

2009 HOUSE JUDICIARY

HB 1186

2009 HOUSE STANDING COMMITTEE MINUTES

Bill/Resolution No. HB 1186

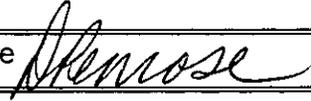
House Judiciary Committee

Check here for Conference Committee

Hearing Date: 1/20/09

Recorder Job Number: 7263

Committee Clerk Signature



Minutes:

Chairman DeKrey: We will open the hearing on HB 1186.

Rep. Lois Delmore: Sponsor, support. (Explained the bill.) There is a need to address the matter of people taking photos with their camera phones, etc. when a person doesn't know their picture is being taken, and then those photos are being distributed to others and out on the internet. Let's say you are in a dressing room in a dept. store, with no knowledge that someone is watching you and someone takes a picture.

Rep. Boehning: What if you are in a bathing suit on the beach and someone takes a picture.

Rep. Delmore: I don't think that is applicable. If I'm in a locker room or dressing room, I have an expectation of privacy.

Rep. Boehning: What happens if someone takes a picture, then passes it on to their address book, and now over 500 people have seen the photo. Who is going to be charged, all 500?

Rep. Delmore: I believe that is an enforcement issue. The one who took the picture originally would be in violation of the law.

Rep. Dahl: Does this cover the situation where someone took a picture of herself on her phone, nude, and then sent it to her husband's phone. Someone saw the picture on the phone, other than the intended party. Does this cover that?

Rep. Delmore: I think it would, if it were without the individual's consent that someone else besides the husband saw the picture.

Rep. Klemin: The new language in section 2 is almost the same as the language in section 1. The only difference is on line 10, the word "surreptitiously" is in there, on line 12 it says "human figure", whereas the new language doesn't. In line 13 it says "written consent" otherwise, except for the penalty being class A vs. class B misdemeanor, the language is identical. Can you please why we need to have this new language when it's almost all the same in the previous section.

Rep. Delmore: I think there are some differences between the two. I agree that they are very close, but upon written consent is very different in section 1 than consent in section 2, because you may not know it has been taken, so you don't even know that there is anything to object to.

Rep. Klemin: Subsection 1 there is "surreptitiously" is what you're getting at, which is not in the new language. What's the difference between a human figure and a figure. Subsection 1 says human figure, subsection 2 doesn't. I think you are talking about human beings in subsection 2, aren't you.

Rep. Delmore: I am.

Rep. Klemin: So really I think the focus of the difference is the consent. Subsection 1 says written consent, subsection 2 doesn't say written consent, just says consent. Is that the main focus?

Rep. Delmore: Yes, it is.

Rep. Klemin: There is a typographical error on line 17, where it cites the section, it should be 12.1-27.1-03.1.

Chairman DeKrey: Thank you. Further testimony in support. Testimony in opposition. We will close the hearing.

Rep. Delmore: Vonette drafted this bill.

Rep. Klemin: Subsection 1 requires more than subsection 2.

Chairman DeKrey: We will have Vonette Richter, LC, come in and talk to us about this bill.

2009 HOUSE STANDING COMMITTEE MINUTES

Bill/Resolution No. HB 1186

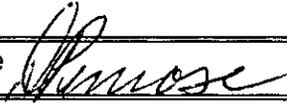
House Judiciary Committee

Check here for Conference Committee

Hearing Date: 1/21/09

Recorder Job Number: 7402

Committee Clerk Signature



Minutes:

Chairman DeKrey: We will take a look at HB 1186.

Rep. Delmore: I am working on this bill. LC put it in two different sections because subsection 1, which is current law, requires that the person surreptitiously acquired the image and knowingly distributed the image all without the individual's written consent. I don't know if it has to be written or not. The violation is a class A misdemeanor. That was put in because of the couple that sent pictures on a cell phone. She said that surreptitiously means that you have no way of really knowing somebody is taking pictures; hole in the wall, etc. Subsection 2 would require that the person that distributed the image without the individual's consent, this would be an easier case to prove, because the act doesn't have to be done surreptitiously, it doesn't require the individual's written consent, just consent. This would cover locker rooms, cell phone situations, etc. Violation of subsection 2 is a class B misdemeanor. That is the reason that she did it that way. She did say that there was a typo, "human" would be added on line 16, and line 17 should be "12.1-27.1-03.1."

Rep. Dahl: Do you want to add "written" on line 17 before the consent, so that a person couldn't say that the victim said it was okay.

Rep. Delmore: If it would make it read better, more easily prosecuted, I wouldn't have a problem with that.

Rep. Klemin: If we just add the word "surreptitiously" in the new subsection 2, it would be exactly the same as subsection 1. That's the only difference now.

Rep. Delmore: As Vonette explained it to me, there is a difference in proving that in court. You really have to make sure that someone has no knowledge that they were taking that picture. A person can take your picture and you know it, but you don't know that they plan to put it out onto the internet of her partially nude or nude body. The second part is necessary because someone may know a picture was taken, but they had no idea that somebody was going to put it out for other people to see. Surreptitiously means that the victim has no idea that a picture was even taken.

Rep. Klemin: An alternative might be to take surreptitiously out of line 10.

Rep. Griffin: I just wanted to relate one comment. You read the language, it says if you acquire or knowingly possess a partially or nude picture, without the individual's consent, there would have to be discretion on the part of the prosecution; but if you have even a nude picture from a magazine, so that you are possessing a partially nude or nude picture, but you don't have the person's consent, technically you would be guilty of a class B misdemeanor.

Rep. Delmore: Are you saying to get rid of "knowingly possesses" in both parts of the Code.

Rep. Griffin: I understand the problem and agree there is a problem. It is a hard statute to write that addresses the problem.

Rep. Klemin: If I took a photograph in the museum in the Europe of a reclining nude, am I going to be in violation of this statute.

Chairman DeKrey: It has to be a person.

Rep. Klemin: Well a nude or partially denuded human figure. It doesn't say person. I don't know how that is defined in the section.

Chairman DeKrey: Well take a look at that again and we'll take it up later.

2009 HOUSE STANDING COMMITTEE MINUTES

Bill/Resolution No. HB 1186

House Judiciary Committee

Check here for Conference Committee

Hearing Date: 2/3/09

Recorder Job Number: 8494

Committee Clerk Signature

Alonzo

Minutes:

Chairman DeKrey: We will take a look at HB 1186.

Rep. Delmore: I move the amendments.

Rep. Griffin: Second.

Chairman DeKrey: Voice vote. Motion carried. We now have the bill before us as amended.

What are the committee's wishes.

Rep. Koppelman: What is the difference in penalty. The difference between the two crimes is written consent vs. verbal consent.

Rep. Delmore: Written consent because in the first one I have no idea somebody took that picture. In the second one it's a class B because it may be a thing where I say "turn around" to someone and take their picture. That person knows that I took the picture. I should still have permission from her, but it's not the surreptitious application as is found in #1. That is why the penalty is greater there, and it was existing law for some of those types of behavior.

Rep. Klemin: I'm wondering about the written consent in #1 and just consent in #2. Why don't we require written consent in #2.

Rep. Delmore: If you think that's important, we can put it in. I didn't have a preference one way or the other. It's just that in #1, I have no way of knowing and so I think it made it easier to prosecute.

Rep. Klemm: That may be, but it seems to me that it's going to be harder to prosecute the new one because somebody will say "well, you consented" and no I didn't.

Rep. Griffin: I would prefer that we leave it as it is. Because I think we could get into some circumstances where you may have a picture or something of a partially nude figure, maybe a picture of your kid, and are you going to have their written consent to use the picture. If you don't have their written consent, you would be guilty of class B misdemeanor. I know that there's discussion on that, but I think leaving it a little tighter should take care of this.

Rep. Boehning: What about the pictures that were taken in a bar in ND of a sexual act. The pictures were circulated probably nationwide. Under this statute, everybody that possessed that video or photograph would be guilty of a class B misdemeanor; they were in public, in a public place.

Rep. Delmore: That very thing has happened, and I think what we need to do is to have a state's attorney decide who they are going to prosecute for that event. If it goes to someone else's email, even here at the Capitol we receive emails that we don't have control over, I can't think that the possession portion of this would result in a penalty.

Rep. Boehning: What if you go to a strip joint and take a picture and forward it to someone. Are you guilty of a class B misdemeanor.

Rep. Delmore: If you are allowed to have a camera and take a picture that would be allowed because they know they may be photographed. I'm talking about a person whose picture was taken on purpose without their knowledge, for the purpose of humiliation and vindictiveness toward the other person. It is a problem in ND, can we get into frivolous things, certainly we

can, but it's not the intent of this bill, and I don't think it would be looked at in that way, at least from the emails I got from legal and state's attorneys.

Rep. Koppelman: I agree with Rep. Klemin that having written consent in here would be important to be prosecuted. I'm afraid that if we don't do that, Rep. Delmore's entire bill might not be applied very much. I think a prosecutor looking at this would say exactly what Rep. Klemin said. You get into a he said, she said thing and how do you prove that they had consent or not. Again, if they don't have written consent, as Rep. Griffin mentioned, they still have discretion and I think they are going to look at each situation on its own merits. But at least I think that's why we have written consent in subsection 1 here, at least they have something specific to say, well show me your written consent and have a little more to hang a case on. I would move that add "written consent" on line 17.

Rep. Zaiser: Second.

Rep. Koppelman: Then it really makes a difference that you talked about Rep. Delmore; whether it's surreptitious or not. It still requires the same kind of consent and more consistent.

Rep. Delmore: I have no problem with that. This bill may create some problems. I think it calls attention to a problem that does exist.

Rep. Klemin: Rep. Boehning gave a good example of where it might be hard to get written consent for it, but maybe that consent would be implied from the fact that they were doing something in public, with an audience. How could you get written consent. Maybe written shouldn't be in there. You can't have implied consent in writing.

Rep. Koppelman: The reason I think it is appropriate is that if the intent of the bill is to avoid this kind of thing from perpetuating, which I think it is; our society is different than it was 10-15 years ago, with cell phone cameras, with the way people can capture images of others, I just think our laws need to reflect that. Rep. Klemin, you may be right that it might make it more

difficult for them to distribute in a situation as Rep. Boehning described, but again, I think that's probably the intent of the bill. I think the intent of the bill is to say, you can do stupid in public, but does that give others the right to perpetuate your stupidity, maybe not.

Rep. Griffin: I would really oppose this amendment just because I do think that we would be passing a bill which, for a law that probably many of us here today would be in violation of the law here if it passed with written consent. I think this is tough; it is hard to come up with terminology to really get at the people we're looking to get at. We're probably including a wider swathe of people than we intend and based on that fact I think we shouldn't make it more difficult to prosecute by having the word "consent" so anybody that is guilty can be prosecuted. I hope that we don't put it in here. I don't think we make laws to make it easier to prosecute people. They still have a burden to show that a crime occurred.

Rep. Delmore: What if we took out the "possesses or" on line 15.

Rep. Koppelman: I would consider that a friendly addition to my amendment. I would second that.

Chairman DeKrey: Voice vote. Motion carried. We now have the bill before us as amended.

Rep. Koppelman: I move a Do Pass as amended.

Rep. Hatlestad: Second.

11 YES 1 NO 1 ABSENT

DO PASS AS AMENDED

CARRIER: Rep. Koppelman

PROPOSED AMENDMENTS TO HOUSE BILL NO. 1186

Page 1, line 16, after "denuded" insert "human"

Page 1, line 17, replace "12.1-27-03.1" with "12.1-27.1-03.1"

Renumber accordingly

VR
2/3/09

PROPOSED AMENDMENTS TO HOUSE BILL NO. 1186

Page 1, line 15, remove "possesses or"

Page 1, line 16, after "denuded" insert "human"

Page 1, line 17, replace "12.1-27-03.1" with "12.1-27.1-03.1" and after "individual's" insert "written"

Renumber accordingly

Date: 2/3/09
Roll Call Vote #: 1

2009 HOUSE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. 1186

HOUSE JUDICIARY COMMITTEE

Check here for Conference Committee

Legislative Council Amendment Number _____

Action Taken DP DNP DP AS AMEND DNP AS AMEND

Motion Made By Rep. Koppelman Seconded By Rep. Hatlestad

Representatives	Yes	No	Representatives	Yes	No
Ch. DeKrey	✓		Rep. Delmore	✓	
Rep. Klemin	✓		Rep. Griffin	✓	
Rep. Boehning		✓	Rep. Vig	✓	
Rep. Dahl	✓		Rep. Wolf		
Rep. Hatlestad	✓		Rep. Zaiser	✓	
Rep. Kingsbury	✓				
Rep. Koppelman	✓				
Rep. Kretschmar	✓				

Total (Yes) 11 No 1

Absent 1

Floor Carrier: Rep. Koppelman

If the vote is on an amendment, briefly indicate intent:

REPORT OF STANDING COMMITTEE

HB 1186: Judiciary Committee (Rep. DeKrey, Chairman) recommends AMENDMENTS AS FOLLOWS and when so amended, recommends **DO PASS** (11 YEAS, 1 NAY, 1 ABSENT AND NOT VOTING). HB 1186 was placed on the Sixth order on the calendar.

Page 1, line 15, remove "possesses or"

Page 1, line 16, after "denuded" insert "human"

Page 1, line 17, replace "12.1-27-03.1" with "12.1-27.1-03.1" and after "individual's" insert "written"

Renumber accordingly

2009 SENATE JUDICIARY

HB 1186

2009 SENATE STANDING COMMITTEE MINUTES

Bill/Resolution No. HB 1186

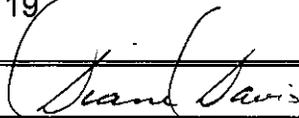
Senate Judiciary Committee

Check here for Conference Committee

Hearing Date: 2/25/09

Recorder Job Number: 9719

Committee Clerk Signature



Minutes: **Senator Nething, Chairman**

Relating to the possession or distribution of certain photographs or other visual images.

Representative Lois Delmore – District 43 – Introduces the bill and explains what the bill does.

She speaks of cell phone cameras that are used to exploit persons by sending the photos out on the web. This is a bill for those people who have no recourse when their image has been sent out and made public.

Senator Fiebiger – Asks about how nuded differs from partially denuded human figure.

Rep. Delmore – Responds, a woman who had her top off only would be partially denuded.

Senator Fiebiger – Asks if it is the same for men.

Rep. Delmore – Replies, yes if someone found that offensive, although that had not been her intention. She said people on the beach are scantily clad by their own choice.

Ladd Erickson- McLean County State's Attorney – Hands out a definition of nude or partially denuded that is currently in the statute. He thinks the concept is fine and does think there is a problem. His worry is about the constitutionality questions that come up in this area. He mentions that the state's attorney had a vigorous debate on this because there is a problem.

In order not to have free speech protection the image must be obscene based on a community standard. He is not sure the definition they have here will meet that. He thinks a lot of work would have to be done on the definition. He also brings up that the action in this bill turns not on the taking of the picture which is already criminalized. His concern is since the taking of the picture is consensual, according to the statute, or the object of the picture put themselves in a position to have their picture taken out in the public. The criminality actually takes place when you start transmitting that image. The first person might have consent but the next person to forward might not.

He doesn't want to oppose the concept but believes there will be a constitutional challenge every time. In his opinion to make this work, would be to create a defense paragraph in the bill so these circumstances are not prosecutable.

Aaron Birst – Association of Counties – Doesn't want to be negative but informs the committee that he has met with many state's attorneys. Out of 25 emails, 20 thought the bill should be killed, 4 said it needed work and one felt the bill was fine the way it is. He talks of a number cases that he has had where ex-spouses or girlfriend, boyfriend have actually taken pictures then sent them out at the break up.

Senator Fiebiger – Asks if there were other reasons given.

Birst – Said, trying to argue consensual.

Close 1186

2009 SENATE STANDING COMMITTEE MINUTES

Bill/Resolution No. HB 1186

Senate Judiciary Committee

Check here for Conference Committee

Hearing Date: 3/18/09

Recorder Job Number: 11187

Committee Clerk Signature

Deanne Davis

Minutes: **Senator Nething, Chairman**

Committee work

They discuss the amendments brought in by Aaron Birst.

Senator Olafson asks for another day to review the amendments.

Committee will table till Monday.

2009 SENATE STANDING COMMITTEE MINUTES

Bill/Resolution No. HB1186

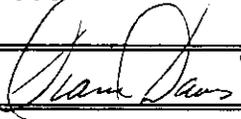
Senate Judiciary Committee

Check here for Conference Committee

Hearing Date: 4/1/09

Recorder Job Number: 11590

Committee Clerk Signature



Minutes: **Senator Nething, Chairman**

Committee work

Senator Olafson passed out an amendment and explains what the amendment does. Moves this into the obscenity and out of miscellaneous violations. They came up with a different definition of the photographs, it will be sexually expressive. There is an exception for baby pictures. The penalty is for distribution. They discussed changing language to a minor but decided to leave it alone in case it is a mentally challenged adult.

Verbal vote on the amendment, all yes

Senator Olafson moves a do pass as amended

Senator Schneider seconds

Vote – 5 yes, 1 absent

Senator Nelson will carry

PROPOSED AMENDMENTS TO ENGROSSED HOUSE BILL NO. 1186

Page 1, line 1, after "A BILL" replace the remainder of the bill with "for an Act to create and enact a new subsection to section 12.1-27.1-01 and section 12.1-27.1-03.3 of the North Dakota Century Code, relating to sexually expressive images; to repeal section 12.1-31-08 of the North Dakota Century Code, relating to possession or distribution of certain photographs or other visual representations; and to provide a penalty.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. A new subsection to section 12.1-27.1-01 of the North Dakota Century Code is created and enacted as follows:

As used in this chapter, "sexually expressive image" means a photograph or visual representation that exhibits a nude or partially denuded human figure, as defined in section 12.1-27.1-03.1, or sexual conduct.

SECTION 2. Section 12.1-27.1-03.3 of the North Dakota Century Code is created and enacted as follows:

Creation, possession, or dissemination of sexually expressive images prohibited - Exception.

1. A person is guilty of a class A misdemeanor if, knowing of its character and content, that person:
 - a. Without written consent from each individual in the image, surreptitiously creates or possesses a sexually expressive image knowing the sexually expressive image was surreptitiously created; or
 - b. Distributes or publishes, electronically or otherwise, a sexually expressive image with the intent to cause emotional harm or humiliation to any individual depicted in the sexually expressive image or after being given notice by an individual or parent or guardian of the individual who is depicted in a sexually expressive image that the individual, parent, or guardian does not consent to the distribution or publication of the sexually expressive image.
2. This section does not authorize any act prohibited by any other law. If the sexually expressive image is of a minor and possession does not violate section 12.1-27.2-04.1, a parent or guardian of the minor may give permission for a person to possess or distribute the sexually expressive image.
3. This section does not apply to any book, photograph, video recording, motion picture film, or other visual representation sold in the normal course of business through wholesale or retail outlets that possess a valid sales tax permit or used by an attorney, attorney's agent, or any other person obtaining evidence for a criminal investigation or pending civil action, or by a medical professional or a peace officer acting within that individual's scope of employment.

SECTION 3. REPEAL. Section 12.1-31-08 of the North Dakota Century Code is repealed."

Renumber accordingly

REPORT OF STANDING COMMITTEE

HB 1186, as engrossed: Judiciary Committee (Sen. Nething, Chairman) recommends **AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO PASS** (5 YEAS, 0 NAYS, 1 ABSENT AND NOT VOTING). Engrossed HB 1186 was placed on the Sixth order on the calendar.

Page 1, line 1, after "A BILL" replace the remainder of the bill with "for an Act to create and enact a new subsection to section 12.1-27.1-01 and section 12.1-27.1-03.3 of the North Dakota Century Code, relating to sexually expressive images; to repeal section 12.1-31-08 of the North Dakota Century Code, relating to possession or distribution of certain photographs or other visual representations; and to provide a penalty.

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SECTION 2. Section 12.1-27.1-03.3 of the North Dakota Century Code is created and enacted as follows:

Creation, possession, or dissemination of sexually expressive images prohibited - Exception.

1. A person is guilty of a class A misdemeanor if, knowing of its character and content, that person:
 - a. Without written consent from each individual in the image, surreptitiously creates or possesses a sexually expressive image knowing the sexually expressive image was surreptitiously created; or
 - b. Distributes or publishes, electronically or otherwise, a sexually expressive image with the intent to cause emotional harm or humiliation to any individual depicted in the sexually expressive image or after being given notice by an individual or parent or guardian of the individual who is depicted in a sexually expressive image that the individual, parent, or guardian does not consent to the distribution or publication of the sexually expressive image.
2. This section does not authorize any act prohibited by any other law. If the sexually expressive image is of a minor and possession does not violate section 12.1-27.2-04.1, a parent or guardian of the minor may give permission for a person to possess or distribute the sexually expressive image.
3. This section does not apply to any book, photograph, video recording, motion picture film, or other visual representation sold in the normal course of business through wholesale or retail outlets that possess a valid sales tax permit or used by an attorney, attorney's agent, or any other person obtaining evidence for a criminal investigation or pending civil action, or by medical professional or a peace officer acting within that individual's scope of employment.

SECTION 3. REPEAL. Section 12.1-31-08 of the North Dakota Century Code is repealed."

Renumber accordingly

2009 HOUSE JUDICIARY

CONFERENCE COMMITTEE

HB 1186

2009 HOUSE STANDING COMMITTEE MINUTES

Bill/Resolution No. HB 1186

House Judiciary Committee

Check here for Conference Committee

Hearing Date: 4/15/09

Recorder Job Number: 11861

Committee Clerk Signature



Minutes:

Rep. Koppelman: Call to order.

Attendance: All present.

Rep. Koppelman: Can you explain your amendments to the bill.

Sen. Olafson: The amendments were originally suggested by the states' attorneys. The new language fits better. They are seeing situations where 13-14 year old girls are sending nude pictures of themselves to their boyfriend, it's going fine for a couple of weeks, a break-up and then the boyfriend starts sending out the picture to other people, and creates a lot of problems. These amendments are their suggestions and they thought it would be good to have a definition of expressive image, was actually the way they brought it to us. LC attorney thought we should use the words "sexually expressive image" and the states' attorneys group agreed to that. They thought that was a good change. The other thing that we are doing here, we are moving this language in the bill from section 12.1-31-08 which is miscellaneous offenses to 12.1-47-1 which is the section on obscenity. The states' attorneys group thought that prosecuting attorneys would be far more likely to be looking in the obscenity chapter than miscellaneous offenses when referring to this. Also we increased the penalty from a class B to a class A misdemeanor. As we worked through these amendments, the thing we are really

trying to get to is when somebody distributes photograph. Possessing it is one thing, distributing it is quite another. I think we have something analogous to that in drug offenses. When you possess drugs, that's one level of crime; distributing it is a far greater crime.

Sen. Nelson: With switching the sections, it made it a little more onerous and basically we thought it would be more obvious in the obscenity section.

Rep. Klemin: In the new section 2, subsection 1a, seems to be a strict liability, that you don't have consent and if you know the character of the image was surreptitiously created, "without written consent from each individual in the image, surreptitiously creates or possesses, knowing the image was surreptitiously created". Is that kind of circular? You surreptitiously create it, knowing that it was surreptitiously created.

Sen. Olafson: I think the key word is "possesses a sexually expressive image" in that section.

Rep. Klemin: Going back to each individual in the image. The concern was that somebody takes a photo of a crowd and you don't know everybody, and know you have to get consent from everybody in the photo. Is that a problem here?

Sen. Olafson: The key there is that if it is a sexually expressive image you would have to get consent.

Rep. Klemin: To possess it also.

Sen. Nelson: That's in current law, 12.1-31-08, section 1a is kind of a modern rewrite to that particular section that currently exists.

Rep. Klemin: Section 08 you said?

Sen. Nelson: If you look at version 2, section 1, subsection 1 it uses a lot of that same language.

Rep. Koppelman: With regard to if you possess a sexually expressive image knowing that it was surreptitiously created, is that a high standard we are setting. I assume that most people

that come into possession of these kinds of images, don't necessarily how, when or by whom they were created, I understand the create part. If you're the one taking the picture. If you come into possession, the likelihood of you knowing how it was taken would be hard to know, unless it was emailed to you with a note that said how it was taken, you're not going to know that.

Sen. Olafson: The burden of proof would be on the state, because knowing the image was surreptitiously created. If the person who possesses the picture knew it was surreptitiously created without the knowledge of the person depicted in the image.

Rep. Koppelman: My only point in raising that question is that I think it creates such a high burden of proof to prove. If the objective here is to protect people and to say that if someone is taking these pictures, and my understanding of surreptitiously is sneakily, without someone knowing or hiding. So the picture gets created and we're saying that the person who created it has some liability, but we're also saying that the person possessing it has liability. My understanding of that is that we want to eliminate or stop to the extent we can, by law, the distribution of that image. So if we make the burden of proof, or the burden of the state so high to say, that image was sent out to 50 people, and only two of them really knew where it came from or what was going on. So the other 48 are okay. With this electronic age, it can just keep going and going and going. I'm just raising a question, not debating the issue, just trying to think through it out loud and figure out if there is another solution.

Sen. Nething: Isn't that the same level that they had in the original bill.

Rep. Koppelman: It is, but I think that the discussion here has to do, to a great extent, with how things are changing with our electronic age and the idea that these kinds of images

maybe years ago, were that somebody, went in the dark of night someplace, or got something

in the mail in a plain brown wrapper, and it's a whole different era than what we're dealing with today, with electronics and email, camera phones, Blackberrys, etc.

Sen. Nething: You didn't change that at all. You kept that level of the law the same.

Rep. Koppelman: I think when you look at the House version of the bill it says, I realize the levels are different, you're going to a class A from a class B; I don't personally have a problem with that. The House version says a person is guilty of a class B misdemeanor if, knowing its character and content, that person acquires and knowingly distributes any photograph or visual representation without the person's consent. There we are saying that if you have one of these sexually expressive images, and you know what the content is and you're distributing it without the consent of the person in the picture, you're guilty of a crime. You are injecting, whether it's from another portion of law or not, a different standard having to do with knowing the origin of the image; the fact that it was surreptitious and so on.

Sen. Nething: Isn't that section 1 of the old law.

Rep. Koppelman: Yes.

Sen. Nething: Section 2 changes it.

Rep. Koppelman: Subsection 2 of the original bill, is that represented here somewhere.

Sen. Olafson: The discussed change here is actually started in the .0300 version of the bill, subsection b, starting on line 20; that is the substantive change from previous law.

Rep. Koppelman: So the surreptitious part has to do with..., I get it now. Thank you.

Sen. Olafson: The subsection a is old language that has been reworded to read better. The real change starts on line 20, subsection b is the substantive change.

Rep. Koppelman: Except if you look at the old section in the House version of the bill, subsection 1 still has a difference, as I read it, because it talks about

Rep. Klemin: Surreptitious is the difference. The House version of the bill, on subsection 2 on the class B misdemeanor is not surreptitious, that is the difference.

Rep. Koppelman: The difference that I see in what you're saying is current law, and the Senate version of the bill with amendments, is that it has to do with the person who possesses. The person who creates I understand. It says the person surreptitiously acquires and knowingly possesses or distributes. It's not "and", it's "or". So that means if I come into possession of this sexually expressive image and distribute it, knowing that it's a nude image, according to current law, without the person's written consent, then I'm violating the law. As I read this letter a here, it says that I have to know that it was surreptitiously created before I'm breaking the law by distributing it that way. I don't think that is current law. As I read current law, it says if I distribute it and I know it's a nude photograph, or a sexually explicit image and I don't have the person's permission, I'm guilty.

Sen. Olafson: If you read the version .0200, beginning on line 9.

Rep. Koppelman: But my point is at the end of line 10, there is an "or". So it says a person is guilty of a class A misdemeanor if knowing of its character and content, that person surreptitiously acquires and knowingly possesses, or distributes any photograph or other visual representation. I suppose you could say it acquires and possesses; or acquires and distributes. It implies that you could be guilty of a crime, under this provision of current law, by distributing one of these images without the consent of the subject. As I read this amendment, it says to me, that that would only be true if I knew that the image was also surreptitiously created, as I read the new language. Under current law, if someone comes across these images and we in ND are saying you can't distribute that image if you know it's a sexually explicit photograph or image of whatever kind, without the written consent of the person that's

in the picture. Now we're saying that you can distribute it, even if you know all that as long as you aren't aware that it was surreptitiously created.

Sen. Nelson: If you distribute it, you get into section b. The permission or non-permission of who can be prosecuted is set forth in section b. Basically I think Sen. Olafson tried to explain that we broke that paragraph up into two statements so that it could read a little better.

Rep. Klemin: I think I see what I'm having problems with. The new paragraph 1a is sort of a version of existing subsection 1. The new paragraph 1b is a revision of the House bill that had subsection 2. My problem here is that in the House section, it didn't have to be surreptitious.

If you knowingly distribute a photograph without that person's written consent then it was a class B misdemeanor. Now what you've done in the Senate version is you've added another element; intent to cause emotional harm or humiliation, and only if you do it with that intent to

cause emotional harm or humiliation or after you got notice from somebody that you can't do this; then it relates to distributes or publishes. So what's happened here is that we don't have a situation here where you are guilty of an offense if you acquire and knowingly distribute the photograph unless you've got intent to cause emotional harm or humiliation. So maybe there are three things that we need to look at. You've got 1) because you have elevated that to a class A misdemeanor, if you have that intent to cause emotional harm or humiliation, but I'm thinking that we still need the House language in here for the class B misdemeanor which doesn't require that intent to cause emotional harm or humiliation. Maybe we need to add the class B misdemeanor for that third scenario. You addressed two but you left out the one we had in the House bill.

Rep. Koppelman: It seems to me that what happened here, is that the Senate was focused on the whole issue of the phenomenon that you described of the boyfriend gets picture of nude girlfriend, and then he distributes it after they break up. If that's all we're thinking of here, we

might be eliminating some penalties for what we traditionally would call distribution of pornography and that kind of thing that we really aren't intending to do.

Rep. Delmore: I think that's in another section of law because it was one that was passed previous to this with movie taking and distribution. I can't tell you where it is, but I think it is covered in another section.

Rep. Klemin: To summarize, we have two situations under which you can have a class A misdemeanor the way it is in the Senate version. One is the surreptitious and the other is the intent to cause emotional harm or humiliation, or after you got notice that you aren't supposed to do it. Then maybe we should consider putting back in the House language as the class B misdemeanor as an additional paragraph, because it seems that situation isn't covered now.

Sen. Nething: I thought that the House language under subsection 2 was picked up under 1a.

Rep. Klemin: I don't believe so because the House subsection 2...the difference between House subsection 1 and House subsection 2 – one is surreptitious and two is not surreptitious; 1a in the Senate version is all surreptitious.

Rep. Koppelman: To further explain where I'm coming from, it seems to me that when I read the House bill, both current law and the new language, what we're dealing with there is strictly the act of distributing these images. When I look at this version, the amendments we're dealing with that plus either motive, the intent to cause harm, etc. or knowledge of how the image was created, the surreptitious part. So it's an additional qualifier to make it a criminal offense, where the original House language is strictly an offense to do this unless you have written consent. The other language is, that's true if this is true plus something else.

Rep. Klemin: I'm proposing that we keep the Senate bill the way it is for the class A misdemeanor, then add in the House language for the class B misdemeanor.

Sen. Olafson: At first glance, I don't think we change the bill owner's intent by adding the House section back in. I don't see that it could create any harm. I understand Rep. Klemin's point about this, that does described a somewhat different scenario than we have in the Senate version with subsection 1a or 1b. I don't think it will harm the bill at all by adding that back in.

Rep. Klemin: I move that the Senate recede from its amendments and amend as follows: to add the House amendments from lines 14-17.

Sen. Olafson: Second.

Rep. Koppelman: What about 2 and 3 here.

Rep. Klemin: That's existing language.

Rep. Koppelman: Voice vote, motion carried. We will have LC draft the amendment and meet again to go over the final amendment. We are in recess.

2009 HOUSE STANDING COMMITTEE MINUTES

Bill/Resolution No. HB 1186

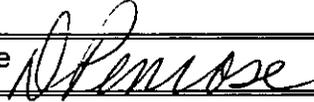
House Judiciary Committee

Check here for Conference Committee

Hearing Date: 4/17/09

Recorder Job Number: 11934

Committee Clerk Signature



Minutes:

Rep. Koppelman: Call to order.

Attendance: All present.

Rep. Koppelman: The amendment before you, 90181.0202, is what we put together after input from Rep. Griffin who works in a state's attorneys office to try to get some feeling there as well. The amendment retains most of the Senate language in 1a and 1b there, it inserts the word "willfully" in 1a before possesses and it gets rid of knowing the sexually expressive image once they are surreptitiously created. That was a concern because it creates such a high standard while I think it gets at the person that creates the image, if we left the language that way, the person that possesses it will be pretty hard to prosecute because you would have to prove that they knew that it was surreptitiously created. I'm not sure that this totally fixes it, but in visiting with Legislative Council, the idea of willfully, and Rep. Griffin talked about this too, brings it to a standard that which includes knowingly. The idea there would be that they possessed it and should have known. So it's not quite as high a proof standard. Item 1b is left as it was. The #2 here is a rewrite of the section 2 from the House that we talked about inserting last time. If you look at that section as originally written, a person is guilty of a class B misdemeanor, if knowing its character and content, that person acquires and knowingly

distributes any photograph or visual representation that exhibits a nude or partially denuded human figure as defined in section ...without the individual's written consent. The concern has been pretty well expressed that if that language as written, if somebody went down to the store and bought a Playboy magazine and handed it to someone else, without getting the written consent of every model in there, would be guilty of breaking the law, as that was originally written. So what you see before you in Item 2 is some of that improved language .

Rep. Delmore: There needs to be a comma in #2, second line, after the word "content".

Rep. Koppelman: We're trying to get at protecting the innocent victim who somehow had a nude picture of themselves and maybe it was taken without their consent and published without their consent, and now someone is distributing it. We're trying to protect that person. I think the language as it is rewritten in #2 hopefully does that. Item 1 does deal with the surreptitious image and also the boyfriend/girlfriend, whether you inflict emotional harm that we talked about the other day. I think this also gets to the matter we talked about the other day. I think this other area is as equally important with just a little bit different nuance.

Rep. Delmore: One of the advantages of #2, is the fact that if you don't want to go all the way to a class A misdemeanor it might give some flexibility to the state's attorney. Obviously, we need to trust them to make their best call under the circumstances. I do think this provides a back-up where it isn't quite as harsh a charge.

Sen. Nething: I thought b and a were class A misdemeanors.

Rep. Koppelman: Item 2 is a class B misdemeanor.

Sen. Nething: That's current law.

Sen. Nelson: No, we amended that in the Senate version.

Rep. Koppelman: That's what we recrafted.

Sen. Olafson: The major change from what we were looking at our last meeting is on the subsection 2 to change the language.

Rep. Koppelman: That's the major change. The other one was that we put the willfully possesses instead of the knowing that the image was surreptitiously created. The other thing I think it does with item 2, it gives some prosecutorial discretion. For example, if someone came to the police department and says that they just learned that there's a nude image of me that is being distributed and John Doe down the road is doing it, it gives the prosecutor something to hang their hat on in pursuing that. By the same token, if someone were to try and invoke this frivolously, I think they would have some discretion to say that's not a crime.

Sen. Olafson: I think section 2 is better than what we looked at the last time.

Rep. Koppelman: What are the wishes of the committee.

Sen. Nelson: I move that the Senate recede from its amendments and adopt amendments of 90181.0202, with the addition of the comma inserted after content, in Section 2, #2.

Rep. Klemin: Second.

Rep. Koppelman: Roll call vote.

6 YES 0 NO 0 ABSENT MOTION CARRIED

Rep. Koppelman: Committee is adjourned.

**REPORT OF CONFERENCE COMMITTEE
(ACCEDE/RECEDE)**

Bill Number 1186 (, as (re)engrossed):

Date: 4/15/09

Your Conference Committee H/Jud

For the Senate:

For the House:

	YES / NO			YES / NO	
<i>Sen Alafson</i>			<i>Rep Koppelman</i>		
<i>Sen Nething</i>			<i>Rep Klein</i>		
<i>Sen Nelson</i>			<i>Rep Delmore</i>		

recommends that the (SENATE/HOUSE) (ACCEDE to) (RECEDE from)

the (Senate/House) amendments on (SJ/HJ) page(s) _____ - _____

_____, and place _____ on the Seventh order.

_____, adopt (further) amendments as follows, and place _____ on the Seventh order:

_____, having been unable to agree, recommends that the committee be discharged and a new committee be appointed.

((Re)Engrossed) _____ was placed on the Seventh order of business on the calendar.

DATE: _____

CARRIER: _____

LC NO. _____	of amendment
LC NO. _____	of engrossment
Emergency clause added or deleted	
Statement of purpose of amendment	

MOTION MADE BY: _____

SECONDED BY: _____

all present

VOTE COUNT ___ YES ___ NO ___ ABSENT

Revised 4/1/05

no action taken -

YK
4/17/09
1082

PROPOSED AMENDMENTS TO ENGROSSED HOUSE BILL NO. 1186

That the Senate recede from its amendments as printed on pages 1140 and 1141 of the House Journal and pages 979 and 980 of the Senate Journal and that Engrossed House Bill No. 1186 be amended as follows:

Page 1, line 1, after "A BILL" replace the remainder of the bill with "for an Act to create and enact a new subsection to section 12.1-27.1-01 and section 12.1-27.1-03.3 of the North Dakota Century Code, relating to sexually expressive images; to repeal section 12.1-31-08 of the North Dakota Century Code, relating to possession or distribution of certain photographs or other visual representations; and to provide a penalty.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. A new subsection to section 12.1-27.1-01 of the North Dakota Century Code is created and enacted as follows:

As used in this chapter, "sexually expressive image" means a photograph or visual representation that exhibits a nude or partially denuded human figure, as defined in section 12.1-27.1-03.1, or sexual conduct.

SECTION 2. Section 12.1-27.1-03.3 of the North Dakota Century Code is created and enacted as follows:

Creation, possession, or dissemination of sexually expressive Images prohibited - Exception.

1. A person is guilty of a class A misdemeanor if, knowing of its character and content, that person:
 - a. Without written consent from each individual in the image, surreptitiously creates or willfully possesses a sexually expressive image that was surreptitiously created; or
 - b. Distributes or publishes, electronically or otherwise, a sexually expressive image with the intent to cause emotional harm or humiliation to any individual depicted in the sexually expressive image or after being given notice by an individual or parent or guardian of the individual who is depicted in a sexually expressive image that the individual, parent, or guardian does not consent to the distribution or publication of the sexually expressive image.
2. A person is guilty of a class B misdemeanor if, knowing of its character and content, that person acquires and knowingly distributes any sexually expressive image that was created without the consent of the subject of the image.
3. This section does not authorize any act prohibited by any other law. If the sexually expressive image is of a minor and possession does not violate section 12.1-27.2-04.1, a parent or guardian of the minor may give permission for a person to possess or distribute the sexually expressive image.

- 2 of 2
4. This section does not apply to any book, photograph, video recording, motion picture film, or other visual representation sold in the normal course of business through wholesale or retail outlets that possess a valid sales tax permit or used by an attorney, attorney's agent, or any other person obtaining evidence for a criminal investigation or pending civil action, or by a medical professional or a peace officer acting within that individual's scope of employment.

SECTION 3. REPEAL. Section 12.1-31-08 of the North Dakota Century Code is repealed."

Renumber accordingly

**REPORT OF CONFERENCE COMMITTEE
(ACCEDE/RECEDE)**

Bill Number 1186 (, as (re)engrossed): Date: 4/17/09

Your Conference Committee H Jud

For the Senate:

For the House:

	YES / NO			YES / NO	
Sen. Alafson	✓		Rep Koppelman	✓	
Sen Nething	✓		Rep Klemien	✓	
Sen Nelson	✓		Rep Delmore	✓	

recommends that the (SENATE/HOUSE) (ACCEDE to) (RECEDE from)

the (Senate/House) amendments on (SJ/HJ) page(s) 1140 - 1141

____, and place _____ on the Seventh order.

, adopt ~~(further)~~ amendments as follows, and place 1186 on the Seventh order:

____, having been unable to agree, recommends that the committee be discharged and a new committee be appointed.

((Re)Engrossed) 1186 was placed on the Seventh order of business on the calendar.

DATE: 4/17/09

CARRIER: Rep. Koppelman

LC NO. _____	of amendment _____
LC NO. _____	of engrossment _____
Emergency clause added or deleted _____	
Statement of purpose of amendment _____	

MOTION MADE BY: Sen. Nelson

SECONDED BY: Rep. Klemien

OTE COUNT 6 YES 0 NO 0 ABSENT

REPORT OF CONFERENCE COMMITTEE

HB 1186, as engrossed: Your conference committee (Sens. Olafson, Nething, Nelson and Reps. Koppelman, Klemin, Delmore) recommends that the **SENATE RECEDE** from the Senate amendments on HJ pages 1140-1141, adopt amendments as follows, and place HB 1186 on the Seventh order:

That the Senate recede from its amendments as printed on pages 1140 and 1141 of the House Journal and pages 979 and 980 of the Senate Journal and that Engrossed House Bill No. 1186 be amended as follows:

Page 1, line 1, after "A BILL" replace the remainder of the bill with "for an Act to create and enact a new subsection to section 12.1-27.1-01 and section 12.1-27.1-03.3 of the North Dakota Century Code, relating to sexually expressive images; to repeal section 12.1-31-08 of the North Dakota Century Code, relating to possession or distribution of certain photographs or other visual representations; and to provide a penalty.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. A new subsection to section 12.1-27.1-01 of the North Dakota Century Code is created and enacted as follows:

As used in this chapter, "sexually expressive image" means a photograph or visual representation that exhibits a nude or partially denuded human figure, as defined in section 12.1-27.1-03.1, or sexual conduct.

SECTION 2. Section 12.1-27.1-03.3 of the North Dakota Century Code is created and enacted as follows:

Creation, possession, or dissemination of sexually expressive images prohibited - Exception.

1. A person is guilty of a class A misdemeanor if, knowing of its character and content, that person:
 - a. Without written consent from each individual in the image, surreptitiously creates or willfully possesses a sexually expressive image that was surreptitiously created; or
 - b. Distributes or publishes, electronically or otherwise, a sexually expressive image with the intent to cause emotional harm or humiliation to any individual depicted in the sexually expressive image or after being given notice by an individual or parent or guardian of the individual who is depicted in a sexually expressive image that the individual, parent, or guardian does not consent to the distribution or publication of the sexually expressive image.
2. A person is guilty of a class B misdemeanor if, knowing of its character and content, that person acquires and knowingly distributes any sexually expressive image that was created without the consent of the subject of the image.
3. This section does not authorize any act prohibited by any other law. If the sexually expressive image is of a minor and possession does not violate section 12.1-27.2-04.1, a parent or guardian of the minor may give permission for a person to possess or distribute the sexually expressive image.

4. This section does not apply to any book, photograph, video recording, motion picture film, or other visual representation sold in the normal course of business through wholesale or retail outlets that possess a valid sales tax permit or used by an attorney, attorney's agent, or any other person obtaining evidence for a criminal investigation or pending civil action, or by a medical professional or a peace officer acting within that individual's scope of employment.

SECTION 3. REPEAL. Section 12.1-31-08 of the North Dakota Century Code is repealed."

Renumber accordingly

Engrossed HB 1186 was placed on the Seventh order of business on the calendar.

2009 TESTIMONY

HB 1186

AMENDMENTS TO HB1186

1. Repeal section 12.1-31-08
2. Enact this bill as 12.1-27.1-03.3
3. Add this definition to 12.1-27.1-01:

"Expressive image" means a photograph or visual representation that exhibits a nude or partially denuded human figure or sexual conduct as defined in this chapter.

2. Replace lines 9-17 on page 1 with:

1. A person is guilty of a class A misdemeanor if, knowing of its character and content, a person:

- a. Without written consent from each individual in the image, a person surreptitiously creates or possesses an expressive image knowing it was surreptitiously created;
- b. Distributes or publishes, electronically or otherwise, an expressive image with the intent to cause emotional harm or humiliation to any individual depicted in the expressive image or after being given notice by any individual, or parent or guardian of any individual, depicted in an expressive image that they do not consent to its distribution or publication.

3. 2. Nothing in this section authorizes any act prohibited by other provisions of law. If the photograph or other visual representation is of a minor and possession does not violate section 12.1-27.2-04.1, a parent of the minor may give permission for a person to possess or distribute the photograph or other visual representation.

4. 3. This section does not apply to any book, as defined in section 12.1-27.1-03.1, photograph, video recording, motion picture film, or other visual representation sold in the normal course of business through wholesale or retail outlets that possess a valid sales tax permit or used by a licensed attorney, attorney's agent,

or any other person obtaining evidence for a criminal investigation or pending civil action, or by a medical professional or a peace officer acting within that person's scope of employment.

NOTE: THESE ARE THE CURRENT DEFINITIONS IN 12.1-27.1 THAT WILL APPLY:

12.1-27.1-01(11). As used in this chapter, the term "sexual conduct" means actual or simulated:

- a. Sexual intercourse;
- b. Sodomy;
- c. Sexual bestiality;
- d. Masturbation;
- e. Sadomasochistic abuse;
- f. Excretion; or
- g. Lewd exhibition of the male or female genitals.

As used in this subsection, the term "sodomy" means contact between the penis and the anus, the mouth and the penis, the mouth and the vulva, or the mouth and the anus. As used in this subsection, the term "sadomasochistic abuse" means a depiction or description of flagellation or torture by or upon a person who is nude or clad in undergarments or in a bizarre or revealing costume; or the condition of being fettered, bound, or otherwise physically restrained on the part of one so clothed.

12.1-27.1-03.1(2)(a) - "Nude or partially denuded human figures"

"Nude or partially denuded human figures" means less than completely and opaquely covered human genitals, pubic regions, female breasts or a female breast, if the breast or breasts are exposed below a point immediately above the top of the areola, or human buttocks; and includes human male genitals in a discernibly turgid state even if completely and opaquely covered.

12.1-27.1-03.1. Objectionable materials or performance - Display to minors - Definitions - Penalty.

1. A person is guilty of a class B misdemeanor if he willfully displays at newsstands or any other business establishment frequented by minors, or where minors are or may be invited as a part of the general public, any photograph, book, paperback book, pamphlet, or magazine, the exposed cover or available content of which exploits, is devoted to, or is principally made up of depictions of nude or partially denuded human figures posed or presented in a manner to exploit sex, lust, or perversion for commercial gain.

2. As used in this section:

a. *"Nude or partially denuded human figures" means less than completely and opaquely covered human genitals, pubic regions, female breasts or a female breast, if the breast or breasts are exposed below a point immediately above the top of the areola, or human buttocks; and includes human male genitals in a discernibly turgid state even if completely and opaquely covered.*

b. "Where minors are or may be invited as a part of the general public" includes any public roadway or public walkway.

c. The above shall not be construed to include a bona fide school, college, university, museum, public library, or art gallery.

12.1-02-02. Requirements of culpability.

1. For the purposes of this title, a person engages in conduct:
 - a. “Intentionally” if, when he engages in the conduct, it is his purpose to do so.
 - b. “Knowingly” if, when he engages in the conduct, he knows or has a firm belief, unaccompanied by substantial doubt, that he is doing so, whether or not it is his purpose to do so.
 - c. “Recklessly” if he engages in the conduct in conscious and clearly unjustifiable disregard of a substantial likelihood of the existence of the relevant facts or risks, such disregard involving a gross deviation from acceptable standards of conduct, except that, as provided in section 12.1-04-02, awareness of the risk is not required where its absence is due to self-induced intoxication.
 - d. “Negligently” if he engages in the conduct in unreasonable disregard of a substantial likelihood of the existence of the relevant facts or risks, such disregard involving a gross deviation from acceptable standards of conduct.
 - e. “Willfully” if he engages in the conduct intentionally, knowingly, or recklessly.
2. If a statute or regulation thereunder defining a crime does not specify any culpability and does not provide explicitly that a person may be guilty without culpability, the culpability that is required is willfully.
3.
 - a. Except as otherwise expressly provided, where culpability is required, that kind of culpability is required with respect to every element of the conduct and to those attendant circumstances specified in the definition of the offense, except that where the required culpability is “intentionally”, the culpability required as to an attendant circumstance is “knowingly”.
 - b. Except as otherwise expressly provided, if conduct is an offense if it causes a particular result, the required degree of culpability is required with respect to the result.
 - c. Except as otherwise expressly provided, culpability is not required with respect to any fact which is solely a basis for grading.
 - d. Except as otherwise expressly provided, culpability is not required with respect to facts which establish that a defense does not exist, if the defense is defined in chapters 12.1-01 through 12.1-06; otherwise the least kind of culpability required for the offense is required with respect to such facts.
 - e. A factor as to which it is expressly stated that it must “in fact” exist is a factor for which culpability is not required.



4. Any lesser degree of required culpability is satisfied if the proven degree of culpability is higher.

5. Culpability is not required as to the fact that conduct is an offense, except as otherwise expressly provided in a provision outside this title.