



PATRICK TESTIN

STATE SENATOR

DATE: September 5th, 2023
RE: **Testimony on 2023 Senate Bill 149**
TO: The Senate Committee on Judiciary and Public Safety
FROM: Senator Patrick Testin

Thank you Chairman Wanggaard and members of the committee for holding this hearing and accepting my testimony in support of Senate Bill 149 (SB 149). This bill broadens the definition of sexual contact to include certain actions that were unforeseen in prior sessions of the legislature.

Our criminal code is crafted to provide the legal system with the tools they need to prosecute those who violate the law; however, it is impossible to accurately envision and account for every inappropriate scenario.

Last fall, a Deputy Assistant District Attorney from Adams County drew my attention to a situation involving inappropriate sexual contact with a minor that did not fit the statute's current definition of sexual contact. The defendant had ejaculated on a paper plate and forced his step-daughter to touch the excretion.

While current law prohibits ejaculating on to a victim or their clothing, it does not address the use of another medium to transfer the fluid. Because of this, the DA's office was unable to charge the defendant with the full litany of crimes that they felt were appropriate. This bill broadens the definition of sexual contact to better enable prosecutors to obtain justice for the victims of these heinous crimes.

This bill has the support of the Wisconsin District Attorneys Association, the Wisconsin Coalition Against Sexual Assault, Outagamie County, and the State Bar of Wisconsin's Criminal Law Section. Please join them in support of SB 149.

NIK RETTINGER

STATE REPRESENTATIVE · 83rd ASSEMBLY DISTRICT

Rep. Rettinger Testimony on Senate Bill 149

Senate Committee on Judiciary and Public Safety

September 5, 2023; Room 411S

Good morning, Chairman Wanggaard. I'd like to thank you and the members of the Senate Committee on Judiciary and Public Safety for holding a hearing on Senate Bill 149. I am proud to author this legislation with my colleagues Senator Patrick Testin as well as Chairman Wanggaard, and strongly believe this bill is an excellent step towards ensuring protections for children under our criminal code are fully enforceable.

As was laid out in the co-sponsorship memo for this bill, a child in Adams County was the victim of a truly despicable sexual act and, due to the present language of the statutes, was unable to be charged to the fullest extent of the law. A Deputy Assistant District Attorney from Adams County made us aware of this case which involved the defendant ejaculating on to a paper plate and forcing his step-daughter to touch the excretion.

Presently, it is illegal to ejaculate on to a victim or their clothing, but the law does not address the use of another medium to transfer the fluid. Because of this, they were unable to successfully charge the defendant with the full litany of crimes that the District Attorney's office felt was appropriate.

While we recognize as legislators we may not be able to account for every scenario before it occurs, I strongly believe the intention and spirit of the Legislature is clear and this loophole should be closed immediately. We have the moral duty to make it clear that this type of heinous act will not be tolerated in Wisconsin ever again.

I know that everyone on this committee recognizes that protecting children is of the utmost importance and I would hope you join the Wisconsin District Attorney's Association, the State Bar of Wisconsin, Outagamie County, and the Wisconsin Coalition Against Sexual Assault in supporting SB 149. Thank you again to the committee for hearing my testimony today on this bi-partisan bill.

CRIMINAL LAW SECTION

To: Senate Judiciary and Public Safety Committee
From: Criminal Law Section, State Bar of Wisconsin
Date: September 5, 2023
Re: Support for SB 149 – definition of sexual contact

The State Bar of Wisconsin's Criminal Law Section supports SB 149, which expands the definition of sexual contact in relation to crimes against children and sexual assault.

Current law prohibits ejaculating on to a victim or their clothing, but does not address the use of another medium to transfer the fluid. Several recent cases throughout the state have brought to light this loophole, which the Criminal Law section believes was an oversight in need of correction in statute.

SB 149 addresses the gap in the current law by changing the definition of sexual contact to include forcing a person to touch any form of bodily fluid for the purpose of sexual gratification, and creates a penalty for doing so.

This change will better allow prosecutors to obtain justice for victims of these heinous crimes. Sadly, there seems to be no limit to what depraved methods sexual abusers will use to assault their victims. While the current law addresses many forms of sexual assault, it does not address them all, and this law will better allow prosecutors to address these types of crimes. This would have a positive impact on victims of sexual assault by helping to ensure justice even in those situations where the manner of assault is of the type not covered by the current law.

For these reasons, the Criminal Law Section of the State Bar of Wisconsin supports SB 149.

If you have questions or concerns, please do not hesitate to contact our lobbyist, Lynne Davis, ldavis@wisbar.org or 608-852-3603.

The State Bar of Wisconsin establishes and maintains sections for carrying on the work of the association, each within its proper field of study defined in its bylaws. Each section consists of members who voluntarily enroll in the section because of a special interest in the particular field of law to which the section is dedicated. Section positions are taken on behalf of the section only.

The views expressed on this issue have not been approved by the Board of Governors of the State Bar of Wisconsin and are not the views of the State Bar as a whole. These views are those of the Section alone.



STATE BAR OF WISCONSIN

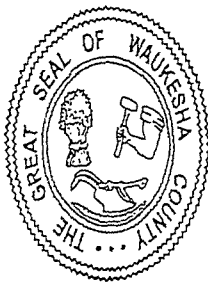
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May 1, 2023

Representative Cindi Duchow
Wisconsin State Assembly
District 99

Representative Duchow:

I am writing to express my support for 2023 Assembly Bill 166. I applaud the efforts of this legislation to offer further protection for victims of sexual assault. I recognize this bill offers another charging option for prosecutors to assist them in holding these offenders accountable for all of their conduct. This bill addresses a potential violation that is not prohibited elsewhere in the statutes. As prosecutors, we appreciate having a full arsenal in our tool box to combat the various acts of sexual assault that can be perpetrated. I encourage the passage of AB 166.

If I can answer any questions, please do not hesitate to contact me.

Very truly yours,

A handwritten signature in black ink, appearing to read "Susan L. Opper", is written over a horizontal line.

Susan L. Opper
District Attorney

Testimony of Jonathan E. Barnett in support of Senate Bill 149, Relating to: definition of "sexual contact" for purposes of crimes against children and sexual assault and providing penalty

Chair Wanggaard, members of the committee, thank you for accepting my testimony on Senate Bill 149. My name is Jonathan Barnett and I am the Deputy Assistant District Attorney in Adams County. I drafted the initial language of this bill and have been working with Senator Testin's office and the attorneys with the LRB toward the final language. I feel I might have to apologize that there is no way to discuss this bill without having to resort to language that is disturbing. In October of 2022, I was performing my duties in the Adams County District Attorney's Office and keeping an eye on a trial that District Attorney Rebecca Maki-Wallander was conducting. It was an intense case and had involved weeks of preparation. The entire office had become very familiar with the victim as she prepped for the case. Toward the end of the multi-day trial, I was informed through our TEAMS chat about the motion to dismiss a count of Sexual Assault of a Child Under 13 Years of Age. I learned that the issue was the definition of "sexual contact." Testimony at trial had detailed how the Defendant had masturbated onto a paper plate in the presence of the victim and then caused the victim to touch the ejaculate. After argument, the Court found that this did not meet the definition of "sexual contact." At first I was incredulous at the notion, but then reviewed the statute. Currently, the definition of "sexual contact" in section 940.225(5)(b) of the Wisconsin Statutes includes "intentional penile ejaculation" when "upon any part of the body clothed or unclothed of the complainant." The word "Upon" created a very limiting function linguistically. It only incorporates the act of ejaculating directly on a person. I can understand the prior drafters not having the foresight to imagine the degree of sexual degradation possible. I previously worked as a Sexual Assault prosecutor in Marathon County. I can say without reservation that I have found the ability of people to find new ways to use sex and sexual contact as a means of power and control to be heartbreaking. The only thing more unbelievable is the ability of sexual assault survivors to find ways to stand back up. The charge was dismissed, though there are other charges that are still the subject of ongoing litigation. As a retired Army Engineer Officer, I heard this ruling and took it as a call to action. I immediately started working on the language that became the bill we are discussing today. The statutory language as it currently exists creates a large loophole. While it is illegal to ejaculate "upon" someone intentionally and without consent, if someone were to use a medium of sorts to transport that same ejaculate onto another, there is no recourse. We could arguably charge Disorderly Conduct, but nothing that addresses the clearly sexual nature of such an act. While we do have a crime involving the expelling of bodily fluids, it only applies if the victim is a public safety officer. All of this is to say that the current law creates absurd results where you can avoid a sexual assault simply by ejaculating upon a plate or cloth and then transferring it onto your victim. There is no difference in these scenarios in reality, but currently one is a felony and the other is not. As I was drafting the language I spoke briefly with then Investigator Floyd Lindsey who informed me of another case in our county where an individual had masturbated and then used his hand to wipe the ejaculate onto the victim. Again, the use of the word "Upon" limited our ability to address the true nature of this act. In the days immediately following, a message went out to the collective of state prosecutors from a prosecutor in St. Croix County involving a case someone ejaculating onto silverware in a restaurant. In reaching out to the greater prosecutor community at large, I also learned of a case where someone ejaculated on his girlfriend's pillowcase as an act of revenge. The purpose of this bill is to bring within the definition of the statute certain acts that seem to have clearly been understood to be within the realm of sexual contact. The law understands that those hiring someone to commit their murders are the same as murderers. Likewise, directing an employee to commit a fraud or a theft does not absolve someone of the fraud or

the theft. However, as things stand now, using this intermediary device is enough to shield someone from facing a sexual assault charge because it interrupted the direct transfer of the bodily fluid. Sexual Assault is one of the very few places in criminal law where victims feel more on trial than the accused. Victims face intense scrutiny and are often blamed for their own victimhood. Many of these cases involve children or adults reliving childhood assaults. More so than cases of theft, burglary or battery, victims often spend their lives feeling they caused their victimhood. Many are terrified to appear in court and have to talk about what happened to them. While I have been uncomfortable having to discuss these facts and I am sure it is uncomfortable to hear them said aloud, especially in this great chamber, it is harder for a victim to describe their own horror and describing their own bodies. It has never ceased to amaze me how resilient these survivors can be and it has never gotten easier having to ask them to say the things there are required to say in testimony. This change in the language defining "sexual contact" is necessary. This is not an attempt to create new laws and loopholes for the State, but a way of defining what already exists. This bill would create a recourse for victims to have their voices heard and to offer an avenue toward closure. For those willing to step forward, face the scrutiny of a judgmental public, and address harms they live with daily, the limits of the word "upon" can be the difference between vindication and eternal rounds of self-blame. When one uses some medium of transfer to force someone to touch their bodily fluids without consent, that should be the same as if they had done so without that same medium of transfer. It seems to me the actions I have described are within the intent of the law, but not within the letter of the law. This is a correction that is overdue. I ask everyone to please vote to pass Senate Bill 149.