
SENATE COMMITTEE ON PUBLIC SAFETY

Senator Aisha Wahab, Chair

2023 - 2024 Regular

Bill No: AB 1962 **Hearing Date:** July 2, 2024
Author: Berman
Version: June 5, 2024
Urgency: No **Fiscal:** Yes
Consultant: SC

Subject: *Crimes: disorderly conduct*

HISTORY

Source: Santa Clara County District Attorney

Prior Legislation: SB 23 (Rubio), Ch. 783, Stats. 2021
SB 1081 (Rubio), Ch. 882, 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: American Association of University Women – California; Arcadia Police Officers' Association; Asian Americans for Community Involvement; Asian Law Alliance; Burbank Police Officers' Association; California Coalition of School Safety Professionals; California District Attorneys Association; California Police Chiefs Association; California Reserve Peace Officers Association; California State Sheriffs' Association; Claremont Police Officers Association; Community Solutions; Corona Police Officers Association; Crime Victims Alliance; Culver City Police Officers' Association; Deputy Sheriffs' Association of Monterey County; Fullerton Police Officers' Association; Los Angeles School Police Management Association; Los Angeles School Police Officers Association; Murrieta Police Officers' Association; Newport Beach Police Association; Novato Police Officers Association; Palos Verdes Police Officers Association; Peace Officers Research Association of California (PORAC); Placer County Deputy Sheriffs' Association; Pomona Police Officers' Association; Prosecutors Alliance of California, a Project of Tides Advocacy; Riverside Police Officers Association; Riverside Sheriffs' Association; Santa Ana Police Officers Association; Street Grace; Upland Police Officers Association; WomenSV (Women of Silicon Valley); YWCA Golden Gate Silicon Valley

Opposition: None known

Assembly Floor Vote: 73 - 0

PURPOSE

The purpose of this bill is to expand the crime of revenge porn to include the distribution of images recorded, captured, or otherwise obtained without the authorization of the person depicted or by exceeding authorized access from property, accounts, messages, files, or resources of the person depicted.

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. This crime is commonly referred to as revenge porn. (Pen. Code, § 647, subd. (j)(4)(A).)

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 expands revenge porn to include the distribution of images recorded, captured, or otherwise obtained without the authorization of the person depicted or by exceeding authorized access from property, accounts, messages, files, or resources of the person depicted.

COMMENTS

1. Need for This Bill

According to the author of this bill:

AB 1962 will close loopholes and strengthen California's law against revenge porn. Under current revenge porn law, a jury must find that there was an agreement between the two parties that the image or video would remain private. However, there are circumstances where there is no such agreement because the image or video was taken surreptitiously. If a sexually explicit image or video is secretly taken and then distributed, this circumstance should fall under California's revenge porn laws.

To ensure that victims of revenge porn are adequately protected, AB 1962 will ensure that a person cannot distribute secretly recorded or captured images or videos without the authorization of the person depicted. Additionally, it would ensure that a person cannot distribute images or videos that are stolen from the depicted person. Too often perpetrators of revenge porn leverage legal loopholes to get away with this heinous crime, leaving victims traumatized, humiliated, and without justice. AB 1962 will ensure that if you record and distribute another person's sexually explicit images without their consent there will be legal consequences.

2. 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 states 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 10, 2024].)

This bill expands the existing revenge porn criminal statute to include images that were not consensually shared, specifically images that were obtained without the consent of the person depicted. Unlike revenge porn where the parties are known to each other, the expanded provisions of 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 intended to share with the perpetrator. The crux of the revenge porn law is to protect the privacy of an individual whose trust has been broken by a person who received a sexually explicit image with the understanding the image would not be shared with others. As discussed below, other crimes exist that involve invading a person’s privacy through unauthorized recording of the person or through unauthorized access of a person’s property including images of the person.

3. Combines Existing Crimes with Added Element of Distribution of the Image

This bill expands the crime of revenge porn or nonconsensual porn prohibited under Penal Code section 647, subdivision (j)(4) by including the distribution of images recorded, captured, or otherwise obtained without the authorization of the person depicted or by exceeding authorized access from property, accounts, messages, files, or resources of the person depicted.

The intent of this bill is to criminalize a situation where a person may be secretly recorded and the material distributed without their consent or even knowledge that the image was taken. Existing law prohibits secretly filming, photographing, or recording another person who may be in a state of full or partial undress, for the purpose of viewing the body of, or the undergarments worn by, that other person, without the consent or knowledge of that other person, in any area in which that other person has a reasonable expectation of privacy, with the intent to invade the privacy of that other person. (Pen. Code, § 647, subd. (j)(3).)

The act of secretly taking a picture or filming a person, with the intent to invade the privacy of that person, whether or not the image is subsequently distributed, is already a crime. For example, in *In re M.H.* (2016) 1 Cal.App.5th 699, evidence was sufficient to find that a minor invaded the privacy of a fellow high school student when he used his smart phone to surreptitiously record another student in a school bathroom stall while he was either masturbating or jokingly pretending to do so, and had the video disseminated on social media.

This bill also punishes a person who distributed images that were obtained by exceeding authorized access from the property, accounts, messages, files, or resources of the person depicted. In addition, Penal Code section 502 makes unauthorized access to a computer network, which includes a phone or social media profile, a crime. Under Section 502, there is protection for traditional hacking, but the statute also protects individual users from unauthorized access, and the offense is chargeable as a misdemeanor or felony. (Pen. Code, § 502.) In 2015, the Attorney General prosecuted a defendant who hacked into email accounts and stole victims' private intimate images. The defendant pled guilty to computer intrusion. (Office of the Attorney General, Attorney General Kamala D. Harris Announces Guilty Plea of Hacker Involved in Cyber Exploitation Scheme (June 17, 2015). (See <https://oag.ca.gov/news/press-releases/attorney-general-kamala-d-harrisannounces-guilty-plea-hacker-involved-cyber> [as of June 10, 2024].)

Additionally, a person could be guilty of using electronic communications to instill fear or harass another if they distribute information about another person for the purpose of imminently causing unwanted physical contact, injury or harassment. (Pen. Code, § 653.2.)

This bill appears to combine these existing crimes with the requirement that the defendant distributed an image with knowledge that distribution of the image would cause serious emotional distress and the person depicted suffers serious emotional distress.

Depending on the circumstances of the case, the defendant could be charged with existing underlying crimes or the new crimes created by this bill. However, the defendant cannot be punished for both the new crimes created by this bill and Penal Code section 647, subdivision (j)(2) or Section 502 based on the same conduct under the principles of double punishment. (Pen. Code, § 654.)

4. 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, otherwise they may violate the First Amendment's prohibitions against vagueness because it fails to provide adequate notice of what is impermissible under the law. Related to vagueness is over breadth where a law written so broadly as sweep up protected speech as well as unprotected speech. "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 expands the existing crime of revenge porn thereby creating new ways under which a person may be prosecuted under the statute. As to the constitutionality of the existing revenge porn statute, the California Appellate Court has found that the law was not overbroad or vague:

[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.) This bill would continue to require intent to cause distress for the new conduct that is punishable under the statute, however, the bill does not make clear whether the person who distributes the image is also required to be the one who recorded or obtained the image without authorization or by exceeding authorized access to the depicted persons accounts or files. Thus, a person may be criminalized under this bill for distribution of an image without knowing that the image was recorded or obtained without permission from the person depicted. For example, a person could take a screenshot of a video posted online that was knowingly captured by a third party without the authorization of the person depicted in the images. If that person shares the video, for example by sending it in a text to a friend, they could be guilty of a misdemeanor. Such a prohibition could have a chilling effect on speech.

The sponsor of the bill raises a potential scenario where there are two defendants, one that took the image secretly or without authorization and the other distributed the image. If the two defendants worked together to commit the crime then both can be found guilty under conspiracy. The person who did not distribute the image can also be found guilty of the crimes created by this bill without being the one who actually distributed the image if they requested, arranged or otherwise caused the second person to distribute the image.

Should this bill be amended to require that the person who unlawfully obtained or secretly recorded the depicted individual be the same person who distributed the image?

5. Argument in Support

According to Association of American University Women California:

The revenge porn statute, as presently written, seemingly precludes the prosecution of revenge porn when the distributed image was taken or obtained without the victim's knowledge or consent. This ambiguity in the statute's language impedes the prosecution of revenge porn in this specific context despite the victims still being subjected to the ugly consequences that this statute was enacted to prevent. By clarifying the revenge porn statute to explicitly include the distribution of intimate images taken without the victim's knowledge or consent, along with accounting for advancements in technology by including images obtained by exceeding authorized access, this bill will strengthen and expand protections for victims of revenge porn.

-- END --