

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

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## I. Overview of U.S. Legislative Efforts

Before 2013, only three U.S. states – New Jersey, Alaska, and Texas – had criminal laws applicable to nonconsensual pornography as such. In the last year and a half, ten states have passed criminal legislation to address this issue specifically.

Of the ten states that passed laws in 2013-14, the Cyber Civil Rights Initiative advised all but two (those it did not advise are marked with an asterisk).

Hawaii	Arizona	Idaho*
Colorado	Virginia*	California
Maryland	Wisconsin	
Georgia	Utah	

Legislation has been introduced or is pending in 18 other states, as well as the District of Columbia and Puerto Rico. In addition to working on federal criminal legislation sponsored by Rep. Jackie Speier (D-CA) and on legislation in the UK, the Cyber Civil Rights Initiative has advised or is advising the following ten states and D.C.

Florida	Washington	Kentucky
Illinois	Missouri	Oklahoma
New York	Pennsylvania	
Oregon	Delaware	

Updated information about passed and pending legislation can be found at the National Conference of State Legislatures (NCSL) [Revenge Porn Legislation Page](#). For a list focused solely on states that have passed revenge porn laws, see <http://www.cagoldberglaw.com/states-with-revenge-porn-laws>.

## II. Elements of an Effective Law

Unfortunately, many laws that have been passed or are pending on this issue 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.

The law SHOULD clearly set out the elements of the offense: the knowing disclosure of sexually explicit photographs and videos of an identifiable person when the discloser knows or should have known that the depicted person has not consented to such disclosure.<sup>2</sup> This is necessary to ensure that individuals making wholly unintentional disclosures are not punished, nor individuals who had no way of knowing that the person depicted did not consent to the disclosure.

The law SHOULD contain exceptions for sexually explicit images voluntarily exposed in public or commercial settings and narrow exceptions for disclosures made in the public interest. Otherwise, individuals could be prosecuted for forwarding or linking to commercial pornography, or prosecuted for recording and reporting unlawful activity, such as flashing.<sup>3</sup>

The law SHOULD NOT 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 most indeed do not include - motive requirements. “Intent to cause emotional distress” or “intent to harass” requirements<sup>4</sup> are impositions of motive that arbitrarily excuse some perpetrators while punishing others.<sup>5</sup> Motive requirements ignore the fact that many perpetrators are motivated

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<sup>2</sup> See [Arizona H.B. 2515](#) (signed into law in April 2014): “It is unlawful to intentionally disclose, display, distribute, publish, advertise or offer a photograph, videotape, film or digital recording of another person in a state of nudity or engaged in specific sexual activities if the person knows or should have known that the depicted person has not consented to the disclosure.”

<sup>3</sup> See [Illinois H.B. 4320](#), 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” in the following circumstances: “when the dissemination is made under a criminal investigation that is otherwise lawful...when the dissemination is for the purpose of, or in connection with, the reporting of unlawful conduct... where the images involve voluntary exposure in public or commercial settings... when the dissemination serves a lawful public purpose.”

<sup>4</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>5</sup> The term “revenge porn” may be partly to blame for these misguided intent requirements, as it inaccurately suggests that this conduct is motivated solely by personal animus.

not by malice, but by a desire to entertain, to make money, or achieve notoriety. As with theft, unlawful surveillance, and sexual assault laws, the point is not that the perpetrator acts with malice, but that he acts without consent.

The law SHOULD NOT be so broadly drafted as to apply to drawings<sup>6</sup> or to all conceivable representations of nudity (e.g. buttocks or female nipples covered by less than opaque clothing).<sup>7</sup>

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

The law SHOULD NOT be limited to conduct perpetrated by a current or former intimate partner.<sup>9</sup> While such laws usefully 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.

The law SHOULD NOT broaden immunity for online entities beyond what is provided by the Section 230 of the Communications Decency Act. 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-

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<sup>6</sup> Michigan’s proposed [S.B. 0294](#) states “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.”

<sup>7</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>8</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>9</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.”

developers or co-creators of content, they can and should be prosecuted under state criminal law.

### **III. Sample Model State Law**

An actor may not knowingly disclose an image of another, identifiable person, whose intimate parts are exposed or who is engaged in a sexual act, when the actor knows or should have known that the depicted person has not consented to such disclosure.

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, or female adult nipple of the person;
- (4) “Sexual act” includes but is not limited to masturbation, genital, anal, or oral sex.

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.<sup>10</sup>

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<sup>10</sup> Alternatively, the need for an exceptions section could be eliminated by adding the attendant circumstance of “reasonable expectation of privacy” on the part of the person depicted. The risk of this approach is that the term “reasonable expectation of privacy” will create more ambiguity than it eliminates, especially if doctrinal baggage from Fourth Amendment jurisprudence is brought to bear on the term.

#### **IV. 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

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

A vengeful ex-partner or malicious hacker 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 for entertainment and profit. In a matter of days, that image can dominate the first several pages of “hits” on the victim’s name in a search engine, as well as being emailed or otherwise exhibited to the victim’s family, employers, co-workers, and peers.

Non-consensual pornography can destroy victims’ intimate relationships as well as their educational and employment opportunities. Victims are routinely threatened with sexual assault, stalked, harassed, fired from jobs, and forced to change schools. Some victims have committed suicide.

Non-consensual pornography is frequently a form of domestic violence. The threat to expose intimate pictures is often used to prevent a partner from exiting the relationship or from reporting other forms of abuse. Sex traffickers also use non-consensual pornography to trap unwilling individuals in the sex trade.

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 wanted to make. After being repeatedly told 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 revenge porn 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 passed or pending legislation criminalizing the conduct.

You can 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 – just one 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.

You can read more about Alecia [here](#).

## 3. ADAM KUHN

Adam Kuhn, chief of staff to Rep. Steve Stivers (R-OH), resigned in June 2014 after an ex-girlfriend tweeted an intimate picture of Kuhn to Rep. Stivers’ account. Jennifer Roubenes Allbaugh, who is married, has stated that she was upset with Kuhn for ending their relationship. Allbaugh told a Politico reporter that she “just wanted to teach the pompous a—— a lesson.” Kuhn is unmarried, and his romantic relationship with Allbaugh has no apparent bearing on his public duties. This makes Kuhn’s situation different from that of disgraced mayoral candidate Anthony Weiner, whose persistent, surreptitious, extramarital sexting arguably

affected his fitness for public office. Kuhn’s career and reputation have been unjustly and irreparably harmed by a woman motivated purely by personal antagonism.

Read more about Adam Kuhn [here](#).

#### **4. “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 into the way that nonconsensual pornography is used by sex traffickers to keep women in servitude.

Read more about Sarah’s story [here](#).