
SENATE COMMITTEE ON PUBLIC SAFETY

Senator Aisha Wahab, Chair

2023 - 2024 Regular

Bill No: AB 1856 **Hearing Date:** June 25, 2024
Author: Ta
Version: May 16, 2024
Urgency: No **Fiscal:** Yes
Consultant: SC

Subject: *Disorderly conduct: distribution of intimate images*

HISTORY

Source: Author

Prior Legislation: AB 1781 (Ta), held in Assem. Public Safety, 2023
SB 1216 (Gonzalez), Ch. 885, Stats. 2022
SB 602 (Berman), Ch. 491, Stats. 2019
SB 564 (Leyva), held in Sen. Approps. Comm., 2019
AB 1260 (Grayson), failed Assem. Public Safety Comm., 2019
SB 1255 (Cannella), Ch. 863, Stats. 2014
SB 255 (Cannella), Ch. 466, Stats. 2013

Support: California District Attorneys Association; California State Sheriffs' Association;
Peace Officers Research Association of California (PORAC)

Opposition: California Public Defenders Association

Assembly Floor Vote: 62 - 0

PURPOSE

The purpose of this bill is to create a new crime for any adult to intentionally distribute or cause to be distributed a deepfake, as defined, of an intimate body part of an identifiable person, or a deepfake of the person engaged in sexual conduct, or a deepfake of a person engaging in conduct which the person depicted participates, and the person distributing the deepfake knows or should know that the person depicted did not consent to the distribution and that distribution will cause serious emotional distress, and the person depicted suffers that distress.

Existing law states that a depicted individual has a private cause of action against a person who does either of the following:

- Creates and intentionally discloses sexually explicit material and the person knows or reasonably should have known the depicted individual in that material did not consent to its creation or disclosure; or,
- Intentionally discloses sexually explicit material that the person did not create and the person knows the depicted individual in that material did not consent to the creation of the sexually explicit material. (Civ. Code, § 1708.86, subd. (b).)

Existing law states for purposes of the above provision “sexually explicit material” means any portion of an audiovisual work that shows the depicted individual performing in the nude or appearing to engage in, or being subjected to, sexual conduct. (Civ. Code, § 1708.86, subd. (a)(14).)

Existing law states that a person is not liable under the above provision in either of the following circumstances:

- The person discloses the sexually explicit material in the course of any of the following: reporting unlawful activity, exercising the person’s law enforcement duties, during hearings, trials or other legal proceedings.
- The material is any of the following: a matter of legitimate public concern; a work of political or newsworthy value; commentary, criticism, or disclosure that is otherwise protected by the California Constitution or the United States Constitution. (Civ. Code, § 1708.86, subd. (c).)

Existing law establishes a right to seek damages against a person who knowingly uses another’s name, voice, signature, photograph, or likeness, in any manner, on or in products, merchandise, or goods, or for purposes of advertising or selling, or soliciting purchases of, products, merchandise, goods or services, without such person’s prior consent, or, in the case of a minor, the prior consent of his parent or legal guardian. (Civ. Code, § 3344 subd. (a).)

Existing law makes it a crime for a person who intentionally distributes or causes to be distributed the image of the intimate body part or parts of another identifiable person, or an image of the person depicted engaged in an act of sexual intercourse, sodomy, oral copulation, sexual penetration, or an image of masturbation by the person depicted or in which the person depicted participates, under circumstances in which the persons agree or understand that the image shall remain private, the person distributing the image knows or should know that distribution of the image will cause serious emotional distress, and the person depicted suffers that distress. (Pen. Code, § 647, subd. (j)(4)(A).)

Existing law defines “intimate body part” to mean “any portion of the genitals, the anus and, in the case of a female, also includes any portion of the breasts below the top of the areola that is either uncovered or clearly visible through clothing.” (Pen. Code, § 647, subd. (j)(4)(C).)

Existing law states that a person intentionally distributes an image when that person personally distributes the image, or arranges, specifically requests, or intentionally causes another person to distribute that image. (Pen. Code, § 647, subd. (j)(4)(B).)

Existing law states that the above crime does not apply when:

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

- The distribution is related to a matter of public concern or public interest. Distribution is not a matter of public concern or public interest solely because the depicted individual is a public figure. (Pen. Code, § 647, subd. (j)(4)(D).)

This bill creates a new crime punishable as a misdemeanor for any person, 18 years of age or older, who:

- Intentionally distributes or causes to be distributed a deepfake of an intimate body part or parts of another identifiable person, or a deepfake of the person depicted engaged in an act of sexual intercourse, sodomy, oral copulation, sexual penetration, or a deepfake of masturbation by the person depicted or in which the person depicted participates;
- Under circumstances in which the person distributing the deepfake knows or should know that the person depicted did not consent to the distribution and that the distribution of the deepfake will cause serious emotional distress; and,
- The person depicted suffers that distress.

This bill defines “deepfake” to mean any audio or visual media, including, without limitation, any image, motion picture film, or video recording, that is created or altered in a manner that it would falsely appear to a reasonable observer to be an authentic record of the actual speech or conduct of the individual depicted in the media.

Existing law defines “distribute” to include exhibiting in public or giving possession.

This bill revises the definition of “distribute” to mean making content available to another person through any medium, including, but not limited to, exhibiting it in public, giving possession of the content, or through the use of internet, email, or text messaging.

This bill applies the existing exceptions in Penal Code section 647(j)(4)(D) to the provisions of this bill.

COMMENTS

1. Need for This Bill

According to the author of this bill:

As with any new technology, artificial intelligence can improve peoples’ lives. However, AI can also be used to inflict harm through dangerous and unregulated “deepfakes.” The weaponization of deepfakes to create and distribute nonconsensual pornography can have a massive impact on the economy, national security, and seriously harms the reputation, mental health, and security of innocent victims who are depicted without their consent. The Legislature must take action to protect victims from extortion, humiliation, and harassment that can come from artificially generated pornography that appears real.

AB 1856 would provide a criminal penalty to individuals who break the law by distributing artificially generated pornography of an individual without their consent.

2. “Deepfakes”

“Deepfakes” refer to manipulated videos, or other digital representations produced by sophisticated artificial intelligence, that yield fabricated images and sounds that appear to be real.” (Shao, *What ‘Deepfakes’ Are and How They May Be Dangerous*, CNBC (1/17/2020) <https://www.cnbc.com/2019/10/14/what-is-deepfake-and-how-it-might-be-dangerous.html> [as of June 17, 2024].) “Deepfake technology enables users to create fake videos, images, or recordings of people that appear authentic. Some of the earliest and most prolific deepfake examples involve pornography—everything from face-swapping a celebrity into a pornographic video to an AI algorithm that creates a realistic nude from a person in an image.” (<https://www.asisonline.org/security-management-magazine/latest-news/today-in-security/2021/january/U-S-Laws-Address-Deepfakes/>) [as of June 17, 2024].)

Highly publicized instances of celebrities who have had their faces overlaid on others’ bodies in a way that are meant to make viewers think they are real have raised awareness around the issue of deepfake pornography. According to a study from cybersecurity company Deeptrace, some 96% of deepfakes posted online are sexually explicit, and 99% of those are of women who work in entertainment. (Mapping the Deepfake Landscape, Deeptrace (2019).) However, it is not uncommon for a private individual to have their real images manipulated to create deepfake pornography. Recently, a group of students from a Beverly Hills middle school who allegedly shared photos of classmates that had been doctored with an AI-powered app were investigated and expelled. The images used real faces of students atop AI-generated nude bodies. These types of images may be produced using an app on cell phones. (Healy, *Scandal over AI-generated nudes at Beverly Hills middle school exposes gaps in law*, Los Angeles Times (Mar. 3, 2024) <https://www.latimes.com/california/story/2024-03-03/scandal-over-ai-generated-nudes-at-beverly-hills-middle-school-highlights-gaps-in-law> [as of June 17, 2024].)

The new crime created by this bill is similar to Penal Code section 647, subdivision (j)(4)(A) which criminalizes “revenge porn” in that it requires distribution and intent to cause serious emotional distress. However, the applicable images under the bill would be a deepfake intimate body part of an identifiable person, or a deepfake of the person engaged in sexual conduct, or a deepfake of a person engaging in conduct which the person depicted participates, whereas revenge porn applies to real images.

Additionally, this bill broadens the definition of “distribute” to include “making the image available to another person through any medium, including, but not limited to, exhibiting it in public, giving possession of the image, or through the use of internet, email, or text messaging.”

This bill defines “deepfake” to mean any audio or visual media, including, without limitation, any image, motion picture film, or video recording, that is created or altered in a manner that it would falsely appear to a reasonable observer to be an authentic record of the actual speech or conduct of the individual depicted in the media. As with any definition that is placed in statute regarding technology, there is a good possibility that the Legislature will be playing “catch up” as technology continues to evolve.

3. First Amendment Considerations

The First Amendment to the United States Constitution states: "Congress shall make no law . . . abridging the freedom of speech . . ." This fundamental right is applicable to the states through the due process clause of the Fourteenth Amendment. (*Aguilar v. Avis Rent A Car System, Inc.* (1999) 21 Cal. 4th 121, 133-134, citing *Gitlow v. People of New York* (1925) 268 U.S. 652, 666.) Article I, section 2, subdivision (a) of the California Constitution provides that: "Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press." It is a fundamental tenant of First Amendment law that speech cannot be prohibited merely because someone justifiably finds it offensive and objectionable. (See e.g. *Cohen v. California*, (1971) 403 U.S. 15, 22; *Virginia v Black* (2003) 538 U.S. 343, 358.)

In *Reno v. ACLU* (1997) 521 U.S. 844, the Supreme Court stated that "The Internet is an international network of interconnected computers . . . enab[ling] tens of millions of people to communicate with one another and to access vast amounts of information from around the world. The Internet is a unique and wholly new medium of worldwide human communication." (*Id.* at 850.) Following its expansive discussion of the many benefits of the Internet, the Court turned its attention to First Amendment issues, finding that the "CDA [Communications Decency Act] is a content-based regulation of speech. The vagueness of such a regulation raises special First Amendment concerns because of its obvious chilling effect on free speech," citing *Gentile v. State Bar of Nevada* (1991) 501 U.S. 1030, 1048-1051. The Court further stated that the CDA, as a criminal statute, "may well cause speakers to remain silent rather than communicate even arguably unlawful words, ideas, and images. As a practical matter, this increased deterrent effect, coupled with the risk of discriminatory enforcement of vague regulations, poses greater First Amendment concerns than those implicated by the civil regulations (internal citation omitted). Given the vague contours of the statute, it unquestionably silences some speakers whose messages would be entitled to constitutional protection. The CDA's burden on protected speech cannot be justified if it could be avoided by a more carefully drafted statute." (*Id.* at 874.)

A chilling effect on free speech may occur where a speaker is unclear if he or she is acting unlawfully and, as such, simply refrains from speaking. Statutes must precisely define the proscribed speech so as to give clear guidance as to what is permissible and what is not. "As a matter of constitutional tradition, in the absence of evidence to the contrary, we presume that governmental regulation of the content of speech is more likely to interfere with the free exchange of ideas than to encourage it. The interest in encouraging freedom of expression in a democratic society outweighs any theoretical but unproven benefit of censorship." (*Id.* at 885.)

Generally, laws that are content neutral face intermediate scrutiny, while laws that are content based are presumptively invalid and face strict scrutiny, a higher standard. (*Turner Broadcasting System v. Federal Communication Commission* (1994) 512 U.S. 622.) A content-based restriction means that the regulation restricts a specific subject matter, in this case sexually explicit speech. The standard by which the court would allow such a regulation to be upheld is strict scrutiny which requires a showing that the restriction is necessary to serve a compelling state interest. (*Sable Communications of California, supra*, at p. 126.) Thus, regardless of how important the state interest, the regulation of indecent speech must still be precise enough to achieve the purpose the regulation is intended to serve. (*Reno, supra*, 521 U.S. at p. 874.)

This bill, which is modeled after the existing revenge porn law, creates a new crime for the nonconsensual distribution of a deepfake of an intimate body part of an identifiable person, or a deepfake of the person engaged in sexual conduct, or a deepfake of a person engaging in conduct which the person depicted participates, that the person distributing the image knows or should know that the person depicted did not consent to the distribution and that the distribution of the image will cause serious emotional distress, and the person suffers that distress. The following circumstances would be exemptions which currently apply to the revenge porn law would also be exempted from criminal liability under the new crime: 1) the distribution is made in the course of reporting an unlawful activity; 2) the distribution is made in compliance with a subpoena or other court order for use in a legal proceeding; 3) The distribution is made in the course of a lawful public proceeding; and 4) the distribution is related to a matter of public concern or public interest. Distribution is not a matter of public concern or public interest solely because the depicted individual is a public figure.

As noted above, this bill is modeled after the existing revenge porn statute. As to that particular statute, the California Appellate Court, without deciding whether a person has a free speech right to distribute such images, found that the law was not overbroad or vague because it only:

[B]arred a person who photographed or recorded the image from distributing it, when such a person had the intent to cause serious emotional distress. The requirement that a person *intend* to cause distress served to narrow the law (see [Stark v. Superior Court \(2011\) 52 Cal.4th 368, 391 \[128 Cal. Rptr. 3d 611, 257 P.3d 41\]](#)), rendering it inapplicable, for example, if the person acted under a mistake of fact or by accident (see [§ 26](#) classes Three & Five).

Furthermore, it is not just *any* images that are subject to the statute, but only those which were taken under circumstances where the parties agreed or understood the images were to remain private. “The government has an important interest in protecting the substantial privacy interests of individuals from being invaded in an intolerable manner. [Citation.]” ([People v. Astalis \(2014\) 226 Cal.App.4th Supp. 1, 8 \[172 Cal. Rptr. 3d 568\]](#).) It is evident that barring persons from intentionally causing others serious emotional distress through the distribution of photos of their intimate body parts is a compelling need of society.

([People v. Iniguez \(2016\) 247 Cal.App.4th Supp.1, 7-8.](#)) Additionally, in *Iniguez* at pp. 10-11, the defendant argued insufficient evidence supported his conviction because he had failed to “distribute” the photo by posting it on Facebook. The court concluded, however, “there is no indication in section 647, subdivision (j)(4), that the term “distribute[s]” was intended to have a technical legal meaning, or to mean anything other than its commonly used and known definition of “to give or deliver (something) to people.” (*Id.* at p. 10; See also, Merriam Webster online definition of “distribute.”) The court further noted, “Legislative analyses of the Senate bill that enacted section 647, subdivision (j)(4), are replete with indications that posting images on public Web sites was precisely one of the evils the statute sought to remedy.” (*Ibid.*) This bill broadens the definition of “distribute” to include “making the image available to another person through any medium, including, but not limited to, exhibiting it in public, giving possession of the image, or through the use of internet, email, or text messaging.

As will be discussed in note 4, the critical difference with the revenge porn statute and the conduct criminalized by this bill is that it criminalizes *private images* shared for the purposes of *inflicting emotional distress*.

The conduct punishable by this bill can also be compared to defamation which is a false, published statement that causes injury and was generally thought to be outside the scope of First Amendment protections. (Civil Code Section 46; *Beauharnais vs. Illinois* (1952) 343 U.S. 250.) However, in the landmark case of *New York Times vs. Sullivan* (1964) 376 U.S. 254, the Court shifted course, finding some First Amendment protection in speech otherwise considered unprotected. “Libel can claim no talismanic immunity from constitutional limitations. It must be measured by standards that satisfy the First Amendment.” The Court went on to state that a public official may not recover damages for defamation concerning his or her official conduct unless the statement was made with “*actual malice*,” meaning knowledge that it was false or with reckless disregard of the truth or falsity of the statement. In the case of *Hustler Magazine vs. Falwell* (1988) 485 U.S. 46, Hustler Magazine parodied the Reverend Jerry Falwell by impersonating his likeness and insinuating he engaged in sexual activity with his mother. Falwell sued for defamation but lost because the Supreme Court ruled the obvious parody was not defamation. (*Hustler Magazine vs. Falwell* (1988) 485 U.S. 46, 79.)

This bill would criminalize the distribution of deepfakes depicting intimate body parts or sexual conduct. This bill does not require the person who distributed the image be the same person who created the image. Thus, a person who is merely sharing a deepfake image that they did not have reason to know is a deepfake may share the image believing it to be authentic but nonetheless could be criminalized under this bill. Because of the way the bill can be broadly applied, this bill may be challenged on First amendment grounds for overbreadth.

Additionally, as discussed in note 2, the majority of deepfake pornography is of women in the entertainment industry most of which are public figures. If a reviewing court views the law as applied to public figures similar to defamation, any criminalization of false statements regarding those individuals may have to comply with the actual malice standard in *Sullivan, supra*, meaning that the person has knowledge that the statement was false or the statement was made with reckless disregard of the truth or falsity of the image.

This issue will likely become more complex for the courts with the introduction of deep fake and, and more generally, AI content. Courts may determine that images generated through machine learning may have artistic, political, scientific, or literary merit making them worthy of First Amendment protection.

4. History of Revenge Porn Law

In 2013, California enacted a law to criminalize “revenge porn.” The law makes it a misdemeanor for a person to intentionally distribute an image that was intended to remain private of the intimate body parts of another or of the person depicted engaged in a sex act and the person distributing the image knows or should know that distribution of the image will cause serious emotional distress and the person depicted suffers that distress. (Pen. Code, § 647, subd. (j)(4).) When the law was originally enacted, the law did not include “selfies” however the following year the law was changed to include these types of images. (See SB 255 (Cannella), chapter 466, statutes of 2013 and SB 1255 (Cannella), chapter 863, statutes of 2014.) California and New Jersey were among the first to make revenge pornography a crime. Currently, 48 stes and the District of Columbia have enacted laws to address this issue.

Following the passage of these laws, major leaders in technology changed their policies to better address nonconsensual images on their platforms:

Reddit, which was a major platform used by NCDII [nonconsensual distribution of intimate images] perpetrators, was the first to ban nonconsensual nude images in early 2015. Twitter and Facebook soon followed suit. Later that year, Google announced it would honor requests to remove intimate images that were posted without permission, marking a change from their previous commitment to wholly unregulated search results. The same year, the Federal Trade Commission took steps to remove major “revenge porn” sites such as IsAnybodyDown, IsAnyoneUp and UGotPosted by charging their owners with extortion, theft, hacking, and identity theft. This effectively upended the business model of “revenge porn” websites.

(Said and McNealey, *Nonconsensual Distribution of Intimate Images: Exploring the Role of Legal Attitudes in Victimization and Perpetration*, Journal of Interpersonal Violence Vol. 38, Iss. 7-8 (Sept. 9, 2022) <https://journals.sagepub.com/doi/full/10.1177/08862605221122834#body-ref-bibr8-08862605221122834> [as of June 18, 2024].)

This bill is modeled after the existing “revenge porn” statute however, unlike revenge porn where the parties are known to each other, the crime created by this bill may often be committed by someone unknown to the victim since it is not an image that the victim had purposely shared with the perpetrator. The purpose of the revenge porn law is to protect the privacy of an individual whose trust has been broken by a person who received a personal image with the understanding the image would not be shared with others. The images shared are real and in most instances would cause a person to suffer emotional distress and that is the intended result of the person unlawfully sharing the photo. The conduct this bill intends to cover, on the other hand, would involve an image of a real person that may be publicly accessible through social media or other means that has been altered in a way that makes the depicted person appear to engage in conduct they did not engage in, and by distributing such an image, an individual knowingly causes that person to suffer emotional distress. The emotional harm to the victim in both instances may be the same however the intent may be different for persons who share deepfake pornography. In particular when the deepfake images are of public figures, it is more likely that someone may have intent other than to humiliate or cause other emotional or reputational harm of the individual depicted, such as making a political commentary or parody.

Another notable difference from the revenge porn law is that the crime created by this bill does not apply to a minor. This distinction is likely meant to address concerns from opposition that young people will be overly criminalized for the conduct this bill targets.

5. Argument in Support

According to California District Attorneys Association:

AB 1856 . . . would make it a crime for a person to intentionally distribute a deepfake of an intimate body part or parts of another identifiable person, or a deepfake of the person depicted engaged in a sexual act, by the person depicted or in which the person depicted participates, if the person distributing the deepfake knows or should know that the person depicted did not consent to the distribution

and that the distribution of the deepfake will cause serious emotional distress, and the person depicted suffers that distress.

Distribution of deepfake images is increasing across the state in high schools and middle schools and often involves the online posting of deepfake images to shame, embarrass, harass, and intimidate victims. These type of incidents can cause lasting emotional trauma and distress.

6. Argument in Opposition

According to California Public Defenders Association:

The bill would make it a misdemeanor punishable by one year in county jail to distribute, exhibit, exchange or offer to do any deepfake depicting an individual engaging in sexual conduct.

AB 1856 would likely run afoul of the First Amendment. As noted in the Assembly Public Safety Committee analysis of AB 1280 (Grayson) 2019 which also sought to criminalize deepfake recordings of adult sexual activity, while courts have found that laws criminalizing deepfakes involving child pornography serve a compelling governmental interest, prohibitions of depictions of adult sexual activity are not afforded the same protection.

Though prohibitions on altering photos and video to make it appear that a minor is engaging in sexual conduct have passed constitutional muster in at least some circumstances, it's not clear that the same result would follow for a prohibition on deepfakes that depict adults engaging in sexual conduct.

“Because AB 1280 “expressly aims to curb a particular category of expression... by singling out the type of expression based on its content and then banning it,” it is considered a content-based regulation of speech, and is thus presumptively unconstitutional. *Free Speech Coalition v. Reno* (9th Cir. 1999) 198 F.3d 1083, 1090-91, *aff'd sub nom. Ashcroft v. Free Speech Coalition* (2002) 535 U.S. 234.

“To overcome this presumption, a content-based regulation of speech, such as the one found in AB 1280, must serve a compelling state interest that it is narrowly drawn to achieve that end. *Id.* It is not clear that AB 1280's prohibition on deepfakes depicting adult sexual conduct would clear this hurdle. “Cases, such as *U.S. v. Anderson* (8th Cir. 2014) 759 F.3d 891, which have upheld prohibitions on child pornography have relied on the government's interest in safeguarding the physical and psychological well-being of minors as the compelling interest that supports the restriction on expression. Because depictions of adult sexual conduct do not implicate the same interest in protecting the well-being of minors, it's not clear that a compelling government purpose would support the prohibition.”

AB 1856 is not needed. Civil Code section 1708.86 already allows for a civil action for people defamed by deepfakes. This is a far better solution than creating a category of criminal speech, a category that will surely be endlessly litigated given the constitutional tension that will ensue. While such litigation will surely

occur in the civil realm, it does not proceed while a litigant spends months or years in a jail cell.

-- END --