of mixed ANOVA tests with labeling as a between-subjects factor and the type of scenario (default versus celebrity; default versus no nudity, BDSM; default versus sexualized voice) as a within-subjects factor. Table 3's "Comparison with Default" column reports the F-values of the within-subjects scenario factor.
- ¹⁴⁸ This analysis was between-participants, as each person got either the personal-use-with-consent or personal-use-without-consent scenario.
- ¹⁴⁹ Due to incomplete data for a few participants, not all comparisons have the same N. This did not affect the means for the comparison deepfake case by more than two one-hundredths for any comparison except the personal-use case, which was only shown to half the sample. For that analysis, the means for the default case were: Blameworthiness unlabeled ($M = 5.53, SD = 1.10$), labeled ($M = 5.27, SD = 1.36$); Harm unlabeled ($M = 5.53, SD = 1.07$), labeled ($M = 5.26, SD = 1.34$); Punishment unlabeled ($M = 3.14, SD = 0.94$), labeled ($M = 2.87, SD = 0.95$).
- ¹⁵⁰ Cal. Civ. Code § 1708.86(a)(14) (West 2020) (defining sexually explicit material).
- ¹⁵¹ *Id.* § 1708.86(a)(13) (defining sexual conduct).
- ¹⁵² *Id.* § 1708.86(b)(1) (creating a civil cause of action against anyone who "[c]reates and intentionally discloses" (emphasis added)); N.Y. Civ. Rights Law § 52-c(2)(a) (McKinney 2021).
- ¹⁵³ See *supra* note 146 for the results labeling had on the default friend condition. In the celebrity condition, labeling had no effect on blameworthiness, $F(1, 573) = 0.01, ns, \eta^2 = 0.00$; harm $F(1, 573) = 0.28, ns, \eta^2 = 0.00$; or punishment $F(1, 573) = 0.47, ns, \eta^2 = 0.00$. In the no-nudity, BDSM condition, labeling had no effect on blameworthiness $F(1, 572) = 0.05, ns, \eta^2 = 0.00$, or harm $F(1, 572) = 0.02, ns, \eta^2 = 0.00$, but there was an effect on punishment such that labeling led to lower punishments $F(1, 572) = 11.00, p < 0.001, \eta^2 = 0.02$. In the sexualized-voice condition, labeling had no effect on blameworthiness $F(1, 574) = 0.07, ns, \eta^2 = 0.00$, or harm $F(1, 574) = 1.79, ns, \eta^2 = 0.00$, but there was an effect on punishment $F(1, 574) = 8.47, p < 0.001, \eta^2 = 0.02$.
- ¹⁵⁴ The analyses took the form of mixed ANOVA tests with labeling as a between-subjects factor and politician (versus person) and video (versus written) as within-subjects factors. There were significant effects on each of the three dependent variables for whether the content was a deepfake video. Blameworthiness: $F(1, 555) = 4.05, p < 0.05, \eta^2 = 0.01$. Harm: $F(1, 555) = 6.28, p < 0.05, \eta^2 = 0.01$. Punishment: $F(1, 555) = 18.05, p < 0.001, \eta^2 = 0.03$.
- ¹⁵⁵ Blameworthiness: $F(1, 555) = 7.58, p < 0.01, \eta^2 = 0.01$. Harm: $F(1, 555) = 9.89, p < 0.01, \eta^2 = 0.02$. Punishment: $F(1, 555) = 23.75, p < 0.001, \eta^2 = 0.04$. There was an interaction effect, by which labeling reduced blameworthiness more for written content, though labeling was also significant for video. Interaction: $F(1, 555) = 5.76, p < 0.05, \eta^2 = 0.01$. Written: $F(1, 557) = 13.05, p < 0.001, \eta^2 = 0.02$. Video: $F(1, 555) = 3.87, p = 0.05, \eta^2 = 0.01$. The interactions on harm and punishment were not significant.
- ¹⁵⁶ $F(1, 555) = 6.70, p = 0.01, \eta^2 = 0.01$.
- ¹⁵⁷ Interaction $F(1, 555) = 10.78, p < 0.001, \eta^2 = 0.02$. Politician $F(1, 557) = 0.49, ns$. Person: $F(1, 555) = 31.76, p < 0.001, \eta^2 = 0.05$.
- ¹⁵⁸ This was inspired by a scene in *Scrubs*. In that scene, the protagonist fantasizes about a recently met and annoying character saying, "I'm a tool. I'm a tool. I'm a tool, tool, tool, an unbelievably annoying tool." *Scrubs: My First Day* (ABC television

broadcast Oct. 2, 2001) (transcript available at https://scrubs.fandom.com/wiki/My_First_Day_transcript [<https://perma.cc/MJ8G-CFE4>]).

¹⁵⁹ Mixed ANOVA tests were conducted with the cocaine and self-insult vignettes as within-subjects factors and labeling as a between-subjects factor. There was a significant effect of scenario on each of the three measures. Blameworthy: $F(1, 560) = 28.79$, $p < 0.001$ $\eta^2 = 0.049$. Harm: $F(1, 560) = 66.31$, $p < 0.001$ $\eta^2 = 0.106$. Punishment: $F(1, 560) = 74.13$, $p < 0.001$ $\eta^2 = 0.117$.

¹⁶⁰ Blameworthy: $F(1, 560) = 6.52$, $p < 0.05$ $\eta^2 = 0.012$. Harm: $F(1, 560) = 7.02$, $p < 0.01$ $\eta^2 = 0.012$. Punishment: $F(1, 560) = 17.59$, $p < 0.001$ $\eta^2 = 0.03$.

¹⁶¹ Mixed ANOVA tests were conducted with the cocaine and self-insult vignettes as within-subjects factors and labeling as a between-subjects factor. There was a significant main effect of scenario on each of the three measures. Blameworthy: $F(1, 561) = 44.57$, $p < 0.001$ $\eta^2 = 0.074$. Harm: $F(1, 561) = 132.97$, $p < 0.001$ $\eta^2 = 0.192$. Punishment: $F(1, 561) = 95.64$, $p < 0.001$ $\eta^2 = 0.146$.

¹⁶² Blameworthy: $F(1, 561) = 7.47$, $p < .01$ $\eta^2 = 0.013$. Harm: $F(1, 561) = 6.64$, $p < 0.05$ $\eta^2 = 0.012$. Punishment: $F(1, 561) = 11.34$, $p < 0.001$ $\eta^2 = 0.02$.

¹⁶³ See, e.g., Natalie M. Banta, *Death and Privacy in the Digital Age*, 94 N.C. L. Rev. 927, 935 (2016) (“[P]rivacy torts are generally available to protect privacy during life; however, the majority of courts do not allow this right to extend beyond death.” (footnotes omitted)); *Warren v. Colvin*, 744 F.3d 841, 843-44 (2d Cir. 2014) (“[Plaintiff] correctly asserts that deceased individuals generally do not enjoy rights under the Privacy Act.”).

¹⁶⁴ A between-subjects ANOVA using alive versus dead and labeled versus not as factors found no significant effect of whether the scientist was alive on any measure. Blameworthy: $F(1, 559) = 2.79$, ns. Harm: $F(1, 559) = 1.03$, ns. Punishment: $F(1, 559) = 0.12$, ns.

¹⁶⁵ See *supra* note 10; *supra* notes 121-126 and accompanying text.

¹⁶⁶ If this scenario seems extreme, recall that Representative Peter King (R-N.Y.) endorsed the Irish Republican Army. In 1985, he said: “If civilians are killed in an attack on a military installation, it is certainly regrettable, but I will not morally blame the I.R.A. for it.” Elspeth Reeve, *Peter King Supported the IRA Before Hunting for Terrorists*, Atlantic (Mar. 9, 2011) <https://www.theatlantic.com/politics/archive/2011/03/peter-king-loved-terrorism-when-it-was-done-irish-people/348691/> [<https://perma.cc/9DSZ-HLW6>].

¹⁶⁷ Mixed ANOVA tests were conducted with the handshake and terror vignettes as within-subjects factors and labeling as a between-subjects factor. There was a significant effect of scenario on two of the measures, and a nonsignificant trend on perceived harmfulness. Blameworthy: $F(1, 557) = 4.15$, $p < 0.05$ $\eta^2 = 0.007$. Harm: $F(1, 557) = 3.34$, $p = 0.07$ $\eta^2 = 0.006$. Punishment: $F(1, 557) = 16.93$, $p < 0.001$ $\eta^2 = 0.03$.

¹⁶⁸ Blameworthy: $F(1, 557) = 5.61$, $p < 0.05$ $\eta^2 = 0.01$. Harm: $F(1, 557) = 7.61$, $p < 0.01$ $\eta^2 = 0.013$. Punishment: $F(1, 557) = 18.33$, $p < 0.001$ $\eta^2 = 0.032$.

¹⁶⁹ Sirena Bergman, *Voter Shares Adorable Video of Obama Chatting to Her New Baby on the Phone While Canvassing for Biden*, Indy 100 (Nov. 1, 2020, 2:45 PM), <https://www.indy100.com/article/obama-phone-banking-biden-viral-video-pennsylvania-election-9724055> [<https://perma.cc/M3HF-QKMB>].

¹⁷⁰ Separate ANOVA tests were conducted for the polling-place and silly-song vignettes with the same design. Both consent and labeling were between-subjects factors. For each, there was a strong effect of consent.

Polling place: Blameworthy: $F(1, 556) = 13.32, p < 0.001 \eta^2 = 0.023$. Harm: $F(1, 556) = 12.18, p < 0.001 \eta^2 = 0.021$. Punishment: $F(1, 556) = 9.91, p < 0.01 \eta^2 = 0.018$.

Silly Song: Blameworthy: $F(1, 559) = 27.09, p < .001 \eta^2 = 0.023$. Harm: $F(1, 559) = 10.27, p < 0.001 \eta^2 = 0.021$. Punishment: $F(1, 559) = 5.80, p < 0.05 \eta^2 = 0.018$.

¹⁷¹ Polling place: Blameworthy: $F(1, 556) = 9.80, p < 0.01 \eta^2 = 0.017$. Harm: $F(1, 556) = 6.77, p < 0.05 \eta^2 = 0.012$. Punishment: $F(1, 556) = 10.16, p < 0.01 \eta^2 = 0.018$.

Silly Song: Blameworthy: $F(1, 559) = 3.60, p = 0.06 \eta^2 = 0.017$. Harm: $F(1, 559) = 7.20, p < 0.01 \eta^2 = 0.012$. Punishment: $F(1, 559) = 2.11, p = 0.15 \eta^2 = 0.018$.

¹⁷² The following definition was used:

A deepfake video is a realistic-looking video that has been edited to depict someone saying or doing something they never said or did. In a deepfake video, a person from one photo or video is inserted into another video. These videos can imitate people's faces and voices so well that they look and sound real.

¹⁷³ ANOVA tests were conducted looking at the factors pornographic versus attitudinal, labeled versus unlabeled, and male versus female. There were significant main effects for labeled, $F(1, 1111) = 71.54, p < 0.001 \eta^2 = 0.061$, pornographic, $F(1, 1111) = 41.44, p < 0.001 \eta^2 = 0.036$, and gender $F(1, 1111) = 11.26, p < 0.001 \eta^2 = 0.01$.

¹⁷⁴ $F(1, 1111) = 3.30, p = .07 \eta^2 = 0.003$.

¹⁷⁵ Attitudinal $F(1, 548) = 49.27, p < 0.001 \eta^2 = 0.082$. Pornographic: $F(1, 563) = 23.68, p < 0.001 \eta^2 = 0.040$.

¹⁷⁶ There was a significant interaction between gender and pornographic versus attitudinal. $F(1, 1111) = 10.14, p < 0.001 \eta^2 = 0.009$. A simple effects analysis revealed that there was a significant effect of gender for the pornographic conditions, $F(1, 563) = 22.96, p < 0.001 \eta^2 = 0.039$, but not for the attitudinal conditions, $F(1, 548) = 0.01$ ns.

¹⁷⁷ Pornographic: Blameworthy: $F(1, 571) = 10.24, p < 0.001 \eta^2 = 0.018$, Male ($M = 5.21, SD = 1.40$), Female ($M = 5.55, SD = 1.11$). Harm: $F(1, 571) = 13.71, p < 0.001 \eta^2 = 0.023$, Male ($M = 5.23, SD = 1.32$), Female ($M = 5.59, SD = 1.00$). Punishment: $F(1, 571) = 9.05, p < 0.01 \eta^2 = 0.016$, Male ($M = 2.86, SD = 0.97$), Female ($M = 3.10, SD = 0.89$).

Attitudinal (cocaine): Blameworthy: $F(1, 559) = 1.36$ ns, Male ($M = 4.77, SD = 1.46$), Female ($M = 4.91, SD = 1.46$). Harm: $F(1, 559) = 2.70, 101$ ns, Male ($M = 4.81, SD = 1.39$), Female ($M = 5.00, SD = 1.37$). Punishment: $F(1, 559) = 0.570, 45$ ns, Male ($M = 2.37, SD = 1.01$), Female ($M = 2.43, SD = 0.93$).

¹⁷⁸ See, e.g., Sarah Esther Lageson, Suzy McElrath & Krissinda Ellen Palmer, *Gendered Public Support for Criminalizing "Revenge Porn,"* 14 *Feminist Criminology* 560, 577 (2019) (reporting greater "support for criminalizing nonconsensual pornography among" those "respondents who identify as women").

¹⁷⁹ These results are available from the authors upon request.

¹⁸⁰ ANOVA tests were conducted looking at the factors pornographic versus attitudinal, labeled versus unlabeled, and male versus female. These are the effects for the main effect of pornographic versus attitudinal.

Employment: Attitudinal ($M = 4.72, SD = 1.43$), Pornographic ($M = 5.3, SD = 1.26$). $F(1, 1119) = 48.26, p < 0.001 \eta^2 = 0.04$.

Emotional harm: Attitudinal ($M = 4.89, SD = 1.35$), Pornographic ($M = 5.4, SD = 1.15$). $F(1, 1119) = 43.79, p < 0.001 \eta^2 = 0.04$.

Reputation: Attitudinal ($M = 4.93, SD = 1.35$), Pornographic ($M = 5.38, SD = 1.22$). $F(1, 1119) = 32.12, p < 0.001 \eta^2 = 0.03$.

Election chances: Attitudinal ($M = 4.92, SD = 1.34$), Pornographic ($M = 5.38, SD = 1.20$). $F(1, 1119) = 33.7, p < 0.001 \eta^2 = 0.03$.

¹⁸¹ Employment: Unlabeled ($M = 5.13, SD = 1.33$), Labeled ($M = 4.91, SD = 1.42$). $F(1, 1119) = 8.05, p < 0.01 \eta^2 = 0.01$.

Election chances: Unlabeled ($M = 5.23, SD = 1.25$), Labeled ($M = 5.09, SD = 1.34$). $F(1, 1119) = 3.46, \eta^2 = 0$.

182 Employment: Male (M = 4.84, SD = 1.48), Female (M = 5.18, SD = 1.26). $F(1, 1119) = 14.94, p < 0.001 \eta^2 = 0.01$.
Emotional harm: Male (M = 4.99, SD = 1.33), Female (M = 5.3, SD = 1.21). $F(1, 1119) = 13.47, p < 0.001 \eta^2 = 0.01$.
Reputation: Male (M = 5.00, SD = 1.36), Female (M = 5.31, SD = 1.22). $F(1, 1119) = 13.74, p < 0.001 \eta^2 = 0.01$.
Election chances: Male (M = 5.01, SD = 1.36), Female (M = 5.29, SD = 1.22). $F(1, 1119) = 11.36, p < 0.001 \eta^2 = 0.01$.

183 This may be in the form of two separate statutes or one statute. For example, Colorado has separate criminal and civil statutes. *Colo. Rev. Stat. Ann. §§ 13-21-1401-1409 (West 2019)* (providing “Civil Remedies for Unauthorized Disclosure of Intimate Images”); *id.* §§ 18-7-107-108 (criminal statute). Vermont has a single statute that provides both criminal penalties and a civil cause of action. *Vt. Stat. Ann. tit. 13, § 2606 (West 2015)*.

184 See Oliver W. Holmes, *The Common Law* 50-51 (Boston, Little, Brown & Co. 1881).

185 John M. Darley, Lawrence M. Solan, Matthew B. Kugler & Joseph Sanders, *Doing Wrong Without Creating Harm*, 7 J. Empirical Legal Stud. 30, 41-43 (2010) (presenting an experimental study showing that more blameworthy states of mind produced higher punitive damages and proposed prison terms, whereas greater realized harm produced higher compensatory damages); Joseph Sanders, Matthew B. Kugler, Lawrence M. Solan & John M. Darley, *Must Torts Be Wrongs? An Empirical Perspective*, 49 Wake Forest L. Rev. 1, 25-27 (2014) (presenting an empirical study showing that people were willing to assign compensatory, but generally not punitive, damages to innocent agents who caused harm).

186 See *The Easiest Way to Find Participants for Academic Research*, CloudResearch, <https://www.cloudresearch.com/industries/students-universities/> [<https://perma.cc/F8SZ-S95X>].

187 Recall that the only major demographic effect in the first study was on gender, which is still representative here.

188 As in the first study, inattentive participants were screened from the final sample based on two criteria. First, participants who did not give the appropriate response to an attention check question--a question asking participants to give a particular response--or a CAPTCHA item were unable to complete the study. Second, participants were screened from the final sample if they finished the study in less than one-third of the time taken by the median participant.

189 The living-scientist scenario was modified slightly to say that the scientist was currently employed at a major university (rather than to have retired recently).

190 Recall that this is the living-scientist variant, not the combination of the dead and living conditions (Schrodinger’s Scientist) reported in *supra* Table 5.

191 The Study 1 values are reported in *supra* Tables 2, 4, and 5, except for the living-scientist scenario (69.6% for labeled, 75.6% for unlabeled). Study 2 compared like scenario to like scenario, combining the criminal-punishment and both-civil-and-criminal-punishment options: $83.73 - 74.96 = 8.76$, which rounds to 8.8.

192 It is somewhat misleading to report the average for this decline (11.7 points), given the restricted range. Specifically, the average is greater than the small percentage of respondents opting against criminalization in the first study’s pornographic condition.

193 As in the first study, inattentive participants were screened from the final sample based on two criteria. First, participants who did not give the appropriate response to an attention check question--a question asking participants to give a particular response--or a CAPTCHA item were unable to complete the study. Second, participants were screened from the final sample if they finished the study in less than one-third of the time taken by the median participant.

194 The switch to masturbation was done to avoid any question of joint creation in the traditional nonconsensual-pornography case.

- ¹⁹⁵ See *supra* notes 108-113 and accompanying text for a discussion of state-by-state variations in nonconsensual-pornography provisions.
- ¹⁹⁶ The within-subjects ANOVA analyzing the harm and blameworthiness measures included order as a factor. There was a main effect of order on both measures. Blameworthiness: $F(1, 415) = 4.23, p = 0.04, \eta^2 = 0.01$. Harm: $F(1, 415) = 5.91, p = 0.015, \eta^2 = 0.014$. In each case, this was due to both scenarios being rated as worse when the traditional nonconsensual-pornography scenario came first. This is odd given that the traditional nonconsensual-pornography scenario was rated as less blameworthy in both orders; we might expect that when the worse-rated scenario is shown first, participants will be primed to rate the next scenario as more harmful and blameworthy, but the opposite occurred. There was no significant interaction between order and scenario condition (deepfake or not) on either measure. Blameworthiness: $F(1, 415) = 0.10, p = 0.753, \eta^2 = 0.000$. Harm: $F(1, 415) = 2.76, p = 0.097, \eta^2 = 0.007$.
- ¹⁹⁷ $F(1, 415) = 9.23, p = 0.003, \eta^2 = 0.022$.
- ¹⁹⁸ $F(1, 415) = 0.07, p = 0.785, \eta^2 = 0.000$.
- ¹⁹⁹ This difference is significant $\chi^2(1, N = 417) = 5.48, p = 0.019$.
- ²⁰⁰ See *supra* note 180 and accompanying text.
- ²⁰¹ *Demeaning*, Oxford Lexico Dictionary, <https://www.lexico.com/en/definition/demeaning> [<https://perma.cc/Q5WT-LGG3>]. The definition from Merriam-Webster is similar: “damaging or lowering the character, status, or reputation of someone or something.” *Demeaning*, Merriam-Webster, <https://www.merriam-webster.com/dictionary/demeaning> [<https://perma.cc/6EB4-FADF>].
- ²⁰² See *supra* Section I.C.
- ²⁰³ This is slightly more complicated in the case of false light, where the accused message merely needs to convey a false impression. A woman was able to win a false light claim against a pornographic magazine when it published her (clothed) picture surrounded by lascivious images, because this arguably implied things about her character. *Braun v. Flynt*, 726 F.2d 245, 254 (5th Cir. 1984). Nonconsensual, labeled deepfake creations imply nothing in particular about the character of those depicted, however, so it would be harder for labeled deepfakes to serve as the basis for a false light claim.
- ²⁰⁴ Abram, *supra* note 1.
- ²⁰⁵ See *supra* notes 108-112 and accompanying text.
- ²⁰⁶ Cillian McHugh, Marek McGann, Eric R. Igou & Elaine L. Kinsella, *Searching for Moral Dumbfounding: Identifying Measurable Indicators of Moral Dumbfounding*, 3 *Collabra: Psych.* 1, 1-2 (2017) (noting that “[i]t is apparent from the literature that there is no single, agreed definition of moral dumbfounding” but that “an absence of reasons for, or an inability to justify or defend, a moral judgement, is consistently identified across definitions”).
- ²⁰⁷ Jonathan Haidt, Fredrik Björklund & Scott Murphy, *Moral Dumbfounding: When Intuition Finds No Reason 1* (Aug. 10, 2000) (unpublished manuscript) (on file with journal).
- ²⁰⁸ See, e.g., *id.* at 5-6 (describing various moral-dumbfounding studies); McHugh et al., *supra* note 206, at 1.
- ²⁰⁹ Haidt et al., *supra* note 207, at 18.

- 210 *Id.* at 11-12; *see also* McHugh et al., *supra* note 206, at 5-6 (describing the Haidt et al. vignettes).
- 211 *See* Haidt et al., *supra* note 207, at 11.
- 212 Kurt Gray & Jonathan E. Keeney, *Impure or Just Weird? Scenario Sampling Bias Raises Questions About the Foundation of Morality*, 6 Soc. Psych. & Personality Sci. 859, 864-65 (2015).
- 213 For a discussion on the background of moral psychology research, see Chelsea Schein, Ryan S. Ritter & Kurt Gray, *Harm Mediates the Disgust-Immorality Link*, 16 Emotion 862, 862-63 (2016).
- 214 Jonathan Haidt & Matthew A. Hersh, *Sexual Morality: The Cultures and Emotions of Conservatives and Liberals*, 31 J. Applied Soc. Psych. 191, 213 (2001).
- 215 *Id.* at 212 (citation omitted).
- 216 Chelsea Schein & Kurt Gray, *Moralization and Harmification: The Dyadic Loop Explains How the Innocuous Becomes Harmful and Wrong*, 27 Psych. Inquiry 62, 62 (2016).
- 217 *Id.* (“This feedback loop has the power to amplify the perceived levels of both harm and immorality: what seems harmful seems wrong, and what seems wrong seems *more* harmful, and what seems more harmful becomes *more* wrong, and so on.”).
- 218 *Id.*
- 219 *Id.*
- 220 *Id.* at 63.
- 221 A. W. Eaton, *A Sensible Antiporn Feminism*, 117 Ethics 674, 677 (2007).
- 222 *Id.* at 680.
- 223 *See, e.g.*, Morrison Torrey, *Feminist Legal Scholarship on Rape: A Maturing Look at One Form of Violence Against Women*, 2 Wm. & Mary J. Women & L. 35, 41 (1995) (“In general, feminist critiques of the legal definition of consent to sexual activity fall into three categories: (1) true consent is not possible until women are no longer subordinated by men; (2) consent is often presumed or implied in non-stranger rape; and (3) prevalent sexual mythology encourages men to disbelieve women when they say ‘no.’”).
- 224 Daniel J. Solove, *Privacy Self-Management and the Consent Dilemma*, 126 Harv. L. Rev. 1880, 1880-82 (2013).
- 225 N.Y. Civ. Rights Law § 52-c(3)(a)-(b) (McKinney 2021).
- 226 *United States v. Alvarez*, 567 U.S. 709, 717 (2012).
- 227 *See, e.g.*, *Reed v. Town of Gilbert*, 576 U.S. 155, 163-64 (2015) (noting that laws which “cannot be ‘justified without reference to the content of the regulated speech’” must face strict scrutiny (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989))).

228 *Alvarez*, 567 U.S. at 715. The relevant part of the Act read:

“Whoever falsely represents himself or herself, verbally or in writing, to have been awarded any decoration or medal authorized by Congress for the Armed Forces of the United States ... shall be fined under this title, imprisoned not more than six months, or both If a decoration or medal involved in an offense under subsection (a) or (b) is a Congressional Medal of Honor ... the offender shall be fined under this title, imprisoned not more than 1 year, or both.”

Id. at 715-16 (quoting 18 U.S.C. § 704(b)-(c)).

229 *Id.* at 719 (“The Court has never endorsed the categorical rule the Government advances: that false statements receive no First Amendment protection Even when considering some instances of defamation and fraud, moreover, the Court has been careful to instruct that falsity alone may not suffice to bring the speech outside the First Amendment. The statement must be a knowing or reckless falsehood.”).

230 *Id.*

231 *Id.* at 723.

232 *See id.* (“Were the Court to hold that the interest in truthful discourse alone is sufficient to sustain a ban on speech, absent any evidence that the speech was used to gain a material advantage, it would give government a broad censorial power unprecedented in this Court’s cases or in our constitutional tradition.”).

233 *See id.* at 721 (noting that “[s]tatutes that prohibit falsely representing that one is speaking on behalf of the Government, or that prohibit impersonating a Government officer, also protect the integrity of Government processes, quite apart from merely restricting false speech”).

234 Deepfakes cannot be banned merely because they depict upsetting content. *See, e.g., Snyder v. Phelps*, 562 U.S. 443, 458 (2011) (holding speech on a matter of public concern “cannot be restricted simply because it is upsetting or arouses contempt”); *Texas v. Johnson*, 491 U.S. 397, 414 (1989) (“If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.”); *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 50 (1988) (declining to hold that “a State’s interest in protecting public figures from emotional distress is sufficient to deny First Amendment protection to speech that is patently offensive and is intended to inflict emotional injury, even when that speech could not reasonably have been interpreted as stating actual facts about the public figure involved”).

235 *Burson v. Freeman*, 504 U.S. 191, 207-08 (1992) (upholding a law creating a campaign-free zone within 100 feet of the entrance to a polling place).

236 Citron, *supra* note 6, at 1917-18.

237 Sales & Magaldi, *supra* note 113, at 1500; *48 States + DC + One Territory Now Have Revenge Porn Laws*, Cyber C.R. Initiative, <https://www.cybercivilrights.org/revenge-porn-laws/> [<https://perma.cc/C5EH-GK5W>].

238 Nonconsensual-pornography statutes have been challenged in Arizona, Texas, Wisconsin, Vermont, Illinois, Indiana, and Minnesota. *See* Sales & Magaldi, *supra* note 113, at 1533-34; *State v. Casillas*, 952 N.W.2d 629, 634 (Minn. 2020); Order Dismissing Charging Information, ¶¶ 12, 28, *Indiana v. Katz*, No. 76C01-2005-CM-000421 (Ind. Cir. Ct. Oct. 2, 2020).

239 *See State v. VanBuren*, 214 A.3d 791, 794 (Vt. 2019); *People v. Austin*, 155 N.E.3d 439, 448 (Ill. 2019); *Casillas*, 952 N.W.2d at 629; *Ex parte Jones*, No. PD-0552-18, 2021 WL 2126172, at *1 (Tex. Crim. App. May 26, 2021), *reh’g denied*, (July 28, 2021).

The Texas Court of Criminal Appeals is Texas's highest court. It did not publish its decision in this case, possibly because the statute had since been materially amended.

²⁴⁰ See *VanBuren*, 214 A.3d at 810-11; *Austin*, 155 N.E.3d at 461-62; *Casillas*, 952 N.W.2d at 641-42; *Jones*, 2021 WL 2126172, at *7 (“We agree with the State that the privacy interest in the statute is a compelling government interest ... [and] particularly, the interest in sexual privacy is substantial.”). A lower court in Wisconsin also used similar language. *State v. Culver*, 918 N.W.2d 103, 110 (Wis. Ct. App. 2018) (“In prohibiting the knowing publication of intentionally private depictions of another person who is either nude, partially nude, or engaged in sexually explicit conduct, the statute serves to protect an important state interest—individual privacy. No one can challenge a state’s interest in protecting the privacy of personal images of one’s body that are intended to be private—and specifically, protecting individuals from the nonconsensual publication on websites accessible by the public.”).

²⁴¹ See *VanBuren*, 214 A.3d at 810-11 (privacy, reputational, and psychological harm; harassment; threats of violence); *Austin*, 155 N.E.3d at 461-62 (psychological harm; threats of violence; harassment; facilitation of domestic violence, human trafficking, and sexual assault); *Casillas*, 952 N.W.2d at 641-42 (privacy, psychological, and reputational harm); *Jones*, 2021 WL 2126172, at *7 (privacy, reputational, and psychological harm; harassment).

²⁴² *VanBuren*, 214 A.3d at 802.

²⁴³ See *id.* at 810-11; *Austin*, 155 N.E.3d at 461.

²⁴⁴ *VanBuren*, 214 A.3d at 810.

²⁴⁵ *Jones*, 2021 WL 2126172, at *7.

²⁴⁶ *Id.* at *7 n.79 (suggesting that counterspeech may serve “as a remedy for lies and ‘speech we do not like’” (quoting *United States v. Alvarez*, 567 U.S. 709, 726-28 (2012))).

²⁴⁷ See, e.g., Citron, *supra* note 6, at 1921-23 (describing a female journalist targeted on social media with sexual violence accompanied with attitudinal and pornographic deepfake videos); Harwell, *supra* note 74 (describing pornographic deepfake videos as being “weaponized disproportionately against women, representing a new and degrading means of humiliation, harassment, and abuse”).

²⁴⁸ See *VanBuren*, 214 A.3d at 808 (“Time and again, the Supreme Court has recognized that speech concerning purely private matters does not carry as much weight in the strict-scrutiny analysis as speech concerning matters of public concern, and may accordingly be subject to more expansive regulation.”).

²⁴⁹ See *Austin*, 155 N.E.3d at 460-62.

²⁵⁰ See Alan F. Westin, *Privacy And Freedom* 7 (1967) (“Privacy is the claim of individuals, groups, or institutions to determine for themselves when, how, and to what extent information about them is communicated to others.”).

²⁵¹ Daniel J. Solove, *The Virtues of Knowing Less: Justifying Privacy Protections Against Disclosure*, 53 Duke L.J. 967, 991 (2003).

²⁵² Daniel J. Solove, *A Taxonomy of Privacy*, 154 U. Pa. L. Rev. 477, 547 (2006).

²⁵³ See Citron, *supra* note 6, at 1921.

254 *State v. VanBuren*, 214 A.3d 791, 810 (Vt. 2019).

255 *See, e.g.*, Andrew Koppelman, *Revenge Pornography and First Amendment Exceptions*, 65 Emory L.J. 661, 662 (2016) (“The constitutionality of [revenge-porn] laws is uncertain”); John A. Humbach, *The Constitution and Revenge Porn*, 35 Pace L. Rev. 215, 260 (2014) (“It appears that most of the revenge-porn laws recently proposed and enacted, which simply punish sexually-themed images disseminated without consent of persons depicted, are unconstitutional”).

256 *See VanBuren*, 214 A.3d at 811; *People v. Austin*, 155 N.E.3d 439, 462 (Ill. 2019); *People v. Iniguez*, 202 Cal. Rptr. 3d 237, 243 (2016).

257 535 U.S. 234, 256 (2002). More specifically, it cannot be criminalized under the child pornography exception to the First Amendment. It may be possible to criminalize it as obscenity.

258 *See id.* at 242.

259 *See Doe v. Boland*, 698 F.3d 877, 880 (6th Cir. 2012) (“Morphed images are of a piece [with traditional pornography], offering a difference in degree of injury but not in kind.”); *United States v. Mecham*, 950 F.3d 257, 260 (5th Cir. 2020), *cert. denied*, 141 S. Ct. 139; *United States v. Hotaling*, 634 F.3d 725, 730 (2d Cir. 2011) (“[H]ere we have six identifiable minor females who were at risk of reputational harm and suffered the psychological harm of knowing that their images were exploited and prepared for distribution by a trusted adult.”); *United States v. Anderson*, 759 F.3d 891, 895-96 (8th Cir. 2014) (“Although subjects of morphed images ... do not suffer the direct physical and psychological effects of sexual abuse that accompany the production of traditional child pornography, the morphed images’ ‘continued existence causes the child victims continuing harm by haunting the children in years to come.’” (quoting *Osborne v. Ohio*, 495 U.S. 103, 111 (1990))).

260 *Mecham*, 950 F.3d at 265.

261 458 U.S. 747, 759 (1982).

262 *Id.* at 759.

263 *Id.*

264 *Osborne*, 495 U.S. at 111.

265 *Id.*

266 *Ferber*, 458 U.S. at 757. It is a little unclear how this interest in protecting children works in the case of morphed images. If the picture was taken at age ten and the subject is now thirty, should they still get the enhanced protection due children?

267 *See Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 236 (2002) (“*Ferber*’s judgment about child pornography was based upon how it was made, not on what it communicated. The case reaffirmed that where the speech is neither obscene nor the product of sexual abuse, it does not fall outside the First Amendment’s protection.”).

268 Ethnicity and gender statistics are from the U.S. Census website. *See QuickFacts*, U.S. Census Bureau, <https://www.census.gov/quickfacts//fact/table//US//PST045217> [<https://perma.cc/S5BR-9P3J>]. Educational attainment was calculated from data in table 1 in *Educational Attainment in the United States: 2018*, U.S. Census Bureau (Apr. 17, 2020), <https://www.census.gov/data/tables/2018/demo/education-attainment/cps-detailed-tables.html> [<https://perma.cc/Q458-PS5U>].

²⁶⁹ Two participants in Study 3 entered what appears to have been their birth year. Their ages were estimated based off that information. One participant entered an out-of-range number, so their response to the age question was disregarded.

²⁷⁰ Political orientation was assessed on a scale ranging from 1, very liberal, to 7, very conservative.

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End of Document

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2022 FDLE LEGISLATIVE BILL ANALYSIS



BILL INFORMATION	
BILL NUMBER:	SB 1798
BILL TITLE:	Sexually Explicit Material
BILL SPONSOR:	Senator Book
EFFECTIVE DATE:	October 1, 2022

COMMITTEES OF REFERENCE
1) Criminal Justice
2) Children, Families, and Elder Affairs
3) Appropriations
4)
5)

CURRENT COMMITTEE
Criminal Justice

SIMILAR BILLS	
BILL NUMBER:	HB 1453
SPONSOR:	Rep. Harding

PREVIOUS LEGISLATION	
BILL NUMBER:	
SPONSOR:	
YEAR:	
LAST ACTION:	

IDENTICAL BILLS	
BILL NUMBER:	
SPONSOR:	

Is this bill part of an agency package?
No

BILL ANALYSIS INFORMATION	
DATE OF ANALYSIS:	January 19, 2022
LEAD AGENCY ANALYST:	Lori Mizell
ADDITIONAL ANALYST(S):	Will Bullough, Joe Prato, Becky Bezemek
LEGAL ANALYST:	Jim Martin, Jeff Dambly
FISCAL ANALYST:	Cynthia Barr

POLICY ANALYSIS

1. EXECUTIVE SUMMARY

Increasing the monetary damages that an aggrieved person may receive as a result of violations relating to sexual cyberharassment; prohibiting persons from willfully and maliciously creating and disseminating or selling any sexually explicit image of a depicted individual without that individual's consent; authorizing a law enforcement officer to arrest without a warrant any person he or she has probable cause to believe has violated specified provisions; prohibiting a person from knowingly and unlawfully obtaining a specified sexually explicit image of a person with a certain intent; revising existing unlawful conduct relating to possessing with the intent to promote and knowingly possessing, controlling, or intentionally viewing presentations that include child pornography, rather than sexual conduct by a child, etc.

2. SUBSTANTIVE BILL ANALYSIS

1. **PRESENT SITUATION:** There are currently no provisions in Chapter 775, FS, to address "digitized" depictions of a minor who appears to be engaged in sexual conduct.
2. **EFFECT OF THE BILL:** Amends s. 775.0847, FS, providing an updated definition of "child pornography" to include any image depicting an actual and identifiable minor who appears, as a result of digitization, to be engaged in sexual conduct. Defines "digitization" to mean realistically depicting any of the following: the nude body parts of another human being as the nude body parts of a minor; computer-generated nude body parts as the nude body parts of a minor; or a minor engaging in sexual conduct.

Creates s. 784.0491, FS, providing definitions and penalties for unlawful dissemination of sexually explicit material depicting an individual. A law enforcement officer may arrest, without a warrant, any person who they have probably cause to believe has violated s. 784.0491(2), FS. Upon proper affidavits being made, a search warrant may be issued to further investigate a violation of s. 784.0491(2), FS, including to search a private dwelling. An aggrieved person may initiate a civil action against a person who violates s. 784.0491(2), FS, to obtain appropriate relief in order to prevent or remedy a violation. Provides exceptions to criminal and civil penalties.

Creates s. 784.0492, FS, providing definitions and penalties for unlawful taking or criminal use of a sexually explicit image. Every act, thing, or transaction prohibited by this section constitutes a separate offense and is punishable as such. An aggrieved person may initiate a civil action against a person who violates this section to obtain all appropriate relief in order to prevent or remedy a violation of this section. Provides exceptions to criminal and civil penalties.

Amends s. 827.071, FS, including child pornography and providing a definition.

3. **DOES THE LEGISLATION DIRECT OR ALLOW THE AGENCY/BOARD/COMMISSION/DEPARTMENT TO DEVELOP, ADOPT, OR ELIMINATE RULES, REGULATIONS, POLICIES OR PROCEDURES?** Y N

If yes, explain:	
What is the expected impact to the agency's core mission?	Y <input type="checkbox"/> N <input type="checkbox"/>
Rule(s) impacted (provide references to F.A.C., etc.):	

4. **WHAT IS THE POSITION OF AFFECTED CITIZENS OR STAKEHOLDER GROUPS?**

List any known proponents and opponents:	
Provide a summary of the proponents' and opponents' positions:	

5. **ARE THERE ANY REPORTS OR STUDIES REQUIRED BY THIS BILL?** Y N

If yes, provide a description:	
--------------------------------	--

Date Due:	
Bill Section Number:	

6. ARE THERE ANY NEW GUBERNATORIAL APPOINTMENTS OR CHANGES TO EXISTING BOARDS, TASK FORCES, COUNCILS, COMMISSION, ETC. REQUIRED BY THIS BILL? Y N

Board:	
Board Purpose:	
Who Appointments:	
Appointee Term:	
Changes:	
Bill Section Number(s):	

FISCAL ANALYSIS

1. DOES THE BILL HAVE A FISCAL IMPACT TO LOCAL GOVERNMENT? Y N

Revenues:	
Expenditures:	
Does the legislation increase local taxes or fees?	
If yes, does the legislation provide for a local referendum or local governing body public vote prior to implementation of the tax or fee increase?	

2. DOES THE BILL HAVE A FISCAL IMPACT TO STATE GOVERNMENT? Y N

Revenues:	
Expenditures:	
Does the legislation contain a State Government appropriation?	
If yes, was this appropriated last year?	

3. DOES THE BILL HAVE A FISCAL IMPACT TO THE PRIVATE SECTOR? Y N

Revenues:	
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Expenditures:	
Other:	

4. DOES THE BILL INCREASE OR DECREASE TAXES, FEES, OR FINES? Y N

Does the bill increase taxes, fees or fines?	
Does the bill decrease taxes, fees or fines?	
What is the impact of the increase or decrease?	
Bill Section Number:	

TECHNOLOGY IMPACT

1. DOES THE LEGISLATION IMPACT THE AGENCY’S TECHNOLOGY SYSTEMS (I.E., IT SUPPORT, LICENSING, SOFTWARE, DATA STORAGE, ETC.)? Y N

If yes, describe the anticipated impact to the agency including any fiscal impact.	
--	--

FEDERAL IMPACT

1. DOES THE LEGISLATION HAVE A FEDERAL IMPACT (I.E., FEDERAL COMPLIANCE, FEDERAL FUNDING, FEDERAL AGENCY INVOLVEMENT, ETC.)? Y N

If yes, describe the anticipated impact including any fiscal impact.	
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LEGAL - GENERAL COUNSEL’S OFFICE REVIEW

Issues/concerns/comments and recommended action:	
--	--

ADDITIONAL COMMENTS

- Lines 69-78, 263-269 and 378-389: FDLE respectfully recommends amending for clarity the definition of “digitization”. Each of these stated definitions of digitization appear to focus on altered or computer-generated edits to images to depict minors in a certain illicit manner. However, the third element of these definitions (“[digitization] means to realistically depict...a minor engaging in sexual conduct”) could be interpreted broadly to include non-altered or non-digital images, thereby conflating the definition of digitization with definitions of child pornography. If this third element is meant to be a catch-all specifically for illicit digital alterations, FDLE would recommend amending this to “any other form of computer-generated alteration of a minor engaging in sexual conduct.”
- Lines 104-112: Third element in this definition of digitization may unintentionally create a burden to prove that certain acts did not occur. Respectfully recommend focusing the burden on proving that an image has been digitally changed to depict a particular act.

- Lines 249-258: Includes the term child pornography and provides a definition. FDLE respectfully requests to change the term to “child sexual abuse material” as this has become the law enforcement standard.
- With the elevation of some offenses to a third-degree felony, this may cause an increase in FDLE’s case load. While the impact of this bill does not necessitate additional FTE or other resources at this time, this bill in combination with other bills could rise to the level requiring additional staffing and other resources.



THE FLORIDA SENATE

Tallahassee, Florida 32399-1100

COMMITTEES:

Appropriations Subcommittee on
Transportation
Tourism, and Economic Development,
Chair
Appropriations
Appropriations Subcommittee on Criminal
and Civil Justice
Criminal Justice
Ethics and Elections
Transportation

SENATOR GEORGE B. GAINER
2nd District

January 24, 2022

Dear Chair Pizzo,

I am respectfully requesting a formal excusal for the upcoming Criminal Justice meeting on January 25th. I regret that I will be unable to attend, as I am still recovering from surgery.

If there are any questions or concerns, please do not hesitate to call my office at (850) 487-5002.

Thank you,

A handwritten signature in blue ink that reads "George B. Gainer".

Senator George Gainer
District 2

Florida 32578 (850) 747-5454

REPLY TO:

- 840 West 11th Street, Panama City, Florida 32401 (850) 747-5454
- Northwest Florida State College, 100 East College Boulevard, Building 330, Rooms 105 and 112, Niceville,
- 408 Senate Building, 404 South Monroe Street, Tallahassee, Florida 32399-1100 (850) 487-5002

Senate's Website: www.flsenate.gov

WILTON SIMPSON
President of the Senate

AARON BEAN
President Pro Tempore

CourtSmart Tag Report

Room: SB 110
Caption: Senate Criminal Justice Committee

Case No.:

Type:
Judge:

Started: 1/25/2022 10:00:33 AM
Ends: 1/25/2022 11:23:34 AM **Length:** 01:23:02

10:00:31 AM Meeting called to order by Chair Pizzo
10:00:37 AM Roll call by CAA Sue Arnold
10:00:44 AM Quorum present
10:00:54 AM Comments from Chair Pizzo, welcoming Senator Bean as a new member to the Committee
10:02:11 AM Introduction of Tab 7, SB 1204 by Chair Pizzo
10:02:22 AM Senator Gainer is excused from the meeting
10:02:34 AM Comments from Senator Broxson
10:02:42 AM Explanation of SB 1204, Public Records/Information or Records/Executions by Senator Broxson
10:03:21 AM Comments from Chair Pizzo
10:03:28 AM Closure waived
10:03:33 AM Roll call by CAA
10:03:35 AM SB 1204 reported favorably
10:03:51 AM Introduction of Tab 3, SB 868 by Chair Pizzo
10:04:05 AM Explanation of SB 868, Sexual Battery on a Mentally Incapacitated Person by Senator Stewart
10:05:05 AM Comments from Chair Pizzo
10:06:08 AM Question from Senator Brandes
10:06:15 AM Response from Senator Stewart
10:06:25 AM Follow-up question from Senator Brandes
10:06:32 AM Response from Senator Stewart
10:07:29 AM Follow-up question from Senator Brandes
10:08:11 AM Response from Senator Stewart
10:09:41 AM Follow-up question from Senator Brandes
10:09:48 AM Response from Senator Stewart
10:10:18 AM Speaker Katrina Duesterhaus in support
10:13:05 AM Speaker Joseph Parr in support
10:15:13 AM Question from Chair Pizzo
10:16:12 AM Response from Mr. Parr
10:16:39 AM Question from Senator Brandes
10:16:45 AM Response from Mr. Parr
10:17:43 AM Follow-up question from Senator Brandes
10:17:52 AM Response from Mr. Parr
10:18:12 AM Speaker Veronica Fuentes in support
10:19:47 AM Speaker Sara Smith-Paer in support
10:22:34 AM Trish Neely, League Women Voters Florida waives in support
10:23:37 AM Comments from Chair Pizzo
10:23:42 AM Senator Baxley in debate
10:25:53 AM Senator Brandes in debate
10:29:59 AM Senator Taddeo in debate
10:32:12 AM Chair Pizzo in debate

10:35:36 AM Senator Stewart in closure
10:35:50 AM Roll call by CAA
10:36:44 AM SB 868 reported favorably
10:37:01 AM Recognition of President Thrasher and FSU Criminology students by Chair Pizzo
10:38:00 AM Introduction of Tab 10, SB 1798 by Chair Pizzo
10:38:13 AM Introduction of Amendment Barcode No. 414724 by Chair Pizzo
10:38:27 AM Explanation of Amendment and Bill by Senator Book
10:43:19 AM Comments from Chair Pizzo
10:43:24 AM Introduction of Amendment-to-Amendment Barcode No. 874658 by Chair Pizzo
10:43:45 AM Explanation of Amendment-to-Amendment by Senator Book
10:44:01 AM Comments from Chair Pizzo
10:44:11 AM Question from Senator Baxley
10:44:17 AM Response from Senator Book
10:44:58 AM Closure waived
10:45:01 AM Amendment-to-Amendment adopted
10:45:09 AM Back on Amendment
10:45:13 AM Closure waived
10:45:16 AM Amendment adopted
10:45:21 AM Comments from Chair Pizzo
10:45:25 AM Question from Senator Brandes
10:45:30 AM Response from Senator Book
10:46:15 AM Follow-up question from Senator Brandes
10:46:23 AM Response from Senator Book
10:46:43 AM State Attorney Jack Campbell, Florida Prosecuting Attorneys/State Attorneys waives in support
10:46:55 AM Comments from Chair Pizzo
10:47:05 AM Senator Burgess in debate
10:47:24 AM Senator Book in closure
10:47:30 AM Roll call by CAA
10:47:38 AM CS/SB 1798 reported favorably
10:47:58 AM Introduction of Tab 6, SB 1200 by Chair Pizzo
10:48:13 AM Explanation of SB 1200, Wrongful Convictions by Senator Bean
10:49:27 AM Comments from Chair Pizzo
10:49:40 AM Phillip Suderman, Americans for Prosperity waives in support
10:49:46 AM Jorge Chamizo, Florida Association of Criminal Defense Lawyers waives in support
10:49:53 AM Comments from Chair Pizzo
10:50:37 AM Closure by Senator Bean
10:50:46 AM Roll call by CAA
10:50:57 AM SB 1200 reported favorably
10:51:07 AM Introduction of Tab 5, SB 1046 by Chair Pizzo
10:51:28 AM Explanation of SB 1046, Public Records/Law Enforcement Geolocation Information by Senator Hooper
10:52:19 AM Comments from Chair Pizzo
10:52:33 AM Question from Senator Powell
10:52:37 AM Response from Senator Hooper
10:53:33 AM Follow-up question from Senator Powell
10:53:40 AM Response from Senator Hooper
10:54:34 AM Roll call by CAA
10:54:43 AM SB 1046 reported favorably
10:54:54 AM Introduction of Tab 8, SB 1534 by Chair Pizzo
10:55:07 AM Explanation of SB 1534, Retail Theft by Senator Boyd, presented by Senator Hooper
10:56:08 AM Introduction of Amendment Barcode No. 241712 by Chair Pizzo

10:56:14 AM Explanation of Amendment by Senator Hooper
10:56:45 AM Jennifer Cook Pritt, Florida Police Chiefs Association waives in support
10:56:50 AM Closure waived
10:56:53 AM Amendment adopted
10:56:59 AM Question from Senator Powell
10:57:06 AM Response from Senator Hooper
10:58:01 AM Libby Guzzo, Office of Attorney General waives in support
10:58:03 AM State Attorney Jack Campbell, Florida Prosecuting Attorneys/State Attorneys waives in support
10:58:07 AM Rob Johnson, The Home Depot waives in support
10:58:11 AM Tim Parson, Florida Sheriffs Association waives in support
10:58:17 AM Angie Hatfield waives in opposition
10:58:31 AM Speaker Grace Lovett, Florida Retail Federation in support
10:59:28 AM Comments from Chair Pizzo
10:59:34 AM Senator Baxley in debate
11:01:13 AM Senator Brandes in debate
11:02:41 AM Chair Pizzo in debate
11:03:17 AM Closure waived by Senator Hooper
11:04:22 AM Roll call by CAA
11:05:23 AM CS/SB 1534 reported favorably
11:05:46 AM Chair Pizzo announces that Gary Bradford, FL PBA waives in support on SB 1046
11:05:51 AM Senator Pizzo announces that Jennifer Cook Pritt, Florida Police Chiefs Association waives in support on SB 1046
11:06:01 AM Introduction of Tab 2, SB 796 by Chair Pizzo
11:06:18 AM Explanation of SB 796, Tampering with or Fabricating Physical Evidence by Senator Bradley
11:06:41 AM Introduction of Coral Gables Police Chief, Edward Hudak by Chair Pizzo
11:06:55 AM Introduction of Amendment Barcode No. 322426 by Chair Pizzo
11:07:01 AM Explanation of Amendment by Senator Bradley
11:07:39 AM Comments from Chair Pizzo
11:07:45 AM Question from Senator Brandes
11:07:54 AM Follow-up question from Senator Brandes
11:08:50 AM Response from Senator Bradley
11:09:14 AM Follow-up question from Senator Brandes
11:09:20 AM Response from Senator Bradley
11:09:24 AM Question from Senator Powell
11:09:29 AM Response from Senator Bradley
11:10:20 AM Comments from Chair Pizzo
11:10:40 AM Closure waived
11:10:44 AM Amendment adopted
11:10:46 AM Comments from Chair Pizzo
11:10:51 AM Buddy Jacobs, General Counsel/State Attorneys of Florida waives in support
11:11:00 AM Comments from Chair Pizzo
11:11:11 AM Closure waived
11:11:14 AM Roll call by CAA
11:11:21 AM CS/SB 796 reported favorably
11:11:31 AM Introduction of Tab 9, SB 1736 by Chair Pizzo
11:11:42 AM Explanation of SB 1736, Records of Physical Examinations of Officers by Senator Hooper
11:12:29 AM Introduction of Amendment Barcode No. 555638 by Chair Pizzo
11:12:34 AM Explanation of Amendment by Senator Hooper
11:12:49 AM Rocco Salvatori waives in support

11:13:18 AM Closure waived
11:13:20 AM Amendment adopted
11:13:22 AM Comments from Chair Pizzo
11:13:28 AM Speaker Lisa Henning, Fraternal Order of Police in support
11:13:30 AM Gary Bradford, FL PBA waives in support
11:13:59 AM Comments from Chair Pizzo
11:14:36 AM Closure waived
11:14:40 AM Roll call by CAA
11:14:45 AM CS/SB 1736 reported favorably
11:15:03 AM Introduction of Tab 4, SB 1012 by Chair Pizzo
11:15:10 AM Explanation of SB 1012, Victims of Crimes by Senator Burgess
11:16:53 AM Comments from Chair Pizzo
11:16:57 AM Adam Ross, State Attorney's Office Sixth Judicial Circuit waives in support
11:17:05 AM Comments from Chair Pizzo
11:17:09 AM Senator Hooper in debate
11:17:28 AM Comments from Senator Burgess
11:17:54 AM Closure waived
11:17:57 AM Roll call by CAA
11:18:01 AM SB 1012 reported favorably
11:18:16 AM Chair passed to Vice-Chair Brandes
11:18:26 AM Introduction of Tab 1, SB 752 by Chair Brandes
11:18:30 AM Explanation of SB 752, Probationary or Supervision Services by Senator Gainer, presented by Senator Pizzo
11:18:50 AM Comments from Chair Brandes
11:18:53 AM Introduction of Amendment Barcode No. 648722 by Chair Brandes
11:18:57 AM Explanation of Amendment by Senator Pizzo
11:19:07 AM Comments from Chair Brandes
11:19:26 AM Closure waived
11:19:32 AM Amendment adopted
11:19:38 AM Question from Senator Powell
11:19:45 AM Response from Senator Pizzo
11:20:00 AM Follow-up question from Senator Powell
11:20:55 AM Response from Senator Pizzo
11:21:44 AM Phil Archer, State Attorney, 18th Circuit waives in support
11:21:47 AM Aaron Wayt, Florida Association of Criminal Defense Lawyers waives in support
11:21:54 AM Comments from Chair Brandes
11:21:57 AM Closure waived
11:22:00 AM Roll call by CAA
11:22:04 AM CS/SB 752 reported favorably
11:22:18 AM Chair returned to Senator Pizzo
11:22:24 AM Senator Perry would like to be shown voting in the affirmative on SB 1204
11:23:09 AM Senator Brandes moves to give staff license to make technical and conforming changes to the Committee Substitutes
11:23:13 AM Comments from Chair Pizzo
11:23:17 AM Meeting is adjourned