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## SENATE COMMITTEE ON PUBLIC SAFETY

Senator Steven Bradford, Chair  
2021 - 2022 Regular

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**Bill No:** SB 1081                      **Hearing Date:** March 29, 2022  
**Author:** Rubio  
**Version:** February 15, 2022  
**Urgency:** No                                      **Fiscal:** Yes  
**Consultant:** SC

**Subject:** *Disorderly conduct: peeping, recording, and distribution of intimate images*

### HISTORY

**Source:** California District Attorneys Association

**Prior Legislation:** SB 23 (Rubio), Ch. 483, Stats. 2021  
SB 894 (Rubio), never heard in Sen. Public Safety, 2020  
AB 2065 (Lackey), failed Asm. Public Safety, 2020  
AB 324 (Kiley), Ch. 246, Stats. 2018  
AB 2643 (Wieckowski), Ch. 859, Stats. 2014  
SB 1255 (Cannella), Ch. 863, Stats. 2014  
SB 255 (Cannella), Ch. 466, Stats. 2013

**Support:** Arcadia Police Officers Association; Burbank Police Officers Association; California Coalition of School Safety Professionals; California State Sheriffs' Association; Claremont Police Officers Association; Corona Police Officers Association; Culver City Police Officers' Association; Fullerton Police Officers' Association; Inglewood Police Officers Association; Los Angeles School Police Officers Association; Newport Beach Police Association; Palos Verdes Police Officers Association; Placer County Deputy Sheriffs' Association; Pomona Police Officer Association; Riverside Police Officers Association; Riverside Sheriffs' Association; Santa Ana Police Officers Political Action Committee; Upland Police Officers Association

**Opposition:** ACLU California Action; California Attorneys for Criminal Justice; California Public Defenders Association (oppose unless amended); Pacific Juvenile Defender Center (oppose unless amended)

### PURPOSE

*The purpose of this bill is to define the terms “distribute” and “identifiable” for purposes of the existing crime of unlawful distribution of a private image, also known as “revenge porn.”*

*Existing law* makes it a misdemeanor for a person to intentionally distribute an image of the intimate body parts of another or of the person depicted engaged in a sex act under circumstances in which the persons agreed or understood that the image would remain private, and the person distributing the image knows or should know that the distribution of the image will cause serious

emotional distress, and the person depicted suffers that distress. This crime is also commonly known as “revenge porn.” (Pen. Code, § 647, subd. (j)(4)(A).)

*Existing law* provides that distribution of the image as described below is not a violation of the law:

- 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; or,
- The distribution is made in the course of a lawful public proceeding.

*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 described above 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).)

*This bill* provides that it is also unlawful for a person who intentionally causes the image to be distributed.

*This bill* defines “intentionally causes an image to be distributed to mean “when that person arranges, specifically requests, or intentionally causes another person to distribute the image.”

*This bill* defines “distribute” or “distribution” to include dissemination, presentation, display, exhibition, or otherwise sharing with a third party or the public.

*This bill* defines “identifiable” to mean the person depicted in the image is reasonably able to recognize themselves, a third party could reasonably determine the person’s identity, or the person who distributes the image reveals or alludes to the identity of the person. A third party need not actually recognize the depicted individual.

## COMMENTS

### 1. Need for This Bill

According to the author of this bill:

California’s revenge porn statute is limited to “distribution” of the pornographic image. One specific case, where an ex-boyfriend pasted enlarged naked pictures of his ex-girlfriend on the side of his truck and drove it all around town, did not meet the current statutory definition. This bill would fix that problem to ensure individuals that engage in revenge porn, for example this ex-boyfriend who drove around his truck, sharing a naked image of his ex-girlfriend – this scenario would allow for the offender to be prosecuted.

Under existing law, the statute does not provide a specific definition of what it means to "distribute" a pornographic image. In fact, "there is no indication 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 . . ." in the context of [Penal Code section 647\(j\)\(4\)](#). (*People v. Iniguez* (2016) 247 Cal. App. 4th Supp. 1, 10.) The *Iniguez* court referenced the Merriam-Webster Dictionary as an appropriate source to ascertain the common definition of "distribute." Today, Merriam-Webster defines *distribute* as "to give out or deliver." (Merriam-Webster Dict. Online <<https://www.merriam-webster.com/dictionary/distribute>> [as of September 1, 2021].) This definition would suggest that distribution requires a transfer of possession of the image from one person to another; merely displaying or otherwise showing a third-party an intimate photo would not qualify.

Further, there is no published case law defining what an "identifiable person" is within the context of Penal Code section 647(j)(4). However, similar language is used in Penal Code section 647(j)(3), which pertains to secretly filming an individual in a state of undress for sexual gratification. *That* definition is provided as someone who is "capable of identification . . . or being recognized." The one published case on this point indicates that a person is identifiable if it is "reasonably probable" that someone – including the victim themselves – could establish their identity based on their appearance, where the photo/video was taken, etc.. (*People v. Johnson* (2015) 234 Cal.App.4th 1432.) Applying the same definition and principles to Penal Code section 647(j)(4), the statute is not triggered if a photograph does not carry the reasonable probability of identification. It remains wholly unaddressed whether the distributor's statements alone about who is depicted within the photograph would render them an "identifiable person" or if the reasonable probability of identification must exist within the four corners of the photo itself.

## 2. "Revenge Porn" Laws

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).) In 2014, California also created a private right of action against a person for the intentional distribution of these types of images. (Civ. Code, § 1708.85.)

According to the National Conference of State Legislatures (NCSL), 46 states and Washington D.C. have laws prohibiting this conduct. "The dissemination of sexually explicit images of others without their permission, sometimes called 'revenge porn' or 'nonconsensual pornography,' often involves situations where the individual consented to the photos or videos but expected they would be kept private. In other cases, images may have been taken surreptitiously, and then shared. . . . There are few studies about the prevalence of these incidents, but research is beginning to shed light. For example, in a recent study of 3,044 adults (54% women), 1 in 20 reported having experienced nonconsensual pornography." (*Fighting Revenge Porn and 'Sextortion'*, NCSL (Aug. 2019).)

### 3. First Amendment Considerations and Relevant Case Law

A law that restricts speech has First Amendment implications. 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.)

While these guarantees are stated in broad terms, “the right to free speech is not absolute.” (*Aguilar v. Avis Rent A Car System, Inc.*, supra, 21 Cal. 4th at p. 134, citing *Near v. Minnesota* (1931) 283 U.S. 697, 708; and *Stromberg v. California* (1931) 283 U.S. 359.) As the United States Supreme Court has acknowledged: “Many crimes can consist solely of spoken words, such as soliciting a bribe (Pen. Code, § 653f), perjury (Pen. Code, § 118), or making a terrorist threat (Pen. Code, § 422).”

The first person to be convicted of the revenge porn law challenged the law as being unconstitutionally vague and overbroad. (*People v. Iniguez* (2016) 247 Cal. App. 4th Supp. 1.) The overbreadth doctrine requires that a statute restricting speech must be narrowly drawn so that the prohibition does not sweep under its coverage both protected and unprotected speech and conduct. The overbreadth involved must be substantial before the statute involved will be invalidated on its face. (*People v. Astalis*, 2014) 226 Cal. App. 4th Supp. 1, 7.) The vagueness doctrine generally requires that a statute be precise enough to give fair warning to actors that contemplated conduct is criminal, and to provide adequate standards to enforcement agencies, factfinders, and reviewing courts. (*Connally v. General Const. Co.*, (1926) 269 U.S. 365.)

In *Iniguez*, defendant had posted a private image showing the victim’s bare breasts on the victim’s employer’s Facebook page and used the victim’s name on the post. The victim stated that she and the defendant had agreed that the photo would remain private and that she suffered embarrassment and fear that she would lose her job. The defendant was convicted of distributing a private image pursuant to paragraph (4), subdivision (j) of Penal Code section 647, also known as the revenge porn law. The defendant appealed the conviction arguing that the law is unconstitutionally vague because it “fails to specify the nature of the agreement and understand[ing] the parties must reach before a person can legally ‘distribute’ the image,” and “fails to notify a person what constitutes ‘private.’” (*Iniguez, supra*, 247 Cal.App.4th Supp. at 6-7.) The defendant also argued that the law was overbroad because it “arbitrarily forecloses to any person the right to distribute legally taken photographs of certain images,” and it applies to “almost any photographs of ‘intimate body parts.’” (*Id.* at p. 9.)

The court disagreed and upheld the conviction. First on the issue of vagueness, the court found that these terms “are not such that a person of common intelligence would be required to guess at their meaning. Similarly, those of common intelligence would not differ as to its application, and its terms do not lend themselves to arbitrary and discriminatory application. The images subject to the statute are those of intimate body parts, including genitals and female breasts. The agreement or understanding referred to in the statute simply reflects that it is reasonable for

individuals to concur with one another that such images not be distributed to other persons. Pictures of these body parts are commonly understood to be private, meaning not to be seen by the general public absent consent given by the party being depicted. Read in the specific context of the statute, the terms used in section 647, former subdivision (j)(4) provided a person with reasonable specificity, thereby comporting with due process.” (*Id.* at pp. 7-8.)

On the issue of overbreadth, the court found that the law’s specified limitations greatly narrowed its applicability, diminishing the possibility that it could lead persons to refrain from constitutionally protected expression. The court reasoned that “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.] 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.’” (*Id.* at p. 10.)

This bill defines “distribution” to include “dissemination, presentation, display, exhibition, or otherwise sharing with a third party” and expands the act of distribution to include “causing to be distributed” to mean “when that person arranges, specifically requests, or intentionally causes another person to distribute the image.” As discussed in *Iniguez*, “distribute” is a commonly understood word and does not require definition. (*Id.* at p. 12.)

This bill also includes a new definition of the term “identifiable” to mean “the person depicted in the image is reasonably able to recognize themselves, a third party could reasonably determine the person’s identity, or the person who distributes the image reveals or alludes to the identity of the person. A third party need not actually recognize the depicted individual.” The term “allude” is defined by Merriam-Webster to mean “to make an indirect reference” and synonyms include to hint or infer.

The purpose of the existing identifiable requirement is to ensure that the law’s restriction on speech is narrowly tailored to protect a compelling government interest, in this case an individual’s privacy interests. When the identity of the person whose privacy is at stake is alluded to through hints or references that the general public may not be able to decipher, it becomes unclear whether the person’s privacy interest has been invaded in an “intolerable manner” justifying the restriction on speech. (*Iniguez, supra*, 247 Cal.App.4th Supp. at p.10)

### 3. “Identifiable” Person Requirement

As discussed above, this bill defines the term “identifiable” in Penal Code section 647, subd. (j)(4). This paragraph is one of four found in Penal Code section 647 that punishes invasion of privacy crimes. The other paragraphs criminalize peeping into a bathroom or dressing room with the intent to invade a person’s privacy (Pen. Code, § 647, subd. (j)(1)); secret videotaping or recording of a person for the purpose of viewing their body or undergarments for sexual gratification (Pen. Code, § 647, subd. (j)(1)); and secret videotaping or recording of a person’s body or undergarments with intent to invade the other person’s privacy (Pen. Code, § 647, subd. (j)(3).) In paragraphs (2), (3), and (4) of subdivision (j), the elements of the crime require that the person whose privacy has been invaded is identifiable. The law was amended in 2017 to define the term “identifiable” in paragraphs (2) and (3) to mean “capable of identification, or capable of being recognized, meaning that someone, including the victim, could identify or recognize the victim. It does not require the victim’s identity to actually be established.” This language was adopted from *People v. Johnson* (2015) 234 Cal.App.4th 1432.

In *Johnson*, the defendant was convicted of 12 counts of secretly videotaping, filming, photographing, or recording by electronic means, another, identifiable person under or through the clothing being worn by that other person, 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, with the intent to arouse, appeal to, or gratify the lust, passions, or sexual desires of that person and invade the privacy of that other person, under circumstances in which the other person has a reasonable expectation of privacy, in violation of subdivision (j)(2) of Penal Code section 647. Only three victims had been named, and the others were named Jane Does because law enforcement had not determined who their identities.

During the trial, the jury was shown video footage defendant had recorded in which he followed women and filmed under their skirts, without their knowledge. In some cases, the resulting footage did not capture the women's faces, or their profiles. (*Id.* at 1436.) In some cases only shoes, legs, skirts or dresses, purses, or the woman's back and the back of her head, appeared on screen. (*Id.* at 1437.) The court was called on to determine whether there was sufficient evidence to support findings that the defendant had violated the criminal statute when the evidence did not include the women's faces.

The court noted that the elements of criminal statute require that the defendant must film an "identifiable person" to face criminal liability. The court held that "identifiable" means capable of identification, or capable of being recognized. The court stated that in order to be "identifiable" it does not require that the victim's identity must ultimately be established. The court held the prosecution does not have to prove up the victim's identity, does not have to prove the victim has actually been identified, located, or named, and does not have to offer evidence showing anyone has actually recognized the victim. (*Id.* at 1441.)

In reaching its decision the court stated that, "identifiable" means that when all of the available evidence is considered, it is reasonably probable that someone could identify or recognize the victim. This includes the victim herself or himself." (*Ibid.*) The court reasoned that "[t]his is consistent with a legislative goal of criminalizing the invasive act when it poses the most significant risk of harm to specific individuals—when it is reasonably probable the victim could be recognized or recognize himself or herself, potentially leading to the victim's humiliation and embarrassment." (*Id.* at 1451.)

This bill provides a different definition of "identifiable" for the crime of revenge porn than is found in two other paragraphs of the same subdivision. Specifically, it states that "identifiable" for purposes the revenge porn law means "the person depicted in the image is reasonably able to recognize themselves, a third party could reasonably determine the person's identity, or the person who distributes the image reveals or alludes to the identity of the person. A third party need not actually recognize the depicted individual."

## 5. Committee Amendments

The author of this bill has agreed to remove the definition of "identifiable person" currently in this bill and adopt a definition that consistent with the definition that currently exists in Penal Code section 647, subdivision (j).

## 6. Argument in Support

According to California District Attorneys Association, the sponsor of this bill:

California led the nation in 2013 when it created the crime of revenge porn. Data shows that this form of “cyber revenge” is an invasive and increasingly common crime intended to shame and intimidate its victims, and the significant emotional distress it causes them can have severe consequences.

Under existing law, the crime of revenge porn is limited to “distribution” of pornographic images. One specific case, where an ex-boyfriend pasted enlarged naked pictures of his ex-girlfriend on the side of his truck and drove all around town, did not meet the current statutory definition.

This bill would fix that problem so that the offending truck driving ex-boyfriend could be prosecuted. SB 1081 will empower victims of revenge porn by expanding the definition of “distribution” and defining what an “identifiable person” means within the statute.

## 7. Argument in Opposition

According to the California Public Defenders Association, who is opposed unless amended:

While we are sympathetic to the issues that SB 1081 seeks to address, it runs afoul of the free speech and due process clauses respectively in the First, and Fifth Amendments of the United States Constitution. SB 1081’s proposed definition of “identifiable” is vague and overbroad.

First, it would include in the definition of “identifiable” that “the person who distributes the image reveals or alludes to the identity of the person. The phrase “alludes to the identity of the person” invites wrongful conviction. The common, everyday meaning of “allude” is “suggest,” or “hint at.” Under this definition the jury would be asked to convict an individual based on a mere hint. The normal “beyond a reasonable doubt” standard for conviction, fails here. A hint is the opposite of beyond a reasonable doubt. For example, an individual could put up a photograph of any naked headless woman and hint that it might be their former girlfriend by writing below the picture, “guess, who this is? she just moved out.” Under SB 1081’s definition, the individual could be charged because they “alluded” to the victim’s identity even if it was someone else’s photograph. This is a free speech issue, not a criminal matter.

Finally, CPDA has additional specific concerns regarding how SB 1081 will impact youth and accelerate “the school to prison pipeline.” We know from our practice that the type of conduct SB 1081 seeks to deter and punish is most often engaged in by youth. Youth, inclusive of adults under the age of 26, are known and proven to be impetuous, irrational and susceptible to peer pressure. Deterring youth from sending unsolicited sexual content should not be left to the juvenile and criminal justice systems. The legislature should shift focus to state mandated programs designed to educate youth on the concerns around sending unsolicited sexual content.