

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

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## **I. Defining the Problem**

Nonconsensual pornography is “the distribution of sexually graphic images of individuals without their consent.”<sup>2</sup> Nonconsensual pornography is created from images voluntarily exchanged with another person within the context of a private relationship, as well as images originally created or obtained without consent (e.g., through hacking, surreptitious filming, or recordings of sexual assaults). No matter the motive or how the images are originally obtained, the unauthorized disclosure of such highly sensitive, private information can cause immediate, devastating, and in many cases irreparable harm. With the click of a button, these images can be made accessible to millions of strangers or transmitted directly to the victim’s family

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<sup>2</sup> Danielle Keats Citron & Mary Anne Franks, *Criminalizing Revenge Porn*, 49 WAKE FOREST L. REV. 345, 346 (2014).

members, employers, and peers. The exposure of such sensitive intimate images wreaks havoc on victims' personal, professional, educational, and family life.<sup>3</sup> sexual assault, stalked, harassed, fired from jobs, and forced to change schools.<sup>4</sup> Some victims have committed suicide.<sup>5</sup>

Contrary to what the colloquialism “revenge porn” suggests, many perpetrators of nonconsensual pornography are not motivated by personal vindictiveness, but by motives such as greed, voyeurism, and self-aggrandizement. Indeed, the CCRI study found that the vast majority of perpetrators—nearly 80%—report being motivated by something other than the desire to hurt the victim.<sup>6</sup> Domestic abusers threaten to disclose intimate photos to keep partners from leaving or reporting abuse to law enforcement;<sup>7</sup> sex traffickers use compromising photos to coerce unwilling individuals to stay in the sex trade; rapists record attacks to discourage victims from reporting assaults;<sup>8</sup> nursing home workers post naked photos of vulnerable patients to social media for entertainment;<sup>9</sup> and “revenge porn” site owners traffic in unauthorized sexually explicit images to make money or to attain notoriety.<sup>10</sup>

Victims often find themselves unemployable due to the disclosure, or may withdraw from online life entirely, to the detriment of their job prospects and careers.<sup>11</sup> Victims can spend thousands of dollars in an often-futile attempt to get

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<sup>3</sup> Id. at 350–54.

<sup>4</sup> See Ariel Ronneberger, *Sex, Privacy, and Webpages: Creating a Legal Remedy for Victims of Porn 2.0*, 21 Syracuse Sci. & Tech. L. Rep. 1 (2009), 10.

<sup>5</sup> Emily Bazelon, [Another Sexting Tragedy](#), Slate, April 12, 2013.

<sup>6</sup> CCRI, *Frequently Asked Questions*, <https://www.cybercivilrights.org/faqs/>.

<sup>7</sup> Citron & Franks at 351.

<sup>8</sup> See Mary Anne Franks, “Revenge Porn” Reform: A View from the Front Lines, 69 FLA. L. REV. 1251, 1258 (2017).

<sup>9</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-explicitphotos-of-residents-on-snapchat>.

<sup>10</sup> ‘Revenge Porn’ Website has Colorado Women Outraged, CBS DENVER, Feb. 3, 2014, <http://denver.cbslocal.com/2013/02/03/revenge-porn-website-hascolorado-woman-outraged/>.

<sup>11</sup> Ariel Ronneberger, *Sex, Privacy, and Webpages: Creating a Legal Remedy for Victims of Porn 2.0*, 21 SYRACUSE SCI. & TECH. L. REP. 1, 8–10 (2009); see also *Warren City Bd. of Educ.*, 124 Lab. Arb. Rep (BNA) 532, 536– 37 (2007) (arbitration decision upholding the termination of a teacher fired because an ex-spouse distributed nude images to co-workers and school officials); Citron & Franks at 352.

the material removed from the internet,<sup>12</sup> or in legal fees pursuing judgments that, even if awarded, they may never collect.<sup>13</sup>

Victims frequently experience serious emotional and psychological distress, including depression, anxiety, agoraphobia, difficulty maintaining intimate relationships, and posttraumatic stress disorder.<sup>14</sup> Victims have been stalked, harassed, threatened with sexual assault, defamed as sexual predators, terminated from employment, expelled from their schools, or forced to change their names. Some victims have committed suicide.<sup>15</sup>

The prevalence and impact of nonconsensual pornography has been exacerbated by rising domestic violence rates,<sup>16</sup> stay-at-home orders, increased time online, and the shift to online education and work-from-home using unfamiliar and insecure communication technology due to the COVID-19 pandemic.<sup>17</sup>

In addition to harm to individual victims, nonconsensual pornography exacerbates gender inequality. Women are more likely to be victims of nonconsensual pornography, while men are more likely to be perpetrators.<sup>18</sup> Available evidence also indicates that women and girls face more serious consequences as a result of victimization.<sup>19</sup> “Revenge porn” websites feature more women than men, and most reported cases to date involve female victims and male

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<sup>12</sup> Ian Sherr, *Forget being a victim. What to do when revenge porn strikes*, CNET, May 13, 2015 (noting that a typical case “can cost as much as \$10,000.”), <https://www.cnet.com/news/forget-being-a-victim-what-to-dowhen-revenge-porn-strikes/>.

<sup>13</sup> Tracy Clark-Flory, *Criminalizing ‘revenge porn,’* SALON, Apr. 6, 2013 ([https://www.salon.com/2013/04/07/criminalizing\\_revenge\\_porn/](https://www.salon.com/2013/04/07/criminalizing_revenge_porn/)).

<sup>14</sup> Samantha Bates, *Revenge Porn and Mental Health: A Qualitative Analysis of the Mental Health Effects of Revenge Porn on Female Survivors*, 12 FEMINIST CRIMINOLOGY 22, 38–39 (2017).

<sup>15</sup> Citron & Franks at 372. *See also* Nina Burleigh, *Sexting, Shame and Suicide*, ROLLING STONE, Sept. 17, 2013, <http://www.rollingstone.com/culture/news/sexting-shame-and-suicide20130917>; BBC News Serv., *Tiziana Cantone: Suicide following years of humiliation online stuns Italy*, Sept. 16, 2016 (31-year-old Italian woman hangs herself after video of her performing a sex act goes viral), <http://www.bbc.com/news/world-europe-37380704>; Emily Bazelon, *Another Sexting Tragedy*, SLATE, Apr. 12, 2013 (17-year-old Canadian girl hangs herself after photos of her being sexually assaulted at a party are circulated), <https://slate.com/human-interest/2013/04/audrie-pott-and-rehtaeh-parsonshow-should-the-legal-system-treat-nonconsensual-sexts.html>; Kate Briquet & Katie Zavadski, *Nude Snapchat Leak Drove Teen Girl to Suicide*, THE DAILY BEAST, June 20, 2016 (15-year-old girl shoots herself in the head after ex-boyfriend posts nude photo on social media), <https://www.thedailybeast.com/nude-snapchat-leak-drove-teen-girl-to-suicide>.

<sup>16</sup> M.B. Pell & Benjamin Lesser, *Researchers warn the COVID-19 lockdown will take its own toll on health*, REUTERS, Apr. 3, 2020, <https://www.reuters.com/investigates/special-report/health-coronavirus-usacost/>.

<sup>17</sup> Jessica M. Goldstein, *‘Revenge porn’ was already commonplace. The pandemic has made things even worse*, WASH. POST, Oct. 29, 2020. [https://www.washingtonpost.com/lifestyle/style/revenge-porn-nonconsensual-porn/2020/10/28/603b88f4-dbf1-11ea-b205-ff838e15a9a6\\_story.html](https://www.washingtonpost.com/lifestyle/style/revenge-porn-nonconsensual-porn/2020/10/28/603b88f4-dbf1-11ea-b205-ff838e15a9a6_story.html)

<sup>18</sup> *Id.* at 12, 15.

<sup>19</sup> Citron & Franks at 353–54.

perpetrators.<sup>20</sup> Nonconsensual pornography often plays a role in crimes that disproportionately affect women, including intimate partner violence, sexual abuse, sexual assault, and sex trafficking. It also helps to “sustain a culture . . . in which sexual consent is regularly ignored.”<sup>21</sup>

The disclosure or threatened disclosure of intimate images chills women’s speech, expression, and professional ambition. Those who are targeted frequently withdraw from various spheres of meaningful activity: work, school, social media, and personal relationships. The chilling effects of nonconsensual pornography include deterring women from vocations such as politics<sup>22</sup> and journalism.<sup>23</sup>

## II. Scale of the Problem

In 2017, CCRI researchers studied a sample of 3,044 American adults who use social media.<sup>24</sup> This study found that 1 in 8 participants had been victimized by or threatened with nonconsensual pornography.<sup>25</sup> The actual number is undoubtedly higher, when one factors in minors and victims who are not yet aware that they have been targeted, such as those whose images are shared in restricted online communities or whose names are not originally attached to the images. The CCRI study also found that 1 in 20 adult social media users admit to distributing nonconsensual pornography<sup>26</sup> and found that women are 1.7 times more likely to be targeted than men.<sup>27</sup>

Nearly half of all victims’ intimate images were distributed by text message and the rest were distributed through social media, in person, or the internet.<sup>28</sup> As

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<sup>20</sup> See Anastasia Powell et al., *The Picture of Who Is Affected by ‘Revenge Porn’ Is More Complex Than We First Thought*, CONVERSATION, May 7, 2017, <https://theconversation.com/the-picture-of-who-is-affected-byrevenge-porn-is-more-complex-than-we-first-thought-77155>.

<sup>21</sup> Clare McGlynn & Erika Rackley, *Image-Based Sexual Abuse*, 37 OXFORD J. OF L. STUDIES 534 (2017).

<sup>22</sup> Jill Filipovic, *Wondering why more women don’t run for office? Look what happened to Katie Hill*, GUARDIAN, Nov. 2, 2019, <https://www.theguardian.com/commentisfree/2019/nov/02/katie-hill-resignation-women-politics-sexuality>

<sup>23</sup> Michelle Ferrier, *Attacks and Harassment: The Impact on Female Journalists and Their Reporting* 7 (2018), <https://www.iwmf.org/wpcontent/uploads/2018/09/Attacks-and-Harassment.pdf>.

<sup>24</sup> Asia A. Eaton et al., *Nationwide Online Study of Nonconsensual Porn Victimization and Perpetration, A Summary Report 11* (2017), <https://www.cybercivilrights.org/wp-content/uploads/2017/06/CCRI-2017-Research-Report.pdf>.

<sup>25</sup> *Id.* at 11.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at 21.

many as 10,000 websites feature “revenge porn,”<sup>29</sup> some dedicated solely to this content.<sup>30</sup> These easily accessible, largely anonymous platforms connect profit-driven purveyors with voyeuristic consumers. These sites frequently display personal information about victims (e.g., name, age, address, employer, email address, and links to social media profiles) alongside the images, making it easy for strangers to harass and threaten victims.<sup>31</sup> Many revenge porn sites are searchable by name, town, or school. These search features, as well as the ability to comment on posts, make it possible for victims to be identified even if they are not immediately identifiable in the image itself or by information that accompanies the original posting.

### III. Legislative Reform in the U.S.

In the United States, only three U.S. states – New Jersey, Alaska, and Texas<sup>32</sup> – had criminal laws that could be directly applied to nonconsensual pornography before CCRI was founded. As of October 2021, forty-eight state legislatures, the District of Columbia, the territory of Guam, and the Uniform Code of Military Justice have recognized the devastating impact of this form of privacy violation through criminal statutes.<sup>33</sup> The Cyber Civil Rights Initiative advised drafters in the majority of these states, though the final versions of these laws do not necessarily reflect CCRI’s recommendations. CCRI’s President and 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>34</sup> The original version of the bill, titled the Intimate Privacy Protection Act, was introduced with bipartisan support in Congress on July 14, 2016. The bill was supported by Facebook, Twitter, the National Organization for Women, the National Democratic Institute, the Information Technology and Innovation

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<sup>29</sup> This figure is based on takedown requests made available to CCRI.

<sup>30</sup> See *Revenge Porn: Misery Merchants*, *The Economist*, July 5, 2014, <https://www.economist.com/international/2014/07/05/misery-merchants>.

<sup>31</sup> See Citron & Franks at 350–51.

<sup>32</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>33</sup> CCRI, 46 States + DC Have Revenge Porn Laws, <https://www.cybercivilrights.org/revenge-porn-laws/> (collecting state statutes). In two additional states—Mississippi and Wyoming—legislation has been passed and is currently awaiting signature by the states’ governors. See Miss. Senate Bill 2021, <http://billstatus.ls.state.ms.us/documents/2021/pdf/SB/2100-2199/SB2121SG.pdf>; Wyo. House Bill 85, <https://www.wyoleg.gov/Legislation/2021/HB0085>.

<sup>34</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>.

Foundation, Feminist Majority, Girls, Inc., and the Cyber Civil Rights Initiative.<sup>35</sup> Leading constitutional scholar Erwin Chemerinsky also gave a statement in support of the bill.<sup>36</sup> The bill has been re-introduced twice more in slightly different forms, most recently as the Stopping Harmful Image Exploitation and Limiting Distribution (SHIELD) Act, which passed the House of Representatives as part of the Violence Against Women Reauthorization Act of 2021.<sup>37</sup>

#### IV. Model State Law

While concerns have been raised about the constitutionality of laws prohibiting nonconsensual pornography, every state supreme court that has taken up the issue to date has ruled that the laws comport with the First Amendment. This includes the Illinois state law criminalizing nonconsensual pornography, which is based on CCRI's model statute and is the strongest intimate privacy law in the country. In October 2020, the U. S. Supreme Court declined to review *Austin v. Illinois*, letting stand the Illinois Supreme Court's 2019 [ruling](#) that the law is a constitutionally permissible protection of the right to intimate privacy.

Below is the text of CCRI's model state law:

*An actor may not knowingly disclose, or threaten to 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 regarding 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>38</sup>*

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<sup>35</sup> Id.

<sup>36</sup> Id.

<sup>37</sup> Rep. Jackie Speier, *Speier and Katko Amendment to Address Online Exploitation of Private Images Included in Violence Against Women Reauthorization Act* (Mar. 17, 2021), <https://speier.house.gov/press-releases?ID=FB99CA92-BFA3-4E6A-AA97-56AE155C46E3>.

<sup>38</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

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;*
- (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.*

## V. **Elements of an Effective Law**

This section provides an in-depth explanation of the elements of an effective law. Far too many existing state laws suffer from overly burdensome requirements, narrow applicability, 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 aspects that should be avoided.

1. The law **SHOULD**, first, clearly set out the elements of the offense. The 3 basic elements should be:

- 1) the disclosure of private, sexually explicit photos or videos;

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term “reasonable expectation of privacy” might create more ambiguity than it resolves, especially considering the doctrinal baggage of the term in Fourth Amendment jurisprudence.

- 2) of an identifiable<sup>39</sup> person, and
- 3) without the consent of the person depicted.<sup>40</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>41</sup> *Mens rea*, or “guilty mind,” “refers to the mental state the defendant must have had regarding the ‘social harm’ elements set out in the definition of the offense.”<sup>42</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>43</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>44</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 have known 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.

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<sup>39</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>40</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>41</sup> Black’s Law Dictionary 55 (4<sup>th</sup> ed. 1968).

<sup>42</sup> United States v. Cordoba-Hincapie, 825 F. Supp. 485 (1993).

<sup>43</sup> See JOSHUA DRESSLER & STEPHEN GARVEY, CRIMINAL LAW: CASES AND MATERIALS, 7<sup>th</sup> ed. (2016), 168-9.

<sup>44</sup> MPC 2.02(c)

3. The law **SHOULD** explicitly include an exception for sexually explicit images voluntarily exposed in public or commercial settings.<sup>45</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>46</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 deal with intimate materials, such as visual evidence of injuries from domestic violence or rape. While it is vital that such 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 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>47</sup> Nonconsensual pornography often is, of course, a form of harassment. “Classic” revenge porn cases involve bitter exes determined to destroy their victims’ lives.

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<sup>45</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>46</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.”

<sup>47</sup> See Franks, [How to Defeat Revenge Porn](#), *supra* note 24.

However, a significant portion of nonconsensual pornography cases involve 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>48</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>49</sup> the fraternity brothers who uploaded photos of unconscious, naked women to a members-only Facebook page,<sup>50</sup> or the caretakers who posted explicit images of their unsuspecting patients to Snapchat.<sup>51</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 emotional distress" or "intent to harass" requirements<sup>52</sup> arbitrarily distinguish between perpetrators motivated by personal desire to harm and those motivated by other reasons.<sup>53</sup> Motive requirements ignore the reality that many perpetrators are motivated not by an intent to distress but instead by a desire to entertain, to make money, or achieve notoriety.<sup>54</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

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<sup>48</sup> See Rob Price, [Bitcoin Beggars Try to Profit Off Leaked Celebrity Nudes](#), Daily Dot, Sept. 1, 2014.

<sup>49</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>50</sup> Holly Otterbein, [Member of Penn State's Kappa Delta Rho Defends Fraternity](#), Philadelphia Magazine, March 18, 2015.

<sup>51</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>52</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>53</sup> See Mary Anne Franks, [How to Defeat Revenge Porn: First, Recognize It's About Privacy, Not Revenge](#), Huffington Post, June 22, 2015.

<sup>54</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.

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>55</sup> Indeed, cyberbullying laws in North Carolina and New York that included such clauses have recently been declared unconstitutional.<sup>56</sup> The courts in these cases noted that phrases such as harass, torment, embarrass, etc. are unconstitutionally vague.

Requiring “intent to harass” and similar provisions moreover renders nonconsensual pornography laws duplicative of harassment laws, which already exist in every state and at the federal level and are demonstrably inadequate to address the specific harm of nonconsensual pornography.<sup>57</sup>

6. The law **SHOULD NOT** be so broadly drafted as to include drawings<sup>58</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>59</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>60</sup>

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<sup>55</sup> See *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377 (1992).

<sup>56</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\\_law\\_wont\\_pass\\_f](http://www.abajournal.com/magazine/article/bully_fighting_new_yorks_high_court_says_anti_cyberbullying_law_wont_pass_f)

<sup>57</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>58</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>59</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>60</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

7. 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>61</sup>

8. The law **SHOULD NOT** be so narrowly drafted as to only apply to disclosures made online or through social media,<sup>62</sup> as nonconsensual pornography can also take “low-tech” forms such as printed photographs and DVDs.<sup>63</sup>

9. The law **SHOULD NOT** be limited to conduct perpetrated by a current or former intimate partner.<sup>64</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.

10. The law **SHOULD NOT** broaden immunity for online entities beyond what is provided by the Section 230 of the federal Communications Decency Act.<sup>65</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

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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>61</sup> See Carrie Goldberg, [Seven Reasons Illinois is Leading the Fight Against Revenge Porn](#), Cyber Civil Rights Initiative, Dec. 31, 2014.

<sup>62</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>63</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.

<sup>64</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>65</sup> 47 U.S.C. § 230

co-developers or co-creators of content, they can be prosecuted under state criminal law.<sup>66</sup>

## **VI. Supplemental Resources: Illustrative Case Studies**

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

### **a. 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

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<sup>66</sup> Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC 521 F.3d 1157 (9<sup>th</sup> Cir. 2008)

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 was not 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. Read more about Holly [here](#).

### **b. 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. The seven-year-old picture was now posted to one of the most notorious – and most popular - revenge porn websites. The photo was 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. At the time, Missouri did 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 but used her energy to advocate for Missouri to reform its criminal laws to address this issue. The Missouri Revenge Porn Bill was signed on June 1st, 2018.<sup>67</sup> Read more about Alecia [here](#).

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<sup>67</sup>Lieb, David A Outgoing Missouri Gov. Eric Greitens signs 'Revenge Porn' Law (June 1, 2018) <http://www.chicagotribune.com/news/nationworld/ct-missouri-eric-greitens-revenge-porn-law-20180601-story.html>

### c. “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](#).

### d. 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 started 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>68</sup> Read more about Audrie’s story [here](#).

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<sup>68</sup> Nina Burleigh, *Sexting, Shame and Suicide*, ROLLING STONE (Sept. 17, 2013), <http://www.rollingstone.com/culture/news/sexting-shame-and-suicide-20130917>.

### e. 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>69</sup>

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<sup>69</sup> Glen Canning, *Rehtaeh Parsons was my daughter* (April 10, 2013), <http://glencanning.com/2013/04/rehtaeh-parsons-was-my-daughter/>.