

# Drafting An Effective “Revenge Porn” Law: A Guide for Legislators

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## I. Defining the Problem

The disclosure of sexually explicit images without consent and for no legitimate purpose –also known as “revenge porn” – causes immediate, devastating, and in many cases irreversible harm. A vengeful ex-partner, opportunistic hacker, or rapist can upload an explicit image of a victim to a website where thousands of people can view it and hundreds of other websites can share it. In a matter of days, that image can dominate the first several pages of search engine results for the victim’s name, as well as being emailed or otherwise exhibited to the victim’s family, employers, co-workers, and peers. Victims are frequently threatened with sexual assault, stalked, harassed, fired from jobs,<sup>2</sup> and forced to change schools.<sup>3</sup> Some victims have committed suicide.<sup>4</sup>

The term “revenge porn,” though popular, is misleading in two respects. First, perpetrators are not always motivated by vengeance. Some act out of a desire for profit, notoriety, or entertainment, or for no particular reason at all. Perpetrators include not only bitter ex-partners but also people who are complete strangers to their victims. Second, the term “revenge porn” is sometimes interpreted to mean that taking a picture of oneself naked or engaged in a sexual act (or allowing someone else to take such a picture) is pornographic. Creating explicit images in the expectation within the context of a private, intimate relationship - an increasingly common practice<sup>5</sup> - is not equivalent to creating pornography. However, disclosing a private, sexually explicit image to someone other than the intended audience can be described as pornographic in the sense that it transforms a private image into public sexual entertainment. Many victim advocates accordingly use the term “nonconsensual pornography.”

Nonconsensual pornography is not a new phenomenon, but its prevalence, reach, and impact have increased in recent years. The Internet has greatly facilitated the rise of nonconsensual pornography, as dedicated “revenge porn” sites and other forums openly solicit private intimate images and expose them to millions of viewers, while allowing the posters themselves to hide in the shadows.<sup>6</sup> As many as 3000 websites feature “revenge porn,”<sup>7</sup> and intimate material is also widely distributed without consent through social media, blogs, emails, and texts. The Cyber Civil Rights Initiative (CCRI) is contacted by an average of 20-30 victims each month. Technology and social media make it possible for abusers to “crowd-source” their harassment as well as making it possible for unscrupulous individuals to profit from it.

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<sup>2</sup> See Ariel Ronneburger, *Sex, Privacy, and Webpages: Creating a Legal Remedy for Victims of Porn 2.0*, 21 Syracuse Sci. & Tech. L. Rep. 1 (2009), 10.

<sup>3</sup> See Danielle Keats Citron & Mary Anne Franks, *Criminalizing Revenge Porn*, 49 Wake Forest L. Rev. 345 (2014).

<sup>4</sup> Emily Bazelon, [Another Sexting Tragedy](#), Slate, April 12, 2013.

<sup>5</sup> In a recent survey of 1100 New Yorkers, nearly half (45%) reported that they had recorded themselves having sex. Post Staff, *New Yorkers Reveal What Their Sex Lives Are Really Like*, N. Y. POST (Sept. 3, 2014), <http://nypost.com/2014/09/03/new-yorkers-reveal-what-their-sex-lives-are-really-like/>.

<sup>6</sup> Dylan Love, [It Will Be Hard to Stop the Rise of Revenge Porn](#), Business Insider, Feb. 8, 2013.

<sup>7</sup> The Economist, [Revenge Porn: Misery Merchants](#), July 5, 2014.

Nonconsensual pornography often plays a role in intimate partner violence, with abusers using the threat of disclosure to keep their partners from leaving or reporting their abuse to law enforcement.<sup>8</sup> Traffickers and pimps also use nonconsensual pornography to trap unwilling individuals in the sex trade.<sup>9</sup> Rapists are increasingly recording their attacks not only to brag about their activities but also to discourage victims from reporting sexual assaults.<sup>10</sup> Nursing home workers have been caught posting nude photos of elderly and disabled patients to social media.<sup>11</sup>

The rise in this destructive conduct is due in part to the fact that malicious individuals do not fear the consequences of their actions. Before 2013, there were few laws in the United States explicitly addressing this invasion of sexual privacy, even as concerns over almost every other form of privacy (e.g., financial, medical, data) have captured legal and social imagination. While some existing voyeurism, surveillance, and computer hacking laws prohibit the nonconsensual observation and recording of individuals in states of undress or engaged in sexual activity, the nonconsensual *disclosure* of intimate images has been largely unregulated by the law. This is beginning to change.

## II. Legislative Efforts: Global and U.S.

In 2009, the Philippines became the first country to criminalize nonconsensual pornography, with a penalty of up to 7 years' imprisonment.<sup>12</sup> The Australian state of Victoria outlawed nonconsensual pornography in 2013.<sup>13</sup> In 2014, Israel became the first country to classify nonconsensual pornography as sexual assault, punishable by up to 5 years imprisonment;<sup>14</sup> Canada and Japan criminalized the conduct the same year.<sup>15</sup> England and Wales criminalized the conduct in February 2015.<sup>16</sup> New Zealand outlawed the practice in July 2015.<sup>17</sup> Northern

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<sup>8</sup> See Jack Simpson, [Revenge Porn: What is it and how widespread is the problem?](#), The Independent, July 2, 2014; Annmarie Chiarini, "[I was a victim of revenge porn.](#)" The Guardian, Nov. 19, 2013.

<sup>9</sup> See Ann Bartow, *Pornography, Coercion, and Copyright Law 2.0*, 10 Vand. J. Ent. & Tech. L. 799, 818; Marion Brooks, [The World of Human Trafficking: One Woman's Story](#), NBC Chicago, Feb. 22, 2013.

<sup>10</sup> Tara Culp-Ressler, [16 Year-Old's Rape Goes Viral on Twitter](#), Think Progress, July 10, 2014.

<sup>11</sup> See Charles Ornstein, *Nursing Home Workers Share Explicit Photos of Residents on Snapchat*, PRO PUBLICA (Dec. 21, 2015) <https://www.propublica.org/article/nursing-home-workers-share-explicit-photos-of-residents-on-snapchat>

<sup>12</sup> World Intellectual Property Organization, *Anti-Photo and Video Voyeurism Act of 2009* (Republic Act No. 9995), <http://www.wipo.int/edocs/lexdocs/laws/en/ph/ph137en.pdf>

<sup>13</sup> 'Revenge porn' outlawed: Israel and Australia ban spurned lovers from posting compromising photos of their exes, DAILY MAIL (Jan. 8, 2014), <http://www.dailymail.co.uk/femail/article-2535968/Revenge-porn-outlawed-Israel-state-Australia-ban-spurned-lovers-posting-compromising-photos-exes.html>

<sup>14</sup> Yifa Yaakov, *Israeli law makes revenge porn a sex crime*, TIMES OF ISRAEL (Jan. 6, 2014), <http://www.timesofisrael.com/israeli-law-labels-revenge-porn-a-sex-crime/>.

<sup>15</sup> House of Commons of Canada, Bill C-13; *The Criminalization of Revenge Porn in Japan*, 24 PAC. RIM. L. & POL'Y J. 289 (2015).

<sup>16</sup> I advised one of the Members of Parliament who originally pushed for a law prohibiting nonconsensual pornography, Maria Miller.

<sup>17</sup> Scoop, [Act Closes 'Revenge Porn' Loophole](#), July 6, 2015.

Ireland and Scotland followed suit in February<sup>18</sup> and March 2016, respectively.<sup>19</sup> In 2015, Germany's highest court ruled that an ex-partner must destroy intimate images of his former partner upon request.<sup>20</sup> Brazil is currently considering legislation on the issue.<sup>21</sup>

In the United States, only three U.S. states – New Jersey, Alaska, and Texas<sup>22</sup> – had criminal laws that could be directly applied to nonconsensual pornography before 2012. Between 2012 and May 2016, 32 states and Washington D.C. passed criminal legislation to address this conduct: Arizona,<sup>23</sup> Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Kansas, Louisiana, Maine, Maryland, Michigan, Minnesota, Nevada, New Hampshire, New Mexico, North Carolina, North Dakota, Oklahoma, Oregon, Pennsylvania, Tennessee, Texas (to supplement previous law), Utah, Vermont, Virginia, Washington, and Wisconsin, bringing the total number of states with “revenge porn” laws as of August 2016, to 34.<sup>24</sup> The Cyber Civil Rights Initiative advised drafters in most of these states, though the final versions of these laws do not necessarily reflect CCRI's recommendations.

The conduct is a felony in 6 of these states (Arizona, Hawaii, Idaho, Illinois, New Jersey, and Texas, as well as Washington, DC), a felony under some circumstances in several states, can be upgraded to a felony under certain circumstances in others, and is a misdemeanor offense in others.<sup>25</sup> State legislation has been introduced or is pending in more than a dozen other states, as well as Puerto Rico. As of August 2016, CCRI advised or is continuing to advise legislative efforts in Alabama, Kentucky, Massachusetts, Missouri, New York, and Virginia.<sup>26</sup>

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<sup>18</sup> See Lucy Clarke-Billings, [Revenge Porn Laws in Europe, U.S. And Beyond](#), NEWSWEEK (Sept. 16, 2016).

<sup>19</sup> See Mark McLaughlin, 'Revenge porn' becomes an offence as MSPs vote on sex crime law shake-up, DAILY RECORD (March 22, 2016), <http://www.dailyrecord.co.uk/news/scottish-news/revenge-porn-becomes-offence-msps-7610604#B3sUIs54qHlvDF1C.97>

<sup>20</sup> *Sex Tape Row: German court orders man to destroy naked images*, BBC NEWS (Dec. 22, 2015), <http://www.bbc.com/news/world-europe-35159187>.

<sup>21</sup> Alex Cochrane, *Legislating on Revenge Porn: An International Perspective*, SOCIETY FOR COMPUTERS AND LAW, July 24, 2014), <http://www.scl.org/site.aspx?i=ed38027>

<sup>22</sup> A portion of Texas's law was declared unconstitutional in 2014. See *Ex parte Thompson* (2014), available at <http://caselaw.findlaw.com/tx-court-of-criminal-appeals/1678295.html>.

<sup>23</sup> The ACLU brought suit against Arizona's original 2015 law; the parties ultimately agreed not to enforce the law. The Arizona legislature passed a revised version of the law in 2016. See Associated Press, *Arizona Gov. Ducey signs bill criminalizing 'revenge porn'*, AZ CENTRAL (March 11, 2016), <http://www.azcentral.com/story/news/politics/legislature/2016/03/11/arizona-gov-ducey-signs-bill-criminalizing-revenge-porn/81666052/>

<sup>24</sup> Cyber Civil Rights Initiative, *34 States + DC Have Revenge Porn Laws*, <http://www.cybercivilrights.org/revenge-porn-laws/> (last accessed August 16, 2016). The total is 34 instead of 35 because Texas's new law supplemented its previous one.

<sup>25</sup> In some states, the offense is a felony if certain aggravating factors are present, e.g. when the perpetrator publishes the images for profit or with the intent to harass the victim. See, e.g., Section 1335, Title 11 Delaware Code, available at [http://www.legis.delaware.gov/LIS/lis147.nsf/vwLegislation/HB+260/\\$file/legis.html?open](http://www.legis.delaware.gov/LIS/lis147.nsf/vwLegislation/HB+260/$file/legis.html?open).

<sup>26</sup> Virginia has a law but is seeking to revise it.

CCRI's Legislative and Tech Policy Director, Mary Anne Franks, began working with the office of Congresswoman Jackie Speier (D-CA) on a federal criminal bill in 2013.<sup>27</sup> The bill, titled the Intimate Privacy Protection Act, was introduced with bipartisan support in Congress on July 14, 2016. In a press release, Congresswoman Speier spoke of the harm caused by nonconsensual pornography: "The damage caused by these attacks can crush careers, tear apart families, and, in the worst cases, has led to suicide. What makes these acts even more despicable is that many predators have gleefully acknowledged that the vast majority of their victims have no way to fight back. ... My bill will fix that appalling legal failure."<sup>28</sup> The bill is supported by Facebook, Twitter, the National Organization for Women, the National Democratic Institute, the Information Technology and Innovation Foundation, Feminist Majority, Girls, Inc., and the Cyber Civil Rights Initiative.<sup>29</sup> Leading constitutional scholar Erwin Chemerinsky also gave a statement in support of the bill.<sup>30</sup>

### III. Elements of an Effective Law

Unfortunately, many of the state laws regulating nonconsensual pornography that have passed or are pending suffer from overly burdensome requirements, narrow applicability, and/or constitutional infirmities. A strong law must be clear, specific, and narrowly drawn to protect both the right to privacy and the right to freedom of expression. The following is a list of features an effective law should have, as well as features that should be avoided.

1. The law SHOULD, first, clearly set out the elements of the offense. The basic elements should be (1 the disclosure of private, sexually explicit photos or videos of an identifiable<sup>31</sup> person and (2 without the consent of the person depicted.<sup>32</sup>
2. The law SHOULD also clearly state the requisite *mens rea* for each element of the crime. It is an axiom of criminal law that a person cannot be guilty "unless the mind be guilty; that is unless the intent is criminal."<sup>33</sup> *Mens rea*, or "guilty mind," "refers to the mental state the

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<sup>27</sup> Progressive Law Practice, Federal Legislation on Tap to Fight 'Revenge Porn,' (Jan. 2015), <http://progressivelawpractice.com/index.php/big-law/692-federal-legislation-on-tap-to-fight-revenge-porn>.

<sup>28</sup> Congresswoman Jackie Speier, *Press Release: Congresswoman Speier, Fellow Members of Congress Take on Nonconsensual Pornography, AKA Revenge Porn* (July 14, 2016), <http://goo.gl/JTD1AZ>.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> The designation of an "identifiable" person makes clear that the statute will not apply to photos or videos that merely depict body parts or sexual activity and provide no indication of who the subjects might be.

<sup>32</sup> See Illinois S.B. 1009 (signed into law December 2014): "A person commits nonconsensual dissemination of private sexual images when he or she... intentionally disseminates an image of another person... who is identifiable from the image itself or from information displayed in connection with the image; and who is engaged in a sexual act or whose intimate parts are exposed... and obtains the image under circumstances in which a reasonable person would know or understand that the image was to remain private; and knows or should have known that the person in the image has not consented to the dissemination." (available at <http://www.ilga.gov/legislation/publicacts/fulltext.asp?Name=098-1138>).

<sup>33</sup> Black's Law Dictionary 55 (4<sup>th</sup> ed. 1968).

defendant must have had with regard to the ‘social harm’ elements set out in the definition of the offense.”<sup>34</sup> At common law, the terms for mens rea were numerous and often ill-defined. The Model Penal Code (MPC), by contrast, uses just four terms for mens rea: purpose, knowledge, recklessness, and negligence. Many states have adopted the MPC approach to mens rea.<sup>35</sup>

The mens rea for the first element, disclosure, should be purpose or knowledge. The distinction between the two is not bright in most circumstances, and in the context of disclosures amount effectively to the same thing. The primary point is to ensure that purely accidental disclosures would not be punishable.

The mens rea for the second element should be no higher than recklessness. While the term “recklessness” can be defined in various ways, the MPC offers a fairly straightforward definition: recklessness is the conscious disregard of a “substantial and unjustified risk.”<sup>36</sup> It is based on the actual knowledge of risk on the part of the offender, as opposed to negligence, which is based on what the offender should have known. That is, for an offender to be punished, he would have to know that there was a substantial risk that the person depicted had not consented to the disclosure and be unable to offer justification for why he took that risk.

3. The law SHOULD explicitly include an exception for sexually explicit images voluntarily exposed in public or commercial settings.<sup>37</sup> This would ensure that individuals would not be prosecuted for recording and reporting unlawful activity in public places, such as flashing, or forwarding or linking to commercial pornography (or content they reasonably believed was commercial pornography).<sup>38</sup>

4. The law SHOULD include a narrow exception for disclosures made in the public interest, including the lawful and common practices of law enforcement or medical treatment. Law enforcement officers and medical professionals often have to deal with intimate materials, such as visual evidence of injuries from domestic violence or rape. While it is vital that such

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<sup>34</sup> United States v. Cordoba-Hincapie, 825 F. Supp. 485 (1993).

<sup>35</sup> See JOSHUA DRESSLER & STEPHEN GARVEY, CRIMINAL LAW: CASES AND MATERIALS, 7<sup>th</sup> ed. (2016), 168-9.

<sup>36</sup> MPC 2.02(c)

<sup>37</sup> See Illinois S.B. 1009, which exempts the intentional dissemination of an image of another identifiable person who is engaged in a sexual act or whose intimate parts are exposed “when the dissemination is made for the purpose of a criminal investigation that is otherwise lawful”; “for the purpose of, or in connection with, the reporting of unlawful conduct”; when the images involve voluntary exposure in public or commercial settings”; or “when the dissemination serves a lawful public purpose.” (available at <http://www.ilga.gov/legislation/publicacts/fulltext.asp?Name=098-1138>)

<sup>38</sup> See Illinois S.B. 1009, which exempts the intentional dissemination of an image of another identifiable person who is engaged in a sexual act or whose intimate parts are exposed “when the dissemination is made for the purpose of a criminal investigation that is otherwise lawful”; “for the purpose of, or in connection with, the reporting of unlawful conduct”; when the images involve voluntary exposure in public or commercial settings”; or “when the dissemination serves a lawful public purpose.”

materials be kept out of the public eye, the law should not burden the necessary flow of evidence or medical records that takes place in professional settings. Outside of law enforcement and medical practices, the “public interest” exception might apply, for example, to situations in which a concerned partner or parent of a victim of nonconsensual pornography contacts an advocacy organization or social media platform and includes links to or copies of the content in the hopes of having it removed or otherwise obtaining assistance, without getting express permission from the victim to do so.

5. The law SHOULD include a severability clause, so that in the event that any particular provision is declared invalid, the rest of the provision will remain effective.

6. The law SHOULD NOT require that perpetrators act with the intent to harass, humiliate, or cause emotional distress. Such a requirement mischaracterizes nonconsensual pornography as a form of harassment rather than as an invasion of privacy and potentially renders statutes vulnerable to First Amendment challenge.

The term “revenge porn” may be partly to blame for these misguided intent requirements, as it implies that this conduct is motivated by personal animus.<sup>39</sup> Nonconsensual pornography often is, of course, a form of harassment. “Classic” revenge porn cases involve bitter exes determined to destroy their victims’ lives. However, a significant portion of nonconsensual pornography cases involves people who do not even know each other. The proprietors of revenge porn websites, for example, do not have personal grievances against the thousands of victims depicted without consent on their platforms. Neither did the distributors of over a hundred female celebrities’ private, intimate photos in the notorious 2014 “celebrity hack.”<sup>40</sup> Nor do the many perpetrators who distribute or publish photos and videos on the presumption that their victims will never discover what they have done, including the California Highway Patrol officers who accessed and forwarded female DUI suspects’ intimate cellphone pictures as a “game,”<sup>41</sup> the fraternity brothers who uploaded photos of unconscious, naked women to a members-only Facebook page,<sup>42</sup> or the caretakers who posted explicit images of their unsuspecting patients to Snapchat.<sup>43</sup>

“Intent to harass” requirements confuse mens rea with motive. While the requisite mens rea for each element of a criminal law should be clearly stated, criminal laws are not required to include – and indeed the majority do not include – motive requirements. “Intent to cause

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<sup>39</sup> See Franks, [How to Defeat Revenge Porn](#), *supra* note 24.

<sup>40</sup> See Rob Price, [Bitcoin Beggars Try to Profit Off Leaked Celebrity Nudes](#), Daily Dot, Sept. 1, 2014.

<sup>41</sup> See Matthias Gafni & Malaika Fraley, [Warrant: CHP officer says stealing nude photos from female arrestees ‘game’ for cops](#), Contra Costa Times, Oct. 24, 2014.

<sup>42</sup> Holly Otterbein, [Member of Penn State’s Kappa Delta Rho Defends Fraternity](#), Philadelphia Magazine, March 18, 2015.

<sup>43</sup> See Charles Ornstein, *Nursing Home Workers Share Explicit Photos of Residents on Snapchat*, PRO PUBLICA (Dec. 21, 2015) <https://www.propublica.org/article/nursing-home-workers-share-explicit-photos-of-residents-on-snapchat>

emotional distress” or “intent to harass” requirements<sup>44</sup> arbitrarily distinguish between perpetrators motivated by personal desire to harm and those motivated by other reasons.<sup>45</sup> Motive requirements ignore the reality that many perpetrators are motivated not by an intent to distress but by a desire to entertain, to make money, or achieve notoriety.<sup>46</sup>

What is more, while “intent to harass” provisions are often touted as necessary to ensure compliance with the First Amendment, the reality is that such provisions are neither required by First Amendment doctrine and in fact create First Amendment vulnerabilities. The Supreme Court has never held that statutes regulating expression must include motive requirements; if anything, the Court has suggested that motive requirements might render an otherwise constitutional statute unconstitutional.<sup>47</sup> Indeed, cyberbullying laws in North Carolina and New York that included such clauses have recently been declared unconstitutional.<sup>48</sup> The courts in these cases noted that phrases such as harass, torment, embarrass, etc. are unconstitutionally vague. While the American Civil Liberties Union (ACLU) has been the most vocal proponent of the claim that “intent to harass” provisions are necessary to ensure a statute’s constitutionality,<sup>49</sup> the organization itself previously characterized the term “intent to cause substantial emotional distress” as “unconstitutionally overbroad” in its objection to federal stalking provisions of the Violence Against Women Act.<sup>50</sup>

Requiring “intent to harass” and similar provisions moreover renders nonconsensual pornography laws duplicative of harassment laws, which already exist in every state and at

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<sup>44</sup> See [Utah H.B. 71](#) (signed into law March 2014): “An actor commits the offense of distribution of intimate images if the actor, with the intent to cause emotional distress or harm, knowingly or intentionally distributes to any third party any intimate image of an individual who is 18 years of age or older...”

<sup>45</sup> See Mary Anne Franks, [How to Defeat Revenge Porn: First, Recognize It’s About Privacy, Not Revenge](#), Huffington Post, June 22, 2015.

<sup>46</sup> As the proprietor of a once-popular revenge porn site described his motivations, “I call it entertainment... We don’t want anyone shamed or hurt we just want the pictures there for entertainment purposes and business.” CBS Denver, [‘Revenge Porn’ Website has Colorado Women Outraged](#), Feb. 3, 2014.

<sup>47</sup> See *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377 (1992).

<sup>48</sup> See Eugene Volokh, *N.C. court strikes down ban on posting ‘personal or sexual information’ about minors ‘with the intent to torment,’* WASH. POST (June 11, 2016) <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/06/11/n-c-court-strikes-down-ban-on-posting-personal-or-sexual-information-about-minors-with-the-intent-to-torment/>; David L. Hudson Jr., *NY high court says anti-cyberbullying law won’t pass First Amendment muster*, ABA JOURNAL (Nov. 1, 2014) [http://www.abajournal.com/magazine/article/bully\\_fighting\\_new\\_yorks\\_high\\_court\\_says\\_anti\\_cyberbullying\\_la\\_w\\_wont\\_pass\\_f](http://www.abajournal.com/magazine/article/bully_fighting_new_yorks_high_court_says_anti_cyberbullying_la_w_wont_pass_f)

<sup>49</sup> The ACLU Foundation of Arizona makes this claim in its recent lawsuit against Arizona’s non-consensual pornography law, [Antigone Books et al v. Horne](#) (2014). The ACLU of Maryland made this claim in its [Testimony](#) for the Maryland House Judiciary Committee on HB 43 (Jan. 28, 2014). See Mary Anne Franks, [The ACLU’s Frat House Take on ‘Revenge Porn,’](#) Huffington Post, April 1, 2015.

<sup>50</sup> ACLU, *New Expansion of Stalking Law Poses First Amendment Concerns*, March 12, 2013 (<https://www.aclu.org/blog/free-speech/new-expansion-stalking-law-poses-first-amendment-concerns>).



the federal level and are demonstrably inadequate to address the specific harm of nonconsensual pornography.<sup>51</sup>

5. The law SHOULD NOT be so broadly drafted as to include drawings<sup>52</sup> or incorporate expansive definitions of nudity (e.g. buttocks, female nipples visible through gauzy or wet fabric, covered male genitals in a “discernibly turgid state”)<sup>53</sup> in its scope. Too-broad definitions could lead to “baby in the bath” problems, criminalizing parents who share innocuous pictures of their infants.<sup>54</sup>

6. At the same time, the law SHOULD NOT be so narrowly drafted as to apply only to images featuring nudity, as an image can be sexually explicit without containing nudity.<sup>55</sup>

6. The law SHOULD NOT be so narrowly drafted as to only apply to disclosures made online or through social media,<sup>56</sup> as nonconsensual pornography can also take “low-tech” forms such as printed photographs and DVDs.<sup>57</sup>

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<sup>51</sup> If legislators are compelled by political pressures to include some reference to harm or distress, a better approach would be to employ an objective standard, e.g. “when a reasonable person would know that such disclosure would cause harm or distress.”

<sup>52</sup> One draft bill in Michigan, S.B. 0294 stated “A person shall not ... post on the Internet any sexually explicit photograph, drawing, or other visual image of another person with the intent to frighten, intimidate, or harass any person.” <http://www.legislature.mi.gov/documents/2013-2014/billengrossed/Senate/pdf/2014-SEBS-0924.pdf>. The bill that Michigan ultimately passed narrowed the scope of images. See Enrolled Senate Bill No. 508, <http://www.legislature.mi.gov/documents/2015-2016/billenrolled/Senate/pdf/2015-SNB-0508.pdf>.

<sup>53</sup> See [Georgia H.B. 838](#), defining “nudity” as “(A) The showing of the human male or female genitals, pubic area, or buttocks without any covering or with less than a full opaque covering; (B) The showing of the female breasts without any covering or with less than a full opaque covering; or (C) The depiction of covered male genitals in a discernibly turgid state.”

<sup>54</sup> See Riya Bhattacharje, [Florida pushes bill to criminalize 'revenge porn'](#), MSN News, April 3, 2013: “University of Miami law professor Mary Anne Franks said it was ‘a very good sign’ that legislators were working toward criminalizing revenge porn, but the proposed bill was too broad in some aspects and too narrow in others. ‘It’s criminalizing the creation of an image that depicts nudity, but it doesn’t define nudity,’ Franks said. ‘It needs to make clear what it means by nudity and that nudity isn’t the only thing we care about. So it is unclear whether it refers to genitalia, buttocks, breasts, etc. or all of the above. That vagueness might mean that a mother who uploads a photo of her baby in the bath to Facebook could face criminal prosecution.’”

<sup>55</sup> See Carrie Goldberg, [Seven Reasons Illinois is Leading the Fight Against Revenge Porn](#), Cyber Civil Rights Initiative, Dec. 31, 2014.

<sup>56</sup> See [Georgia H.B. 838](#), limiting application to a person who “(1) Electronically transmits or posts, in one or more transmissions or posts, a photograph or video ... when the transmission or post is harassment or causes financial loss to the depicted person and serves no legitimate purpose to the depicted person; or (2) Causes the electronic transmission or posting, in one or more transmissions or posts, of a photograph or video ...when the transmission or post is harassment or causes financial loss to the depicted person and serves no legitimate purpose to the depicted person.”

<sup>57</sup> See, e.g., the case of David Feltmeyer, who allegedly distributed sexually explicit DVDs of his ex-girlfriend on the windshields of cars in her neighborhood after she declined to continue a relationship with him. [Police: Man Left DVDS of ex Girlfriend Performing Sex Acts on Car Windshields](#), AP News, March 3, 2007. See also the case of Jovica Petrovic, who sent 8.5 x11 glossy photos of his ex-wife performing sex acts in FedEx envelopes to her boss as well as to her home address, where they were opened by her seven-year-old son. Nicholas Phillips, [Sext Fiend](#), Riverfront Times, April 18, 2013.

7. The law SHOULD NOT be limited to conduct perpetrated by a current or former intimate partner.<sup>58</sup> While such laws highlight the fact that nonconsensual pornography is often a form of intimate partner violence, they allow friends, co-workers, and strangers to engage in this destructive conduct with no consequence.

8. The law SHOULD NOT broaden immunity for online entities beyond what is provided by the Section 230 of the federal Communications Decency Act.<sup>59</sup> Section 230 protects online entities from liability only to the extent that they function solely as intermediaries for third-party content. To the extent that online entities act as co-developers or co-creators of content, they can be prosecuted under state criminal law.<sup>60</sup>

#### IV. Model State Law

An actor may not knowingly disclose an image of another person who is identifiable from the image itself or information displayed in connection with the image and whose intimate parts are exposed or who is engaged in a sexual act, when the actor knows or recklessly disregarded the risk that the depicted person has not consented to such disclosure [and under circumstances in which the actor knew or should have known that the depicted person had a reasonable expectation of privacy. A person who has consented to the disclosure of an image within the context of a confidential relationship retains a reasonable expectation of privacy with regard to disclosures beyond such a relationship, as does a person whose intimate parts are exposed or who is engaging in a sexual act involuntarily, whether in public or private.]<sup>61</sup>

A. Definitions. For the purposes of this section,

- (1) “Disclose” includes transferring, publishing, distributing, or reproducing;
- (2) “Image” includes a photograph, film, videotape, recording, digital, or other reproduction;
- (3) “Intimate parts” means the naked genitals, pubic area, anus, or female post-pubescent nipple of the person;

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<sup>58</sup> See [Pennsylvania H.B. 2107](#): “a person commits the offense of unlawful dissemination of intimate image if, with intent to harass, annoy or alarm a current or former sexual or intimate partner, the person disseminates a visual depiction of the current or former sexual or intimate partner in a state of nudity or engaged in sexual conduct.”

<sup>59</sup> 42 U.S.C. §230

<sup>60</sup> Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC 521 F.3d 1157 (9<sup>th</sup> Cir. 2008)

<sup>61</sup> The “reasonable expectation of privacy” language is bracketed because of the benefits and drawbacks of including it. The benefit of including such language is to emphasize that the statute only protects private images. This point is already addressed in B(1) of the exceptions, but including it in the elements might helpfully underscore this aspect. The drawback of this approach is that the term “reasonable expectation of privacy” might create more ambiguity than it resolves, especially considering the doctrinal baggage of the term in Fourth Amendment jurisprudence.

- (4) “Sexual act” includes but is not limited to masturbation; genital, anal, or oral sex; sexual penetration with objects; or the transfer or transmission of semen upon any part of the depicted person’s body.

B. Exceptions. This section does not apply to

- (1) Images involving voluntary exposure in public or commercial settings; or
- (2) Disclosures made in the public interest, including but not limited to the reporting of unlawful conduct, or the lawful and common practices of law enforcement, criminal reporting, legal proceedings, or medical treatment.

C. Severability.

- (1) The provisions of this section are severable. If any provision of this section or its application is held invalid, that invalidity shall not affect other provisions or applications that can be given effect without the invalid provision or application

## V. Supplemental Resources: Revenge Porn Statistics

From a Cyber Civil Rights Initiative survey with 1606 total respondents, 361 victims:

- 61% of respondents said they had taken a nude photos/videos of themselves and shared it with someone else
- 23% of respondents were victims of revenge porn.

Statistics on Revenge Porn Victims:

- 83% of revenge porn victims said they had taken nude photos/videos of themselves and shared it with someone else
- 90% of revenge porn victims were women
- 68% were 18-30 years old, 27% were 18-22
- 57% of victims said their material was posted by an ex-boyfriend, 6% said it was posted by an ex-girlfriend, 23% said it was posted by an ex-friend, 7% said it was posted by a friend, 7% said it was posted by a family member
- Information that was posted with the material:
  - Full name: 59%
  - Email Address: 26%
  - Social network info/screenshot of social network profile: 49%
  - Physical home address: 16%
  - Phone number: 20%
  - Work Address: 14%
  - Social Security Number: 2%
- 93% of victims said they have suffered significant emotional distress due to being a victim

- 82% said they suffered significant impairment in social, occupational, or other important areas of functioning due to being a victim
- 42% sought out psychological services due to being a victim
- 34% said that being a victim has jeopardized their relationships with family
- 38% said it has jeopardized their relationships with friends
- 13% said they have lost a significant other/partner due to being a victim
- 37% said they have been teased by others due to being a victim
- 49% said they have been harassed or stalked online by users that have seen their material
- 30% said they have been harassed or stalked outside of the Internet (in person, over the phone) by users that have seen the material online
- 40% fear the loss of a current or future partner once he or she becomes aware that this is in their past
- 54% fear the discovery of the material by their current and/or future children
- 25% have had to close down an email address and create a new one due to receiving harassing, abusive, and/or obscene messages
- 26% have had to create a new identity (or identities) for themselves online
- 9% have had to shut down their blog
- 26% have had to close their Facebook account
- 11% have had to close their Twitter account
- 8% have had to close their LinkedIn account
- 26% have had to avoid certain sites in order to keep from being harassed
- 54% have had difficulty focusing on work or at school due to being a victim
- 26% have had to take time off from work or take less credits in/a semester off from school due to being a victim
- 8% quit their job or dropped out of school
- 6% were fired from their job or kicked out of school
- 13% have had difficulty getting a job or getting into school
- 55% fear that the professional reputation they have built up could be tarnished even decades into the future
- 57% occasionally or often have fears about how this will affect their professional advancement
- 52% feel as though they are living with something to hide that they cannot acknowledge to a potential employer (such as through an interview).
- 39% say that this has affected their professional advancement with regard to networking and putting their name out there
- 3% have legally changed their name due to being a victim
- 42% haven't changed their name, but have thought of it
- 42% have had to explain the situation to professional or academic supervisors, coworkers, or colleagues

- 51% have had suicidal thoughts due to being a victim
- 3% of victims have posted revenge porn of someone else

## VI. Supplemental Resources: Illustrative Case Studies

The following cases provide a sense of the scope and severity of this conduct.

### 1. HOLLY JACOBS

Holly Jacobs is not the name she was born with. A few years ago, the Miami, Florida resident was working on completing her doctorate in Industrial/Organizational Psychology at FIU and had moved on from what she thought had been an amicable breakup with a longtime, long-distance boyfriend.

She was happy in a new relationship, so much so that she posted a picture of herself with her new boyfriend to Facebook to announce their relationship. Soon after, she received an email that would change her life.

*“It’s 8:15 where you are. You have until 8:37 to reply. Then I start the distribution.”*

Holly quickly realized what the sender of the email was threatening to distribute, which also made the sender’s identity clear. She and her ex-boyfriend had exchanged intimate photos throughout their three-year relationship, but she had never thought that he would use them to destroy her life.

Three days after Holly received the email, her pictures were on over 200 websites and she had been inundated with unwelcome sexual propositions from men who had seen them. The pictures had also been sent to her boss and a co-worker. Holly spent the next few months trying to explain the situation to her employer, her family, her friends, and colleagues, and to plead with porn sites and search engines to remove her material. After a solid month writing her dissertation by day and sending takedown notices at night, the material was gone. But not for long. Within two weeks, her material was up on 300 websites.

At that point, Holly gave up trying to change her search results, and started the process to change her name. She couldn’t see any other way to escape the material that was following her everywhere, jeopardizing her career, her psychological health, and her relationship.

But that wasn’t the biggest change Holly was to make. After being told repeatedly by lawyers and police officers that what her ex was doing wasn’t against the law, she decided that this should change too. She started the End Revenge Porn Campaign and teamed up with activist Charlotte Laws and law professors Mary Anne Franks and Danielle Citron to form a nonprofit organization, the Cyber Civil Rights Initiative. One of the organization’s primary

goals is to get nonconsensual pornography criminalized in every state and at the federal level. Less than two years later, the formerly obscure issue of revenge porn has been pushed into the public consciousness and more than half of U.S. states have enacted criminal legislation against the conduct. Read more about Holly [here](#).

## 2. ALECIA ANDREWS-CRAIN

Alecia Andrews-Crain, a Missouri mother of two, thought she could finally breathe a sigh of relief after the full order of protection against her abusive ex-husband had been granted in February 2014. But one morning only a few days later, as Alecia went about her work as an independent insurance agent, she was greeted by a startling message in her inbox.

*Subject: Someone did something nasty to you on [redacted].com*

Once she clicked on the link, she saw a photograph of herself taken seven years ago as she stepped out of the shower. She was still married to her husband then, and she had no time to react to his unexpected presence in the bathroom with a camera – an example of his casually abusive behavior. This seven-year-old picture was now posted to one of the most notorious – and most popular - revenge porn websites. The photo showed up connected to her LinkedIn and Facebook profiles, causing her personal and professional humiliation.

Like Holly, Alecia went to the police, certain that her ex’s malicious behavior had to be against the law. In fact, Missouri does not have a law prohibiting the nonconsensual distribution of intimate images, and the act was not considered a violation of her order of protection. Alecia was left without recourse. Alecia is now advocating for Missouri to reform its criminal laws to address this issue. Read more about Alecia [here](#).

## 3. “SARAH”

In 2013, Alex Campbell was sentenced to life in prison for human trafficking. According to the four witnesses who testified against him, Campbell used violence and intimidation to force women into prostitution. One of the women, “Sarah” (not her real name) was forced to perform sexual acts with another woman while Campbell filmed it. Campbell threatened to send this video to Sarah’s family if she ever attempted to escape. Sarah’s story offers a glimpse of how nonconsensual pornography is used by sex traffickers to keep women in servitude. Read more about Sarah’s story [here](#).

## 4. AUDRIE POTT

While attending a party in September 2012, fifteen-year-old Audrie Pott became extremely intoxicated. Three boys and a girl took her to an upstairs bedroom. The girl left when the boys starting undressing Audrie and drawing on her breasts and buttocks with markers. The boys

then took pictures of themselves sexually assaulting Audrie. When Audrie woke up the next morning, she didn't know where she was or what had happened to her. Seeing the marks on her body led Audrie to ask her friends how they got there. Through Facebook conversations, Audrie learned what the boys had done to her. She also learned that there were pictures, and that those pictures were circulating around the school.

A week later, Audrie called her mother from school at midday and asked to be taken home. She retreated to her room when the two arrived at home; her mother decided to check on her after not hearing anything for 20 minutes. The bathroom door was locked and there was no answer from inside. Audrie's mother forced open the door and found her only child hanging from a belt attached to the showerhead. Paramedics arrived soon after Audrie's mother called 911, but their efforts to save Audrie were unsuccessful.<sup>62</sup> Read more about Audrie's story [here](#).

## 5. REHTAEH PARSONS

In 2011, 15-year-old Rehtaeh Parsons went to a party. She had several alcoholic drinks, becoming quite sick after doing so – sick enough that at one point in the evening she was vomiting out of an open window. As she did so, an older boy sexually penetrated her from behind. Another boy at the party, who Rehtaeh later said also raped her, took a photo, which eventually spread around her school and her town. Rehtaeh received a barrage of messages calling her a slut and propositioning her for sex. In April 2013, Rehtaeh attempted to hang herself, which left her in a comatose state. She was taken off life support a few days later.

In an open letter following her death, her father, Glen Canning, wrote: “Why is it [the boys] didn't just think they would get away with it; they knew they would get away with it. They took photos of it. They posted it on their Facebook walls... they emailed it... They shared it with the world as if it was a funny animation.” Rehtaeh's father closed the letter with these words: “[For the love of God do something](#).”<sup>63</sup>

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<sup>62</sup> Nina Burleigh, *Sexting, Shame and Suicide*, ROLLING STONE (Sept. 17, 2013), <http://www.rollingstone.com/culture/news/sexting-shame-and-suicide-20130917>.

<sup>63</sup> Glen Canning, *Rehtaeh Parsons was my daughter* (April 10, 2013), <http://glencanning.com/2013/04/rehtaeh-parsons-was-my-daughter/>.