

**To:** Drafting Committee on Unauthorized Disclosure of Intimate Images Act  
**From:** Mary Anne Franks, Reporter  
**Subject:** Explanatory Memo  
**Date:** December 2, 2016

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## I. The Issue

The disclosure of private, sexually explicit images without consent and for no legitimate purpose – often referred to 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, and forced to change schools.<sup>1</sup> Some victims have committed suicide.<sup>2</sup> While nonconsensual pornography affects both male and female individuals, available evidence to date indicates that the majority of victims are women and girls and that women and girls face often more serious consequences as a result of their victimization.<sup>3</sup>

Nonconsensual pornography refers to sexually explicit images and video disclosed without consent and for no legitimate purpose. The term encompasses footage obtained by hidden cameras, consensually exchanged images within a confidential relationship, stolen photos, and recordings of sexual assaults. 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>4</sup> Traffickers and pimps also use nonconsensual pornography to trap unwilling individuals in the sex trade.<sup>5</sup> Rapists record their attacks not only to further humiliate their victims but also to discourage them from reporting sexual assaults.<sup>6</sup> Nursing home workers have been caught posting nude photos of elderly and disabled patients to social media.<sup>7</sup>

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<sup>1</sup> See Danielle Keats Citron & Mary Anne Franks, *Criminalizing Revenge Porn*, 49 Wake Forest L. Rev. 345 (2014).

<sup>2</sup> Emily Bazelon, [Another Sexting Tragedy](#), Slate, April 12, 2013.

<sup>3</sup> See Jill Filipovic, *Revenge Porn is About Degrading Women*, THE GUARDIAN (Jan. 28, 2013), <https://www.theguardian.com/commentisfree/2013/jan/28/revenge-porn-degrades-women>; Danielle Citron, *Cyber Stalking and Cyber Harassment: A Devastating and Endemic Problem*, CONCURRING OPINIONS (March 16, 2012), <http://www.concurringopinions.com/archives/2012/03/cyber-stalking-and-cyber-harassment-a-devastating-and-endemic-problem.html>.

<sup>4</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), <http://www.theguardian.com/commentisfree/2013/nov/19/revenge-porn-victim-maryland-law-change>.

<sup>5</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), <http://www.nbcchicago.com/investigations/human-trafficking-alex-campbell-192415731.html>.

<sup>6</sup> Tara Culp-Ressler, *16 Year-Old’s Rape Goes Viral on Twitter*, THINK PROGRESS (July 10, 2014), <http://thinkprogress.org/health/2014/07/10/3458564/rape-viral-social-media-jada/>.

<sup>7</sup> See Charles Ornstein, *Nursing Home Workers Share Explicit Photos of Residents on Snapchat*,

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>8</sup> As many as 3000 websites feature “revenge porn,”<sup>9</sup> and intimate material is also widely distributed without consent through social media, blogs, emails, and texts. 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. The Cyber Civil Rights Initiative (CCRI), a nonprofit organization devoted to fighting online abuse generally and nonconsensual pornography in particular, is contacted by an average of 20-30 victims each month.

The rise of nonconsensual pornography is due in part to the fact that perpetrators do not fear the consequences of their actions. Before 2013, there were few laws – civil or criminal – 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 until recently.<sup>10</sup>

## II. Recent Law and Technology Developments

The legal and social landscape of the issue has shifted significantly in the last few years, both in the U.S. and the rest of the world. More than half a dozen countries have criminalized nonconsensual pornography, including the Philippines, Israel, Canada, Japan, and New Zealand. On July 14, 2016, Representative Jackie Speier (D-CA) introduced a bipartisan federal bill addressing nonconsensual pornography, the Intimate Privacy Protection Act, in the U.S. Congress. As of November 2016, 34 states<sup>11</sup> and Washington D.C. have passed laws

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PRO PUBLICA (Dec. 21, 2015) <https://www.propublica.org/article/nursing-home-workers-share-explicit-photos-of-residents-on-snapchat>

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

<sup>9</sup> The Economist, [Revenge Porn: Misery Merchants](#), July 5, 2014.

<sup>10</sup> See Mary Anne Franks, *Revenge Porn Reform: A View From the Front Lines*, FLORIDA L. REV. (forthcoming 2017).

<sup>11</sup> See the Cyber Civil Rights Initiative, [States with Revenge Porn Laws](https://www.cybercivilrights.org/revenge-porn-laws/) (available at <https://www.cybercivilrights.org/revenge-porn-laws/>). Before 2013, only three U.S. states – New Jersey, Alaska, and Texas – had criminal laws that could be directly applied to nonconsensual pornography. Between 2013 and May 2016, 32 states and Washington, D.C. passed criminal legislation to address this conduct: Arizona, 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 November 2016, to 34. The conduct is a felony in 6 of these states (Arizona, Hawaii, Idaho, Illinois, New Jersey, 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 a misdemeanor offense in the rest. State legislation has been introduced or is pending in more than a dozen additional states, as well as Puerto Rico.

criminalizing the nonconsensual distribution of private, sexually explicit images. Eleven states have enacted civil legislation specifically addressing nonconsensual pornography.<sup>12</sup>

In 2015, major tech companies including Google, Microsoft, Facebook, and Twitter announced that they were banning this conduct and implementing procedures to allow victims to request that the private material be removed.<sup>13</sup>

### **III. Concerns**

Legal reform regarding nonconsensual pornography has not been without controversy. The primary targets of criticism have been criminal laws, which some critics believe violate the First Amendment and contribute to over-criminalization. Civil remedies have been critiqued far less harshly. In fact, many critics of criminal approaches laud civil approaches as a preferable alternative. But concerns remain about the creation of any new laws regarding nonconsensual pornography. The primary objections appear to be that 1. existing laws are sufficient to deal with the problem; 2. civil remedies are burdensome and ineffective; 3. laws regulating the publication of sexually explicit material raise First Amendment issues.

#### **a. Sufficiency of Existing Laws**

Both criminal and civil approaches have been criticized on the grounds that existing laws are adequate to address the problem of nonconsensual pornography. It is certainly true that there are multiple existing laws that could in theory be applied to nonconsensual pornography. First, there are the criminal laws that have been passed in 34 states specifically to address the problem. Second, there are other criminal laws, such as harassment, stalking, and extortion laws, that could be brought to bear in some cases. Third, there are existing civil approaches, including copyright and torts.

Many of the criminal laws that have been passed are extremely restricted in scope, applicable only to situations in which a perpetrator is proven to be motivated by an intent to cause distress. These laws will simply be inapplicable to many cases of unauthorized disclosure, particularly cases in which the perpetrator is motivated by greed, voyeurism, or some other factor. What is more, law enforcement is frequently reluctant or unprepared to take nonconsensual pornography cases seriously. In addition, many victims do not wish to bring criminal charges for a variety of reasons. Finally, sixteen states still have no criminal laws specific to nonconsensual pornography.

With regard to civil approaches, copyright law does offer hope for some victims. If the victim created the material in question herself, she holds the copyright in the material and can take action against unauthorized use. However, this option will not be of use to the many victims who do not take the images or videos themselves. Even in cases where the victim does hold the

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<sup>12</sup> These states are California, Colorado, Florida, Minnesota, North Carolina, North Dakota, Pennsylvania, Texas, Vermont, Washington, and Wisconsin. See Carrie Goldberg, <http://www.cagoldberglaw.com/states-with-revenge-porn-laws/>

<sup>13</sup> Jessica Roy, *How Tech Companies are Fighting Revenge Porn – and Winning*, NEW YORK MAGAZINE (June 24, 2015), <http://nymag.com/thecut/2015/06/how-tech-companies-are-fighting-revenge-porn.html>.

copyright and submits a proper Digital Millennium Copyright Act (DMCA) notice and takedown request, many site owners will ignore it.<sup>14</sup> Even when a site owner does honor a takedown request, the image will often resurface on another site or even the same site after a short time.

Existing tort actions, such as invasion of privacy and intentional infliction of emotional distress, can be useful to well-informed victims and those fortunate enough to have retained experienced counsel. However, it is often difficult for a victim to learn on her own that such paths are available to her, as these torts are not particularly well-known to the public or particularly easy for laypeople to comprehend.

In sum, the existence of other possible legal approaches does not diminish the value of or need for a clear and specific civil approach, one bolstered by procedural safeguards specific to the nature of intimate privacy violations.

## **b. Limitations of Civil Remedies**

Civil actions require money, time, and resources that many victims simply do not have, and the chances of success are often low. They also often require further dissemination of the very material that harms the victim. Additionally, in many cases the party responsible will be judgment proof. Even successful civil actions cannot truly address the harm created by revenge porn: even if a victim wins damages or an injunction forcing the poster to take down the image, there is nothing to be done about the number of images already downloaded or reproduced.

Another difficulty in bringing civil claims for non-consensual pornography is finding a party to sue. Given the ease with which individual purveyors of nonconsensual pornography can access or distribute images anonymously, it is difficult to identify and prove who they are.<sup>15</sup> Victims are moreover barred from civil claims against the websites that distribute this material due to Section 230 of the Communications Decency Act. CDA §230 has been interpreted to grant website owners and operators far-ranging immunity for tortious material submitted by third-party users.<sup>16</sup>

But most, if not all, legal remedies are imperfect, and the fact that a uniform act cannot help every victim – or any victim completely – does not mean, that such an act is not valuable. A civil act specifically focused on nonconsensual pornography would provide some victims with a path to justice who might otherwise have none.

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<sup>14</sup> Jeff Roberts, *No, copyright is not the answer to revenge porn*, GIGAOM (Feb. 6, 2014), <https://gigaom.com/2014/02/06/no-copyright-is-not-the-answer-to-revenge-porn/>; Mitchell J. Matorin, *In the Real World, Revenge Porn is Far Worse Than Making it Illegal*, TPM (Oct. 18, 2013), <http://talkingpointsmemo.com/caf/our-current-law-is-completely-inadequate-for-dealing-with-revenge-porn>

<sup>15</sup> See Mary Anne Franks, *Unwilling Avatars: Idealism and Discrimination in Cyberspace*, 20 COLUM. J. GENDER & L. 224 (2011).

<sup>16</sup> “No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.” One can hope that more courts rule along the lines of the Ninth Circuit in *Fair Housing Council v. Roommates.com*, where the website in question was found to have helped create the harmful content as opposed to merely distributing it, but such rulings have been rare so far. See *Roommates.com*, *supra* note \_\_\_\_.

### **c. Free Speech: First Amendment and Section 230**

As noted above, many critics who maintain that criminal laws against nonconsensual pornography conflict with the First Amendment often praise civil laws as a superior alternative. This discrepancy may be due in part to misunderstandings regarding the First Amendment, namely, lack of awareness that the First Amendment applies to both criminal and civil laws. In fact, injunctive remedies and other features of civil law have the potential to create greater First Amendment problems than criminal law. Accordingly, even though civil approaches have drawn fewer First Amendment objections than criminal ones, First Amendment concerns should be afforded considerable attention in the drafting of a uniform civil law.

In particular, the draft act needs to be sensitive to the concerns of overbreadth, content-based distinctions, and vagueness with regard to the First Amendment. The draft act must also take into account how any law addressing the issue of nonconsensual pornography will interact with Section 230 of the Communications Decency Act, which protects online entities from liability when they merely provide platforms for third-party content.<sup>17</sup> The language of the uniform act should reflect the reality that Section 230 preempts any state law in conflict with it,<sup>18</sup> but also recognize that Section 230 immunity is only provided to information service providers to the extent that these providers serve as intermediaries for third-party content. State laws can regulate the conduct of online entities when they act as co-developers or co-creators of content.<sup>19</sup>

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<sup>17</sup> 42 U.S.C. §230.

<sup>18</sup> “No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.” 42 U.S.C. §230(e)(3).

<sup>19</sup> Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC 521 F.3d 1157 (9<sup>th</sup> Cir. 2008); see also Mary Anne Franks, *The Lawless Internet? Myths and Misconceptions about CDA Section 230*, HUFF. POST (Dec. 18, 2013), [http://www.huffingtonpost.com/mary-anne-franks/section-230-the-lawless-internet\\_b\\_4455090.html](http://www.huffingtonpost.com/mary-anne-franks/section-230-the-lawless-internet_b_4455090.html)