

2013 DRAFTING REQUEST

Bill

Received: 7/25/2013 Received By: phurley
Wanted: As time permits Same as LRB:
For: John Spiros (608) 266-1182 By/Representing: Katherine Bates
May Contact: Drafter: phurley
Subject: Criminal Law - sex offenses Addl. Drafters:
Extra Copies:

Submit via email: YES
Requester's email: Rep.Spiros@legis.wisconsin.gov
Carbon copy (CC) to:

Pre Topic:

No specific pre topic given

Topic:

Distributing a nude depiction without consent

Instructions:

See attached

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/P1	phurley 8/13/2013	wjackson 8/8/2013	phenry 8/9/2013	_____	lparisi 8/9/2013		Crime
/P2	chanaman 8/28/2013	wjackson 8/22/2013	rschluet 8/23/2013	_____	sbasford 8/23/2013		Crime
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H/c to Katherine
class A misdemeanor
look at other laws

942.09 Representations depicting nudity.

(1) (intro.) In this section:

(a) "Captures a representation" means takes a photograph, makes a motion picture, videotape, or other visual representation, or records or stores in any medium data that represents a visual image.

(am) "Nude or partially nude person" has the meaning given in s. 942.08 (1) (a).

(b) "Nudity" has the meaning given in s. 948.11 (1) (d).

(c) "Representation" means a photograph, exposed film, motion picture, videotape, other visual representation, or data that represents a visual image.

(2)

(am) (intro.) Whoever does any of the following is guilty of a Class I felony:

1. Captures a representation that depicts nudity without the knowledge and consent of the person who is depicted nude while that person is nude in a circumstance in which he or she has a reasonable expectation of privacy, if the person knows or has reason to know that the person who is depicted nude does not know of and consent to the capture of the representation.

2. Makes a reproduction of a representation that the person knows or has reason to know was captured in violation of subd. 1. and that depicts the nudity depicted in the representation captured in violation of subd. 1., if the person depicted nude in the reproduction did not consent to the making of the reproduction.

3. ~~Possesses~~, distributes, or exhibits a representation that was captured in violation of subd. 1. or a reproduction made in violation of subd. 2., if the person knows or has reason to know that the representation was captured in violation of subd. 1. or the reproduction was made in violation of subd. 2., and if the person who is depicted nude in the representation or reproduction did not consent to the possession, distribution, or exhibition.

(bm) (intro.) Notwithstanding par. (am), if the person depicted nude in a representation or reproduction is a child and the capture, possession, exhibition, or distribution of the representation, or making, possession, exhibition, or distribution of the reproduction, does not violate s. 948.05 or 948.12, a parent, guardian, or legal custodian of the child may do any of the following:

1. Capture and possess the representation or make and possess the reproduction depicting the child.

2. Distribute or exhibit a representation captured or possessed under subd. 1., or distribute or exhibit a reproduction made or possessed under subd. 1., if the distribution or exhibition is not for commercial purposes.

(cm) This subsection does not apply to a person who receives a representation or reproduction depicting a child from a parent, guardian, or legal custodian of the child under par. (bm) 2., if the possession, exhibition, or distribution is not for commercial purposes.

(5)

(a) (intro.) Whoever, while present in a locker room, intentionally captures a representation of a nude or partially nude person while the person is nude or partially nude in the locker room is guilty of a Class B misdemeanor. This paragraph does not apply if the person consents to the capture of the representation and one of the following applies:

1. The person is, or the actor reasonably believes that the person is, 18 years of age or over when the person gives his or her consent.
2. The person's parent, guardian, or legal custodian consents to the capture of the representation.

(b)

1. (intro.) Whoever intentionally does any of the following is guilty of a Class A misdemeanor:

- a. Captures a representation of a nude or partially nude person while the actor is present in, and the person is nude or partially nude in, the locker room and exhibits or distributes the representation to another.
- b. Transmits or broadcasts an image of a nude or partially nude person from a locker room while the person is nude or partially nude in the locker room.

2. (intro.) This paragraph does not apply if the person consents to the exhibition or distribution of the representation or the transmission or broadcast of the image and one of the following applies:

- a. The person is, or the actor reasonably believes that the person is, 18 years of age or over when the person gives his or her consent.
- b. The person's parent, guardian, or legal custodian consents to the exhibition, distribution, transmission, or broadcast.

History: 1995 a. 249; 2001 a. 16; 2001 a. 33 ss. 2 to 13; Stats. 2001 s. 942.09; 2001 a. 109; 2007 a. 118.

Sub. (2) (a) requires that the person who is depicted nude is in a circumstance in which he or she has an assumption that he or she is secluded from the presence or view of others, and that assumption is a reasonable one under all the circumstances, according to an objective standard. *State v. Nelson*, 2006 WI App 124, 294 Wis. 2d 578, 718 N.W.2d 168, 05-2300.

A "legitimate expectation of privacy" for purposes of a search or seizure under the 4th amendment is not consistent with the context and purpose of this section. The 4th amendment embodies a balance between society's interest in law enforcement and the privacy interest asserted by the individual that is not relevant to this section. Construing "reasonable expectation of privacy" according to its common meaning does not render the statute unconstitutionally vague and provides sufficient notice of the conduct prohibited under sub. (2) (a). *State v. Nelson*, 2006 WI App 124, 294 Wis. 2d 578, 718 N.W.2d 168, 05-2300.

Nelson did not purport to provide a definition of reasonable expectation of privacy covering all circumstances. The question for purposes of the privacy element is not whether the nude person had a reasonable expectation that the defendant would view him or her nude at the time of the recording, but whether the nude person had a reasonable expectation, under the circumstances, that he or she would not be recorded in the nude. *State v. Jahnke*, 2009 WI App 4, 316 Wis. 2d 324, 762 N.W.2d 696, 07-2130.

PDF - Chapter 943 

[Work in Progress]

Combating Non-Consensual Pornography
July 22, 2013

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[Work in Progress]

“The inviolability of the person is as much invaded by a compulsory stripping and exposure as by a blow. To compel any one ... to lay bare the body, or to submit it to the touch of a stranger, without lawful authority, is an indignity, an assault, and a trespass...”

- Supreme Court Justice Horace Gray, writing for the majority in
Union Pac. R. Co. v. Botsford (1891)¹

I. Defining the Issue

Non-consensual pornography, sometimes referred to as “revenge porn,” “cyber rape,” or “involuntary porn,” is the *non-consensual disclosure of sexually explicit images or videos of individuals* regardless of how the images or videos were originally created or obtained. Non-consensual pornography can originate in the non-consensual observation of individuals while they are engaged in sexual acts or when their intimate body parts are exposed (including but not limited to the use of hidden cameras, computer hacking techniques, and theft) and/or the non-consensual recording of sexually explicit images of individuals (including the recording of consensual encounters as well as sexual assaults). It can also originate in a consensual transmission of intimate images and videos that are later disclosed without consent. While existing voyeurism and computer hacking laws at both the federal and state level may prohibit the *non-consensual observation and recording* of individuals in states of undress or engaged in sexual activity, the *non-consensual disclosure* of sexually graphic images is currently not clearly prohibited by any federal law and by only one state law (New Jersey’s). In other words, with regard to sexually graphic images, current law wrongly treats consent to sexual images as an absolute rather than a contextual concept. Both legal and social norms respect contextual consent in other situations: for example, a person who consents to physical contact in one context is not assumed to have consented to physical contact in other contexts.² Contextual consent likewise means that an individual who consents to being viewed intimately in one context should not be assumed to have consented to being viewed intimately in other contexts.

II. The Scope of the Harm

Non-consensual pornography can destroy a victim’s intimate relationships, educational and employment opportunities, and the ability to participate fully in society as an equal citizen. 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. In a matter of days or weeks, that image can become 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/or fellow students. Victims of non-consensual pornography have been harassed, stalked, fired from jobs, forced to change schools, and in some cases have committed suicide.³ While non-

¹ 141 U.S. 250 (1891)

² The concept of contextual consent is reflected in criminal law (especially with regard to assault and rape), tort law (especially with regard to privacy), and contract law. For more, see Mary Anne Franks, “Why You Can’t Punch a Boxer in the Face When He Asks You for Directions: Consent, Context, and Humanity.” <http://www.concurringopinions.com/archives/2013/02/why-you-cant-punch-a-boxer-in-the-face-when-he-asks-you-for-directions-consent-context-and-humanity.html> (February 9, 2013).

³ See Julia Dahl, “Audrie Pott, Rehtaeh Parsons suicides show sexual-bullying is ‘pervasive’ and ‘getting worse,’ expert says,” CBS NEWS, April 12, 2013, http://www.cbsnews.com/8301-504083_162-57579366-

[Work in Progress]

consensual pornography can affect both male and female individuals, empirical evidence so far indicates that non-consensual pornography is primarily produced and consumed by men and boys and primarily targets women and girls.⁴ Non-consensual pornography, like rape, domestic violence and sexual harassment, thus belongs to the category of violence that violates legal and social commitments to equality. They are acts that deny women and girls control over their own bodies and lives. The failure to take non-consensual pornography seriously sends the message that it is acceptable to use sex to punish, control, and terrorize women and girls. Thus, non-consensual pornography does not only inflict serious and in many cases irremediable injury on individual victims; it is also a vicious form of sex discrimination.

III. The Inadequacy of Existing Legal Responses: Civil Claims

The most obvious existing legal responses are civil claims, including tort actions involving privacy or intentional infliction of emotional distress claims; sexual harassment claims; and copyright claims. Civil litigation of any kind places a tremendous burden on the victim and in many cases will be an implausible or impossible approach. Civil litigation requires money, time, and access to legal resources. Perhaps most distressingly, it often requires further dissemination of the harmful material. The irony of privacy actions is that they generally require further breaches of privacy to be effective. Moreover, the priority of most victims is the removal of the material, not monetary compensation. Additionally, in many cases defendants will not have enough financial resources to make a damages claim worthwhile (i.e., many defendants are judgment-proof).

A. Tort Law

Tort actions are effectively precluded when the images and videos are transmitted via the Internet. Section 230 of the Communications Decency Act has largely been interpreted to grant website owners and operators immunity for tortious material submitted by third-party users. According to this section, "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."⁵ For example, if an individual hacks into a person's computer, obtains a sexually explicit photograph, and submits it to a website, the website owner carries no liability for displaying or even publicizing it.⁶ While the victim could initiate a tort action against the individual who first obtained and submitted the photo, to do so she would not only have to know who the individual is, but also be able

504083/audrie-pott-rehtaeh-parsons-suicides-show-sexual-cyber-bulling-is-pervasive-and-getting-worse-expert-says/; Observer.com's Betabeat, "A Victim Speaks: Standing Up to a Revenge Porn Tormentor," May 1, 2013, (<http://betabeat.com/2013/05/revenge-porn-holli-thometz-criminal-case/>).

⁴ See Jill Filipovic, "Revenge Porn is About Degrading Women," <http://rsnorg.org/opinion2/273-40/15795-revenge-porn-is-about-degrading-women>; Danielle Citron, "Cyber Stalking and Cyber Harassment: A Devastating and Endemic Problem," *Concurring Opinions*, <http://www.concurringopinions.com/archives/2012/03/cyber-stalking-and-cyber-harassment-a-devastating-and-endemic-problem.html>.

⁵ 47 U.S.C. §230(c)(1)

⁶ The Ninth Circuit in *Fair Housing Council v. Roommates.com*, 521 F.3d 1157 (9th Cir. 2008), resisted the sweeping immunity interpretation of CDA §230, but it seems to be an outlier case so far.

[Work in Progress]

to prove it - no small feat given the ability of Internet users to act anonymously or pseudonymously, and the reluctance of websites and service providers to supply identifying information about their users.

B. Sexual Harassment Law

Non-consensual pornography in many cases is sexual harassment in the straightforward, intuitive sense of the term. As defined by the Equal Employment Opportunity Commission, sexual harassment includes “unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature.”⁷ Unfortunately, protections against sexual harassment have little force outside of employment and educational settings under current law.⁸ Accordingly, while non-consensual pornography that is produced, distributed, or accessed by a victim's co-workers, employers, school officials, or fellow students raises the possibility of a hostile environment sexual harassment claim under Title VII of the Civil Rights Act of 1964 or Title IX of the Education Amendments of 1972, such claims would not be available to address non-consensual pornography falling outside this narrow category.

C. Copyright Law

Copyright law is a more promising avenue for some victims of non-consensual pornography because CDA §230 does not immunize websites from copyright claims.⁹ If a victim took the image or video herself, she is the copyright owner and can in theory take action against unauthorized use. This strategy has proven successful in some cases. However, this option will not be of use to the many victims who do not take the images or videos themselves. Some lawyers and scholars have suggested that an expansive conception of “joint authorship” might cover these victims,¹⁰ but it is not clear how much traction this theory will have in actual cases. Moreover, similar problems of publicity, time, and resources that accompany tort claims hinder copyright claims.

IV. The Inadequacy of Existing Legal Responses: Criminal Law

As mentioned above, some forms of non-consensual pornography can be addressed by federal and state criminal laws regulating child pornography, stalking, harassment, voyeurism, and computer hacking. However, no federal criminal law explicitly recognizes the non-consensual disclosure of sexually intimate images of adults as a crime in itself, and only one state so far has a law that does so.

⁷ 29 C.F.R. § 1604.11 [1980].

⁸ I have argued that the protection against sexual harassment, as a form of sex discrimination, should not be so limited. See Mary Anne Franks, *Sexual Harassment 2.0*, 71 MARYLAND L. REV. 655 (2012).

⁹ 47 USC § 230 (e)(2): “Nothing in this section shall be construed to limit or expand any law pertaining to intellectual property.”

¹⁰ See Derek Bambauer, “Beating Revenge Porn With Copyright,” <https://blogs.law.harvard.edu/infolaw/2013/01/25/beating-revenge-porn-with-copyright/>.

[Work in Progress]

While “pornography” is to some degree regulated by federal criminal law, this regulation focuses almost exclusively on the age of the individuals portrayed. Little to no attention is paid to whether the individuals have consented to be portrayed in such a manner.

The following is a list of applicable federal criminal laws and a brief explanation of the limitations of each. Cognate state criminal laws regulating child pornography, stalking, harassment, voyeurism, and computer hacking are similarly limited.

A. Sexual Exploitation and Other Abuse of Children

18 U.S.C. 2257 sets out recordkeeping requirements for producers of pornography. There are two serious limitations to this law for the purposes of addressing non-consensual pornography. First, the statute’s definition of “producer” essentially tracks the definition of the Communications Decency Act §230: that is, it does not include websites or servers that facilitate or distribute material submitted by third-party users, which are precisely the type of websites and servers most likely to be engaged in non-consensual pornography. Second, as the law’s title indicates, the statute focuses almost exclusively on age-verifying identification. It sets out no requirements to verify that the individuals portrayed have consented to the use of their images.

B. Interstate Anti-Stalking Punishment and Prevention Act

18 U.S.C. 2261A makes it a crime “for anyone who travels in interstate or foreign commerce to use the mail, any interactive computer service, or any interstate or foreign commerce facility to engage in a course of conduct that causes substantial emotional distress to a person or causes the person or a relative to fear for his or her life or physical safety.” This statute could and should apply to some instances of non-consensual pornography. Non-consensual pornography is often part of a pattern of intimate partner stalking and harassment. Unfortunately, few law enforcement officials and prosecutors treat it as such.

In addition, many perpetrators of non-consensual pornography may not fulfill the intent requirement of the statute, namely, the intent to “kill, injure, harass, or place under surveillance with intent to kill, injure, harass, or intimidate, or cause substantial emotional distress” to the victim. Many admitted purveyors of nonconsensual pornography maintain, with some plausibility, that their sole intention is to obtain notoriety, fulfill some sexual desire, or increase traffic for their websites.

C. Video Voyeurism Prevention Act of 2004

18 U.S.C. 1801 makes it a crime to intentionally “capture an image of a private area of an individual without their consent, and knowingly do[] so under circumstances in which the individual has a reasonable expectation of privacy.” Substantively, this Act could cover some instances of non-consensual pornography, but it does not appear that this statute would reach situations in which the initial image is consensually produced or given, but is then non-consensually distributed or accessed. That is, the statute is written without acknowledgment of the contextual nature of consent.

[Work in Progress]

D. Computer Fraud and Abuse Act

18 U.S.C. 1030 addresses various forms of computer fraud and hacking. Because the accessing, uploading, or dissemination of nonconsensual pornography can involve computer fraud and hacking, some perpetrators would theoretically run afoul of this statute. However, such activity is not the real target of this statute, and there are ways to participate in the creation or distribution of nonconsensual pornography that do not involve hacking or fraud as defined by this statute.

V. The Importance of a Criminal Law Approach

Non-consensual pornography is on the rise in part because there is very little incentive for malicious actors to refrain from such behavior. While victims can try to take advantage of a patchwork of civil and criminal laws that can be brought to bear on the harms they experience, there is no existing clear legal or social prohibition against non-consensual pornography in itself. Criminal law is both the most principled and the most effective avenue to preventing and addressing online non-consensual pornography.¹¹ While non-consensual pornography may indeed also be a violation of privacy or an infringement of copyright, it is at its base an act of sexual use without consent. When such sexual use is inflicted on an individual's physical body, it is considered rape or sexual assault. The fact that non-consensual pornography does not involve physical contact does not make it any less a form of sexual abuse. As to effectiveness, the fact that CDA §230 does not shield websites from federal criminal liability¹² means that a criminal law approach to non-consensual pornography is also the most practical approach to the problem.

Federal and state criminal laws regarding voyeurism, stalking and harassment, and child pornography demonstrate the legal and social understanding that physical contact is not necessary to cause great harm and suffering. Criminal laws prohibiting voyeurism rest on the commonly accepted assumption that observing a person in a state of undress or engaged in sexual activity without that person's consent not only inflicts dignitary harms upon the individual observed, but inflicts a social harm serious enough to warrant criminal prohibition and punishment. Stalking and harassment laws reflect the understanding that some forms of non-physical conduct can produce such distress and intimidation as to be justly prohibited by criminal law.

The legal and social condemnation of child pornography is another example of our collective understanding that the production, viewing, and distribution of certain kinds of sexual images are harms in themselves. In *New York v. Ferber* (1982), the Supreme Court recognized that the production and distribution of child pornography is distinct from the underlying crime of the sexual abuse of children.¹³ The Court observed that "the distribution of photographs and films depicting sexual activity by juveniles... are a permanent record of the children's participation and the harm to

¹¹ As attorney Erica Johnstone puts it, "Even if people aren't afraid of being sued because they have nothing to lose, they are afraid of being convicted of a crime because that shows up on their record forever." Tracy Clark-Flory, Salon.com, "Criminalizing Revenge Porn," April 6, 2013. (http://www.salon.com/2013/04/07/criminalizing_revenge_porn/).

¹² 47 USC § 230 (e)(1): "Nothing in this section shall be construed to impair the enforcement of ... any ... Federal criminal statute."

¹³ 458 U.S. 747

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the child is exacerbated by their circulation.”¹⁴ When images and videos of sexual assaults and surreptitious observation are distributed and consumed, they likewise inflict further harms on the victims and on society distinct from the criminal acts to which the victims were originally subjected. The trafficking in this material moreover increases the demand for images and videos that exploit the individuals portrayed. This is why the Court in *Ferber* held that it is necessary to shut down the “distribution network” of child pornography in order to reduce the sexual exploitation of children: “The most expeditious, if not the only practical, method of law enforcement may be to dry up the market for this material by imposing severe criminal penalties on persons selling, advertising, or otherwise promoting the product.”¹⁵ Victims of non-consensual pornography of any age are harmed each time a person views or shares their intimate images, and to allow the traffic in such images to flourish increases the demand and the pervasiveness of such images.

International criminal law provides precedent and perspective on this issue. Both the International Criminal Tribunal for Rwanda (ICTR) and the International Criminal Tribunal for the former Yugoslavia (ICTY) have employed a definition of sexual violence that does not require physical contact. In both tribunals, forced nudity was found to be a form of sexual violence.¹⁶ In the *Akayesu* case, the ICTR found that “sexual violence is not limited to physical invasion of the human body and may include acts which do not involve penetration or even physical contact.”¹⁷ In the *Furundzija* case, the ICTY similarly found that international criminal law punishes not only rape, but “all serious abuse of a sexual nature inflicted upon the physical and moral integrity of a person by means of coercion, threat of force, intimidation in a way that is degrading and humiliating for the victim’s dignity.”¹⁸

VII. Model State Criminal Laws Compared: New Jersey and Florida

To date, New Jersey is the only state with a law in place that clearly and comprehensively criminalizes the non-consensual disclosure of sexually intimate images. Legislators in Florida attempted to pass a much less clear and much less comprehensive bill in their most recent term, but the measure was ultimately defeated.¹⁹ For some reason, it appears that several states currently considering legislation on the issue are modelling their draft statutes on Florida’s flawed, failed measure rather than on New Jersey’s law, which has been on the books for nearly a decade²⁰ and has seemingly faced no serious constitutional or other challenges to date. This section will detail New Jersey’s superior approach to the issue and explain the weaknesses of proposals like Florida’s.

¹⁴ *Id.* at 759.

¹⁵ *Id.* at 760.

¹⁶ See ANN-MARIE DE BROUWER, SUPRANATIONAL CRIMINAL PROSECUTION OF SEXUAL VIOLENCE: THE ICC AND THE PRACTICE OF THE ICTY AND ICTR (2005) 135-7; HELEN DURHAM, TRACEY GURD (EDS.), LISTENING TO THE SILENCES: WOMEN AND WAR (2005), 146-7.

¹⁷ <http://www.unictr.org/tabid/128/Default.aspx?id=18&mnid=4>

¹⁸ <http://www.icty.org/case/furundzija/4>

¹⁹ There are indications that the bill’s original sponsors will attempt to introduce the bill again in their next session.

²⁰ New Jersey’s law took effect on January 8, 2004.

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A. New Jersey

New Jersey offers an extremely promising approach to the harm of non-consensual pornography. New Jersey criminalizes certain invasions of privacy, in particular invasions involving intimate photographs or videos. The relevant law prohibits the non-consensual observation, recording, or disclosure of intimate images, recognizing that each of these actions constitutes a distinct harm.

New Jersey's approach is commendable in that it treats the conduct seriously while providing specific definitions and affirmative defenses that guard the statute against First Amendment overbreadth. The law has been in effect since 2004 without serious challenge.²¹

According to New Jersey 2C: 14-9,

1. a. An actor commits a crime of the fourth degree if, knowing that he is not licensed or privileged to do so, and under circumstances in which a reasonable person would know that another may expose intimate parts or may engage in sexual penetration or sexual contact, he observes another person without that person's consent and under circumstances in which a reasonable person would not expect to be observed.

b. An actor commits a crime of the third degree if, knowing that he is not licensed or privileged to do so, he photographs, films, videotapes, records, or otherwise reproduces in any manner, the image of another person whose intimate parts are exposed or who is engaged in an act of sexual penetration or sexual contact, without that person's consent and under circumstances in which a reasonable person would not expect to be observed.

c. An actor commits a crime of the third degree if, knowing that he is not licensed or privileged to do so, he discloses any photograph, film, videotape, recording or any other reproduction of the image of another person whose intimate parts are exposed or who is engaged in an act of sexual penetration or sexual contact, unless that person has consented to such disclosure. For purposes of this subsection, "disclose" means sell, manufacture, give, provide, lend, trade, mail, deliver, transfer, publish, distribute, circulate, disseminate, present, exhibit, advertise or offer. Notwithstanding the provisions of subsection b. of N.J.S.2C: 43-3, a fine not to exceed \$30,000 may be imposed for a violation of this subsection.

d. It is an affirmative defense to a crime under this section that:

- (1) the actor posted or otherwise provided prior notice to the person of the actor's intent to engage in the conduct specified in subsection a., b., or c., and**
- (2) the actor acted with a lawful purpose.**

Under New Jersey law, a third-degree crime carries a prison sentence of between 3 and 5 years; fourth-degree crimes carry a sentence of up to 18 months.²²

²¹ In 2012, Brandon Carangelo was charged under the New Jersey statute for uploading pictures of his ex-girlfriend without her consent. *See* http://www.nj.com/hudson/index.ssf/2012/10/bayonne_man_charged_with_posti.html. According to court records, he was found guilty.

B. Florida

In spring 2013, Representative Tom Goodson sponsored a bill criminalizing non-consensual pornography in the Florida House of Representatives. While the bill received significant initial support, it ultimately died in committee.²³ The reasons for this are not clear, but eleventh-hour attempted amendments to the bill demonstrated alarming hostility and contempt towards victims.²⁴ Strangely, several states have looked to the wording of Florida's failed bill as a model for their own legislation. This is a disturbing trend not only because the bill failed to pass but also because Florida's bill, while well-intentioned, was seriously flawed. The following is the text of Florida's HB 787.

847.0042 Nude depictions with personal identifying information.

(1) A person may not knowingly transmit or post to a social networking service or any other website, or knowingly cause to be transmitted or posted to a social networking service or any other website, in one or more transmissions or posts:

- (a) A photograph or video which depicts nudity of another person;**
- (b) Descriptive information in any form that conveys the personal identification information, as defined in s. 817.568, of the person whose nudity is depicted in the photograph or video; and**
- (c) That results in the personal identification information being displayed together with, or being otherwise identifiable as connected with, the photograph or video, for the purpose of harassing the depicted person or causing others to harass the depicted person. "Harass" means to engage in conduct directed at a specific person that is intended to cause substantial emotional distress to such person and serves no legitimate purpose.**

(2) (a) Except as provided in paragraph (b), a person who violates this section commits a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

(b) A person who is 18 years of age or older at the time of violating this section commits a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084, if the violation involves a photograph or video of a person who was younger than 16 years of age at the time the photograph or video was made.

(3) An offense is committed within this state if any conduct that is an element of the offense or any harm to the depicted person resulting from the offense occurs within this state.

The two most serious problems with Florida's bill were the requirement of "personal identifying information" and "intent to cause substantial distress or humiliation." There is no principled reason to require that one's name, address, etc. be included in addition to the distribution of the images

²² <http://www.csclarklaw.com/new-jersey-laws-statutes/new-jersey-criminal-statutes-2c43-1-degrees-of-crimes.html>

²³ <http://www.myfloridahouse.gov/Sections/Bills/billsdetail.aspx?BillId=50026>

²⁴ Michael E. Miller, "Miami Student Holly Jacobs Fights Revenge Porn," <http://www.miaminewtimes.com/2013-05-09/news/revenge-porn-miami-holly-jacobs/full/>.

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themselves for the conduct to be criminalized. If a sexually explicit image includes an individual's face, no other identifying information is necessary to cause harm (this is especially true when such images are sent directly to the individual's relatives, employers, peers, students, etc.). A good bill could include penalty enhancements for non-consensual pornography that included additional personal information, but non-consensual pornography that does not include such information should not escape punishment. This restrictive language could either have been removed or could have included the stipulation that an individual's face qualifies as personally identifying information.

As to the second issue, many people who engage in non-consensual pornography, especially those who host websites that traffic in such material, can plausibly claim that they have no intent to "cause substantial distress or humiliation."²⁵ They want money or notoriety and in many cases do not even know the people whose images they use.²⁶ Any law against non-consensual pornography will be rendered largely ineffective if it cannot be applied to the main channels of demand and distribution as well as supply.

There were further problems with Florida's bill that other states would do well to avoid. Using "nudity" as a category runs the risk of being both over- and under-inclusive. The first raises First Amendment concerns, and the second reduces the law's effectiveness. A mother who uploads a picture of her toddler taking a bath would violate the law as written, whereas a man who uploads an image of himself the moment after he ejaculates on his sleeping girlfriend's face would not. In other words, some nude images are not sexually explicit, and some non-nude images are extremely explicit. Furthermore, the Florida bill restricted the reach of the law to images distributed to "social networking service[s] or any other website." That would presumably have excluded images and videos distributed via email, text, and hard copy without any justification for doing so.

VIII. Recommendations

To be featured in pornographic depictions against one's will is a form of sexual abuse, yet existing state and federal definitions of sexual abuse do not include such acts. Modifying state and federal definitions so that they include this form of sexual abuse would be the most just and effective way to address this harm. Both federal and state criminal prohibitions should look to New Jersey's criminal invasion of privacy law as a model for legislation, though this model can certainly be improved. Non-consensual pornography is more accurately conceptualized as a form of sexual abuse than as an invasion of privacy (or as harassment, as some states characterize it). As such, state legislators could consider including it along with other sex offenses, establishing confidentiality for victims and requiring convicted perpetrators to register as sex offenders. On the federal level, the definition of "sexual act" could be amended to include the sexual use of actual visual representations (not drawings or written descriptions) of an individual's body without consent, so that non-consensual pornography that occurs in interstate commerce (via email or other Internet communication) could be included in the federal definition of "sexual assault" (such "virtual sexual assault" could be considered a lesser degree than rape and other forms of physical sexual penetration). Language for

²⁵ The problems here are similar to those raised by harassment and stalking statutory language on intent. *See* V.B.

²⁶ Joe Mullin, "How a 'Revenge Porn' Site Got Built," <http://arstechnica.com/tech-policy/2013/02/how-a-revenge-porn-site-got-built-fake-identities-to-trade-photos/>.

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this expanded definition could be borrowed from international criminal case law.²⁷ This amendment could alternatively be made to the federal stalking statute, which already establishes prohibitions against certain forms of interstate sexual crimes.

As detailed above, the most effective and just solution to the problem of non-consensual pornography would be to prohibit it under federal criminal law. While state criminal laws prohibiting the conduct are important (especially for reaching forms of non-consensual pornography that does not cross state lines), such laws are by their nature limited both by jurisdiction and by CDA §230.²⁸ State laws criminalizing the conduct can, however, provide important supplemental support.²⁹

A federal criminal prohibition on non-consensual pornography would have the most immediate and effective impact because it would reach all acts that occur in “interstate commerce.” According to existing federal provisions, using the Internet to transmit information qualifies as “interstate commerce”; thus a federal statute would allow for prosecutions of the large proportion of non-consensual pornography that is distributed via the Internet.

A. Model State Statute

I. An actor commits a crime if, knowing that he is not licensed or privileged to do so, he discloses any photograph, film, videotape, recording or any other reproduction of the image of another person whose intimate parts are exposed or who is engaged in an act of sexual penetration or sexual contact³⁰ unless that person has consented to such disclosure. For the purposes of this section, “disclose” means sell, manufacture, give, provide, lend, trade, mail, deliver, transfer, publish, distribute, circulate, disseminate, present, exhibit, advertise or offer.

II. Exceptions:

A. The actor acted with a lawful purpose, including law enforcement in connection with a criminal prosecution; compliance with subpoenas or court orders for use in legal proceedings; routine security observation by retail establishments when such observation is clearly posted; employers acting within the scope of their employment.

B. There shall exist a rebuttable presumption that individuals featured in commercial pornography productions compliant with the requirements of 18 USC §2257 have consented to such depictions.

²⁷ See Section V.

²⁸ State laws will not have force to the extent that they are inconsistent with the terms of CDA §230. 47 USC § 230 (e)(3): “Nothing in this section shall be construed to prevent any State from enforcing any State law that is consistent with this section. 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.”

²⁹ While websites and Internet servers would likely escape liability for state criminal violations because of CDA §230, state law could reach the individuals responsible for the original non-consensual disclosure.

³⁰ “Intimate parts” and “sexual penetration/sexual contact” could be defined by reference to other statutes of the particular state, or by using federal definitions (see VIII.B.II).

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B. Model Federal Statute

I. Whoever uses the mail, any interactive computer service, or any facility of interstate or foreign commerce to engage in a course of conduct or travels in interstate or foreign commerce or within the special maritime and territorial jurisdiction of the United States to produce or disclose a sexually graphic visual depiction of an individual without that individual's consent shall be fined under this title or imprisoned not more than one year, or both.

(a) The falsification of proof of consent shall be punishable by law.

(b) State Attorneys General shall have the authority to enforce the provisions of this law.

II. Definitions:

(1) "Disclosure" includes creation, distribution, publication, dissemination, transfer, sale, purchase, delivery, trade, offering, or advertising;

(2) "Sexually graphic" means revealing intimate areas of an individual or exposing an individual engaged in sexually explicit conduct;

a. "Intimate areas" is defined as in 18 USC § 1801 [slightly modified]: "the naked genitals, pubic area, buttocks, or any portion of the female breast below the top of the areola";

b. "Sexually explicit conduct" as defined in 18 USC § 2256: "(i) graphic sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex, or lascivious simulated sexual intercourse where the genitals, breast, or pubic area of any person is exhibited; (ii) graphic or lascivious simulated; (I) bestiality; (II) masturbation; or (III) sadistic or masochistic abuse; or (iii) graphic or simulated lascivious exhibition of the genitals or pubic area of any person";

(3) "Visual depiction" is defined as in 18 USC § 2256: "includes undeveloped film and videotape, data stored on computer disk or by electronic means which is capable of conversion into a visual image, and data which is capable of conversion into a visual image that has been transmitted by any means, whether or not stored in a permanent format;

II. Exceptions:

A. The actor acted with a lawful purpose, including law enforcement in connection with a criminal prosecution; compliance with subpoenas or court orders for use in legal proceedings; routine security observation by retail establishments when such observation is clearly posted; employers acting within the scope of their employment.

B. There shall exist a rebuttable presumption that individuals featured in commercial pornography productions compliant with the requirements of 18 USC §2257 have consented to such depictions.

IX. First Amendment Concerns

The First Amendment's protection of free speech is by no means absolute. The First Amendment moreover does not protect stalking, harassment, true threats, child pornography, incitement, obscenity, fighting words, libel, fraud, expression directly related to criminal conduct, or discrimination.³¹ First Amendment protection is moreover greatly reduced for matters of "purely private concern." Prohibiting the non-consensual disclosure of sexually graphic images can be justified by any or all of the following five reasons:

1. The First Amendment does not serve as a blanket protection for **malicious, harmful conduct** simply because such conduct may have an expressive dimension. Stalking, harassment, voyeurism, and threats can all take the form of speech or expression, yet the criminalization of such conduct is common and carefully crafted criminal statutes prohibiting this conduct have not been held to violate First Amendment principles.³² The non-consensual disclosure of sexually intimate images is no different.

2. The non-consensual disclosure of sexually graphic images is a matter of **purely private concern**, which the Supreme Court has held does not warrant the robust protection afforded to expression of matters of public concern. The Supreme Court has "long recognized that not all speech is of equal First Amendment importance. It is speech on 'matters of public concern' that is 'at the heart of the First Amendment's protection.' ... In contrast, speech on matters of purely private concern is of less First Amendment concern."³³ While some matters of private concern may receive First Amendment, there must be some legitimate interest in the consumption of such images for this to be the case.³⁴ There is no such legitimate interest in disclosing or consuming sexually explicit images without the subjects' consent. Prohibiting the non-consensual disclosure of sexually graphic images of individuals poses "no threat to the free and robust debate of public issues; there is no potential interference with a meaningful dialogue of ideas concerning self-government; and there is no threat of liability causing a reaction of self-censorship by the press."³⁵

3. Sexually intimate images of individuals disclosed without consent belongs to the category of "**obscenity**," which the Supreme Court has determined does not receive First Amendment protection. In *Miller v. California*, the Court set out the following guidelines for determining whether material is obscene: "(a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest,...; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value."³⁶ The Supreme Court provided two "plain examples" of "sexual conduct" that could be regulated:

"(a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated.

³¹ U.S. v. Stevens, 130 S.Ct. 1577, 1580 (2010) (internal citations omitted).

³² See Timothy L. Allsup, 13 N.C. J.L. & Tech. On. 227, 239-243 (2012).

³³ *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 758-60 (1985) (internal citations omitted).

³⁴ *Connick v. Myers*, 461 U.S. 138, 147 (1983).

³⁵ *Snyder v. Phelps*, 131 S.Ct. 1207, 1215 (2011) (internal citations omitted).

³⁶ *Miller v. California*, 413 U.S. 15, 23 (1973).

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(b) Patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals.”³⁷

Disclosing pictures and videos that expose an individual’s genitals or reveal an individual engaging in a sexual act without that individual’s consent easily qualifies as a “patently offensive representation” of sexual conduct. Such material moreover offers no “serious literary, artistic, political, or scientific value.”³⁸

4. The “**publication of private facts**” tort is widely accepted by the majority of courts to comply with the First Amendment, although the Supreme Court has yet to rule explicitly on the constitutionality of this tort with regard to matters not of public record. According to the *Restatement (Second) of Torts*, “One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, if the matter publicized is of a kind that (a) would be highly offensive to a reasonable person, and (b) is not of legitimate concern to the public.”³⁹ In *New York Times v. Sullivan*, the Court observed that criminal statutes afford more safeguards to defendants than tort actions, suggesting that criminal regulation of conduct raises fewer First Amendment issues than tort actions.⁴⁰ If so, then a carefully-crafted criminal statute prohibiting the publication of private facts – including the non-consensual publication of sexually intimate images – should easily pass constitutional muster.

5. Because the non-consensual disclosure of sexually intimate images is a practice disproportionately targeted at women and girls, it is a form of **discrimination** that produces harmful **secondary effects** and as such is not protected by the First Amendment. The First Amendment does not protect discriminatory conduct,⁴¹ and regulations that are predominantly concerned with harmful secondary effects rather than the expressive content of particular conduct do not violate the First Amendment.⁴² Prohibitions against discrimination on the basis of race, sex, national origin, and other categories, even when such discrimination takes the form of “expression,” have been upheld by the Supreme Court.⁴³ Title II and Title VII of the Civil Rights Act of 1964, along with Title IX of

³⁷ Id. at 25.

³⁸ Noted First Amendment scholar Eugene Volokh has written that “a suitably clear and narrow statute banning nonconsensual posting of nude pictures of another, in a context where there’s good reason to think that the subject did not consent to publication of such pictures, would likely be upheld by the courts ... [C]ourts can rightly conclude that as a categorical matter such nude pictures indeed lack First Amendment value.” The Volokh Conspiracy, <http://www.volokh.com/2013/04/10/florida-revenge-porn-bill/>.

³⁹ RESTATEMENT (SECOND) OF TORTS (1977), §652D, Publicity Given to Private Life.

⁴⁰ “Presumably a person charged with violation of this statute enjoys ordinary criminal-law safeguards such as the requirements of an indictment and of proof beyond a reasonable doubt. These safeguards are not available to the defendant in a civil action.” *New York Times Co. v. Sullivan*, 376 U.S. 254, 277 (1964).

⁴¹ “[A]ntidiscrimination laws... have long been held constitutional.” *Wisconsin v. Mitchell*, 508 U.S. 476, 476 (1993)

⁴² “Another valid basis for according differential treatment to even a content-defined subclass of proscribable speech is that the subclass happens to be associated with particular “secondary effects” of the speech, so that the regulation is “justified without reference to the content of the ... speech,” ... Where the government does not target conduct on the basis of its expressive content, acts are not shielded from regulation merely because they express a discriminatory idea or philosophy.” *R.A.V. v. City of St. Paul*, 505 U.S. 377, 389 (1992) (internal citations omitted).

⁴³ “[S]ince words can in some circumstances violate laws directed not against speech, but against conduct ... a particular content-based subcategory of a proscribable class of speech can be swept up incidentally within

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the Education Amendments of 1972, all allow for the regulation of certain forms of speech and expression when they violate fundamental principles of equality and non-discrimination. Apart from the harm that non-consensual pornography inflicts on individual victims, it inflicts discriminatory harms on society as a whole. Like rape, domestic violence, and sexual harassment (i.e., abuses directed primarily at women and girls) non-consensual pornography reinforces the message that women's bodies belong to men, and that the terms of women's participation in any sphere of life are to be determined by their willingness to endure sexual subordination and humiliation. Non-consensual pornography causes women to lose jobs, leave school, change their names, and fear for their physical safety, driving women out of public spaces and out of public discourse. Combating this pernicious form of sex discrimination is not only consistent with longstanding First Amendment principles, but is necessary to comport with equally important Fourteenth Amendment equal protection principles.

X. Recommended Resources

A. Websites

www.withoutmyconsent.org
www.endrevengeporn.com
www.womentagainstrevengeporn.com
<http://annmariechiarini.com/>

B. News Articles

San Francisco Chronicle, "Public Humiliation Over Private Photos," February 8, 2013 (<http://www.sfgate.com/opinion/article/Public-humiliation-over-private-photos-4264155.php#page-1>).

Salon.com, "Criminalizing Revenge Porn," April 6, 2013 (http://www.salon.com/2013/04/07/criminalizing_revenge_porn/).

Observer.com's Betabeat, "A Victim Speaks: Standing Up to a Revenge Porn Tormentor," May 1, 2013, (<http://betabeat.com/2013/05/revenge-porn-holli-thometz-criminal-case/>).

MSN, "Florida's bill Florida pushes bill to criminalize 'revenge porn,'" April 9, 2013 (<http://news.msn.com/us/florida-pushes-bill-to-criminalize-revenge-porn>).

DAME Magazine, "The Fight to Criminalize Revenge Porn," April 11, 2013 (<http://www.damemagazine.com/2013/04/11/fight-criminalize-revenge-porn>).

the reach of a statute directed at conduct, rather than speech... Thus, for example, sexually derogatory "fighting words," among other words, may produce a violation of Title VII's general prohibition against sexual discrimination in employment practices." *R.A.V. v. City of St. Paul*, 505 U.S. 377, 389 (1992) (internal citations omitted).

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Nerve.com, "My Ex Posted 'Revenge Porn' Photos of Me," January 8, 2013
<http://www.nerve.com/love-sex/true-stories/my-ex-posted-revenge-porn-photos-of-me>

C. Blog Posts

Danielle Citron, "Revenge Porn and the Uphill Battle to Sue Site Operators."
<http://www.concurringopinions.com/archives/2013/01/revenge-porn-and-the-uphill-battle-to-sue-site-operators.html> (January 25, 2013).

Danielle Citron, "Revenge Porn and the Uphill Battle to Sue Site Operators, Part II."
<http://www.concurringopinions.com/archives/2013/01/revenge-porn-and-the-uphill-battle-to-pierce-section-230-immunity-part-ii.html> (January 25, 2013).

Mary Anne Franks, "Why We Need a Federal Criminal Law Response to Revenge Porn."
<http://www.concurringopinions.com/archives/2013/02/why-we-need-a-federal-criminal-law-response-to-revenge-porn.html> (February 15, 2013).

Mary Anne Franks, "Why You Can't Punch a Boxer in the Face When He Asks You for Directions: Consent, Context, and Humanity."
<http://www.concurringopinions.com/archives/2013/02/why-you-cant-punch-a-boxer-in-the-face-when-he-asks-you-for-directions-consent-context-and-humanity.html> (February 9, 2013).

Mary Anne Franks, "Adventures in Victim Blaming: Revenge Porn Edition."
<http://www.concurringopinions.com/archives/2013/02/adventures-in-victim-blaming-revenge-porn-edition.html> (February 1, 2013).

D. Academic Articles

Ann Bartow, *Pornography, Coercion, and Copyright Law 2.0*, 10 VAND. J. ENT. & TECH. L. 799 (2008).

Danielle Citron, *Cyber Civil Rights*, 89 B.U. L. REV. 61 (2009); *Law's Expressive Value in Combating Cyber Gender Harassment*, 108 MICH. L. REV. 373 (2009).

Mary Anne Franks, *Unwilling Avatars: Idealism and Discrimination in Cyberspace*, 20 COLUM. J. GENDER & L. 224 (2011); *Sexual Harassment 2.0*, 71 MARYLAND L. REV. 655 (2012).

Ariel Ronneburger, *Sex, Privacy, and Webpages: Creating a Legal Remedy for Victims of Porn 2.0*, 21 SYRACUSE SCI. & TECH. L. REP. 1 (2009).



State of Wisconsin
2013 - 2014 LEGISLATURE



LRB-2771/P1

PJH:.....

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PRELIMINARY DRAFT - NOT READY FOR INTRODUCTION

7-25-13
d-note

Gen Cat

1

AN ACT ... relating to: distributing a sexually explicit image without consent

2

and providing and creating a penalty.

Analysis by the Legislative Reference Bureau

Under current law, no one may photograph, videotape, or otherwise capture an image of a nude or partially nude person (depicted person) without the depicted person's knowledge and consent. A person who does so, or who possesses, reproduces, or distributes the image with the knowledge that the image was captured without the depicted person's knowledge or consent, is generally guilty of a Class I felony, and may be fined up to \$10,000, imprisoned for up to three years and six months, or both. ✓

Under this bill, no one may reproduce, distribute, exhibit, publish, transmit, or otherwise disseminate an image of a person who is nude or partially nude or who is engaging in sexually explicit behavior without the consent of the person, regardless of whether the depicted person consented to the capture of the image. A person who does so is guilty of a Class A misdemeanor and may be fined up to \$10,000, imprisoned for up to nine months, or both. ✓

Because this bill creates a new crime or revises a penalty for an existing crime, the Joint Review Committee on Criminal Penalties may be requested to prepare a report concerning the proposed penalty and the costs or savings that are likely to result if the bill is enacted.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRB-2771/P1dn

.....
PJH:WJ

Date

Katherine 

Please review this draft to ensure that it complies with your intent. I reviewed the materials you forwarded to me and tried to incorporate elements of the New Jersey law into this draft. Some of the words and phrases defined in the New Jersey law are already found in s. 942.09 or elsewhere in the statutes, and some of the phrasing I changed to comply with our drafting standards.

Please let me know if you would like any changes to the draft, or if you have any questions or concerns. When the draft meets your approval, I will redraft it in introducible form.

Peggy Hurley
Legislative Attorney
Phone: (608) 266-8906
E-mail: peggy.hurley@legis.wisconsin.gov

**DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU**

LRB-2771/P1dn
PJH:wlj:ph

August 9, 2013

Katherine:

Please review this draft to ensure that it complies with your intent. I reviewed the materials you forwarded to me and tried to incorporate elements of the New Jersey law into this draft. Some of the words and phrases defined in the New Jersey law are already found in s. 942.09 or elsewhere in the statutes, and some of the phrasing I changed to comply with our drafting standards.

Please let me know if you would like any changes to the draft, or if you have any questions or concerns. When the draft meets your approval, I will redraft it in introducible form.

Peggy Hurley
Legislative Attorney
Phone: (608) 266-8906
E-mail: peggy.hurley@legis.wisconsin.gov

Hurley, Peggy

From: Bates, Katherine
Sent: Monday, August 19, 2013 2:46 PM
To: Hurley, Peggy
Subject: RE: Draft review: LRB -2771/P1 Topic: Distributing a nude depiction without consent

Hello!
In P/2 form, if you don't mind.
Thank you!

Katherine

From: Hurley, Peggy
Sent: Monday, August 19, 2013 1:59 PM
To: Bates, Katherine
Subject: RE: Draft review: LRB -2771/P1 Topic: Distributing a nude depiction without consent

Hi Katherine,

I will pull the draft and make that change. Would you like a /P2, or would you like the draft in introducible form?

Peggy

From: Bates, Katherine
Sent: Monday, August 19, 2013 1:57 PM
To: Hurley, Peggy
Subject: RE: Draft review: LRB -2771/P1 Topic: Distributing a nude depiction without consent

Good Afternoon!
I've responded to your comments in red. If you have any questions please let me know.

For your bill, I created sub. (3m), which prohibits the distribution, without consent, of a nude or partially nude person or of a person engaging in sexually explicit conduct. The bill creates a definition of "sexually explicit conduct" because that definition is not found in current law. However, the bill uses the definition of "nude or partially nude" already in s. 942.09 and the definition of "representation" already in s. 942.09.

The definition of "nude or partially nude" under current s. 942.09 is lifted from another statute, s. 942.08: "Nude or partially nude person" means any human being who has less than fully and opaquely covered genitals, pubic area or buttocks, any female human being who has less than a fully opaque covering over any portion of a breast below the top of the nipple, or any male human being with covered genitals in a discernibly turgid state." I think this addresses Ms. Franks' concern regarding overbreadth or vagueness on this definition.

The bill also uses the definition of "representation" that is already used in s. 942.09: "a photograph, exposed film, motion picture, videotape, other visual representation, or data that represents a visual image." I appreciate Ms. Franks' concerns regarding this definition, but if we were to limit "representation" to photographs or videos, I think it would be necessary to change the definition for all of s. 942.09. I can do this, if you want me to, but I wanted to raise the point that this definition has been used in current law for some time. I do not know, however, if the definition of "representation" has been subject to a direct court challenge. If this definition has been unchallenged for all this time than it is good enough for me.

Regarding the commercial use, I think I could add something like "(c) This subsection does not apply if the person represented consented to the reproduction, distribution, exhibition, publication, transmission, or other dissemination of the representation for commercial purposes." Your thoughts? Perfect. Thank you!

Katherine Bates

Office of Representative John Spiros
86th Assembly District
State Capitol – 17 North
608-266-1183

From: Hurley, Peggy
Sent: Monday, August 12, 2013 11:31 AM
To: Bates, Katherine
Subject: RE: Draft review: LRB -2771/P1 Topic: Distributing a nude depiction without consent

Hi Katherine,

I've reviewed the questions forwarded by Ms. Franks. I think most of them can be resolved by considering the context of the current statute into which I added your draft.

Current section 942.09 criminalizes capturing or distributing certain representations depicting nudity. Here is the statute, in full:

942.09 Representations depicting nudity. (1) In this section:

(a) "Captures a representation" means takes a photograph, makes a motion picture, videotape, or other visual representation, or records or stores in any medium data that represents a visual image.

(am) "Nude or partially nude person" has the meaning given in s. 942.08 (1) (a).

(b) "Nudity" has the meaning given in s. 948.11 (1) (d).

(c) "Representation" means a photograph, exposed film, motion picture, videotape, other visual representation, or data that represents a visual image.

(2) (am) Whoever does any of the following is guilty of a Class I felony:

1. Captures a representation that depicts nudity without the knowledge and consent of the person who is depicted nude while that person is nude in a circumstance in which he or she has a reasonable expectation of privacy, if the person knows or has reason to know that the person who is depicted nude does not know of and consent to the capture of the representation.
2. Makes a reproduction of a representation that the person knows or has reason to know was captured in violation of subd. 1. and that depicts the nudity depicted in the representation captured in violation of subd. 1., if the person depicted nude in the reproduction did not consent to the making of the reproduction.
3. Possesses, distributes, or exhibits a representation that was captured in violation of subd. 1. or a reproduction made in violation of subd. 2., if the person knows or has reason to know that the representation was captured in violation of

subd. 1. or the reproduction was made in violation of subd. 2., and if the person who is depicted nude in the representation or reproduction did not consent to the possession, distribution, or exhibition.

(bm) Notwithstanding par. (am), if the person depicted nude in a representation or reproduction is a child and the capture, possession, exhibition, or distribution of the representation, or making, possession, exhibition, or distribution of the reproduction, does not violate s. 948.05 or 948.12, a parent, guardian, or legal custodian of the child may do any of the following:

1. Capture and possess the representation or make and possess the reproduction depicting the child.
2. Distribute or exhibit a representation captured or possessed under subd. 1., or distribute or exhibit a reproduction made or possessed under subd. 1., if the distribution or exhibition is not for commercial purposes.

(cm) This subsection does not apply to a person who receives a representation or reproduction depicting a child from a parent, guardian, or legal custodian of the child under par. (bm) 2., if the possession, exhibition, or distribution is not for commercial purposes.

(5) (a) Whoever, while present in a locker room, intentionally captures a representation of a nude or partially nude person while the person is nude or partially nude in the locker room is guilty of a Class B misdemeanor. This paragraph does not apply if the person consents to the capture of the representation and one of the following applies:

1. The person is, or the actor reasonably believes that the person is, 18 years of age or over when the person gives his or her consent.
2. The person's parent, guardian, or legal custodian consents to the capture of the representation.

(b) 1. Whoever intentionally does any of the following is guilty of a Class A misdemeanor:

- a. Captures a representation of a nude or partially nude person while the actor is present in, and the person is nude or partially nude in, the locker room and exhibits or distributes the representation to another.
- b. Transmits or broadcasts an image of a nude or partially nude person from a locker room while the person is nude or partially nude in the locker room.

2. This paragraph does not apply if the person consents to the exhibition or distribution of the representation or the transmission or broadcast of the image and one of the following applies:

- a. The person is, or the actor reasonably believes that the person is, 18 years of age or over when the person gives his or her consent.
- b. The person's parent, guardian, or legal custodian consents to the exhibition, distribution, transmission, or broadcast.

For your bill, I created sub. (3m), which prohibits the distribution, without consent, of a nude or partially nude person or of a person engaging in sexually explicit conduct. The bill creates a definition of "sexually explicit conduct" because that definition is not found in current law. However, the bill uses the definition of "nude or partially nude" already in s. 942.09 and the definition of "representation" already in s. 942.09.

The definition of "nude or partially nude" under current s. 942.09 is lifted from another statute, s. 942.08: "Nude or partially nude person" means any human being who has less than fully and opaquely covered genitals, pubic area or buttocks, any female human being who has less than a fully opaque covering over any portion of a breast below the top

of the nipple, or any male human being with covered genitals in a discernibly turgid state." I think this addresses Ms. Franks' concern regarding overbreadth or vagueness on this definition.

The bill also uses the definition of "representation" that is already used in s. 942.09: "a photograph, exposed film, motion picture, videotape, other visual representation, or data that represents a visual image." I appreciate Ms. Franks' concerns regarding this definition, but if we were to limit "representation" to photographs or videos, I think it would be necessary to change the definition for all of s. 942.09. I can do this, if you want me to, but I wanted to raise the point that this definition has been used in current law for some time. I do not know, however, if the definition of "representation" has been subject to a direct court challenge.

Regarding the commercial use, I think I could add something like "(c) This subsection does not apply if the person represented consented to the reproduction, distribution, exhibition, publication, transmission, or other dissemination of the representation for commercial purposes." Your thoughts?

Please review and let me know what changes you would like to your bill. If you have any other questions or concerns, or would like to discuss these further, please let me know.

Peggy

From: Bates, Katherine
Sent: Friday, August 09, 2013 2:05 PM
To: LRB.Legal
Subject: RE: Draft review: LRB -2771/P1 Topic: Distributing a nude depiction without consent

Hello!

Thank you for getting this done so quickly! I forwarded the draft on to Mary Anne Franks, who provided the model draft. I've included her comments below in regards to some things that might be clarified.

Thank you and have a great weekend!

Katherine Bates

Office of Representative John Spiros
86th Assembly District
State Capitol – 17 North
608-266-1183

Thank you for sending this, Katherine. I am very impressed with the draft, especially by the fact that it doesn't repeat the mistakes of other bills by limiting its scope only to images published with identifying information. It also does a nice job of clarifying what is already prohibited under WI law and separating that from what the current bill does.

There are a couple of issues with the wording that will raise First Amendment "overbreadth and vagueness" concerns, but I think these can be solved fairly easily.

First, the bill forbids the nonconsensual distribution of "representations." This word suggests that paintings, sculptures, crayon drawings, etc. would be prohibited under the statute, which is very broad. I believe this is why the New Jersey statute, for example, is careful to limit the images in question to photographs and videos.

The "nude or partially nude" language, without further specification, raises other overbreadth questions. Is a man or woman in a bathing suit "partially nude"? What about a man with his shirt off? Is the definition of "nude" different for men and women? It might be advisable to import some language regarding "intimate parts" or "nudity" from either existing state law (perhaps laws on indecent exposure) or existing federal law (noted in the proposed federal statute in my memo).

Finally, there is the question of commercial use. If someone uploads a picture of his room to Craigslist, and there's a Playboy magazine centerfold (or, for that matter, a National Geographic magazine featuring topless women) in it, would he be penalized by the statute given that he has not personally obtained consent from the model featured? In other words, can the bill make clear that secondhand distribution of commercial pornography/photography would not be penalized (I attempted to do this using "rebuttable presumption" language in my draft statutes).

Happy to discuss any of these issues further. Also, I have learned that California's bill has not yet been approved, which means that Wisconsin might very well be the first state to pass criminal legislation specifically addressing revenge porn (New Jersey's statute being a comprehensive criminal invasion of privacy law).

All best,
Mary Anne

From: LRB.Legal
Sent: Friday, August 09, 2013 10:40 AM
To: Rep.Spiros
Subject: Draft review: LRB -2771/P1 Topic: Distributing a nude depiction without consent

Following is the PDF version of draft LRB -2771/P1 and drafter's note.



State of Wisconsin
2013 - 2014 LEGISLATURE



LRB-2771/PT

PJH:wlj:ph

stays ↑ mr

PRELIMINARY DRAFT - NOT READY FOR INTRODUCTION

8-19

Regen

1 AN ACT ~~to create~~ 942.09 (1) (d) and 942.09 (3m) of the statutes; relating to:
2 distributing a sexually explicit image without consent and providing a penalty.

Analysis by the Legislative Reference Bureau

Under current law, no one may photograph, videotape, or otherwise capture an image of a nude or partially nude person (depicted person) without the depicted person's knowledge and consent. A person who does so, or who possesses, reproduces, or distributes the image with the knowledge that the image was captured without the depicted person's knowledge or consent, is generally guilty of a Class I felony, and may be fined up to \$10,000, imprisoned for up to three years and six months, or both.

Under this bill, no one may reproduce, distribute, exhibit, publish, transmit, or otherwise disseminate an image of a person who is nude or partially nude or who is engaging in sexually explicit behavior without the consent of the person, regardless of whether the depicted person consented to the capture of the image. A person who does so is guilty of a Class A misdemeanor and may be fined up to \$10,000, imprisoned for up to nine months, or both

Because this bill creates a new crime or revises a penalty for an existing crime, the Joint Review Committee on Criminal Penalties may be requested to prepare a report concerning the proposed penalty and the costs or savings that are likely to result if the bill is enacted.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

1 **SECTION 1.** 942.09 (1) (d) of the statutes is created to read:

2 942.09 (1) (d) "Sexually explicit conduct" has the meaning given in s. 948.01
3 (7).

4 **SECTION 2.** 942.09 (3m) of the statutes is created to read:

5 942.09 (3m) (a) Whoever, without the consent of the person represented,
6 reproduces, distributes, exhibits, publishes, transmits, or otherwise disseminates a
7 representation of a nude or partially nude person or of a person engaging in sexually
8 explicit conduct is guilty of a Class A misdemeanor. The consent of the person
9 represented to the capture of the representation or to the possession of the
10 representation by the actor is not a defense to a violation of this subsection.

11 (b) This subsection does not apply to the parent, guardian, or legal custodian
12 of the person represented if the representation does not violate s. 948.05 or 948.12
13 and the reproduction, distribution, exhibition, publication, transmission, or other
14 dissemination is not for commercial purposes.

15

(END)

Insert

**2013-2014 DRAFTING INSERT
FROM THE
LEGISLATIVE REFERENCE BUREAU**

LRB-2771/P1ins
PJH:wlj:ph

1 **INSERT:**

2 (c) This subsection does not apply if the person represented consented to the
3 reproduction, distribution, exhibition, publication, transmission, or other
4 dissemination of the representation for commercial purposes.

Tradewell, Becky

From: LRB.Legal
Sent: Wednesday, August 28, 2013 9:44 AM
To: Tradewell, Becky
Subject: FW: Draft review: LRB -2771/P2 Topic: Distributing a nude depiction without consent

Hi Becky, In Peggy's absence, could you please take care of the request below?
Thanks much...

Lori

From: Bates, Katherine
Sent: Wednesday, August 28, 2013 9:38 AM
To: LRB.Legal
Subject: RE: Draft review: LRB -2771/P2 Topic: Distributing a nude depiction without consent

Thank you!
We're ready for the real draft.

Katherine Bates

Office of Representative John Spiros
86th Assembly District
State Capitol – 17 North
608-266-1183

From: LRB.Legal
Sent: Friday, August 23, 2013 8:26 AM
To: Rep.Spiros
Subject: Draft review: LRB -2771/P2 Topic: Distributing a nude depiction without consent

Following is the PDF version of draft LRB -2771/P2.



State of Wisconsin
2013 - 2014 LEGISLATURE



LRB-2771/P2
PJH:wjrs

1
t & eev

~~PRELIMINARY DRAFT - NOT READY FOR INTRODUCTION~~

[Handwritten signature]
to day
please

refer

1 AN ACT to create 942.09 (1) (d) and 942.09 (3m) of the statutes; relating to:
2 distributing a sexually explicit image without consent and providing a penalty.

Analysis by the Legislative Reference Bureau

Under current law, no one may photograph, videotape, or otherwise capture an image of a nude or partially nude person (depicted person) without the depicted person's knowledge and consent. A person who does so, or who possesses, reproduces, or distributes the image with the knowledge that the image was captured without the depicted person's knowledge or consent, is generally guilty of a Class I felony, and may be fined up to \$10,000, imprisoned for up to three years and six months, or both.

Under this bill, no one may reproduce, distribute, exhibit, publish, transmit, or otherwise disseminate an image of a person who is nude or partially nude or who is engaging in sexually explicit behavior without the consent of the person, regardless of whether the depicted person consented to the capture of the image. A person who does so is guilty of a Class A misdemeanor and may be fined up to \$10,000, imprisoned for up to nine months, or both.

*

Because this bill creates a new crime or revises a penalty for an existing crime, the Joint Review Committee on Criminal Penalties may be requested to prepare a report concerning the proposed penalty and the costs or savings that are likely to result if the bill is enacted.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:



State of Wisconsin
2013 - 2014 LEGISLATURE



LRB-2771/1

PJH:wlj&eev:rs

Stays
MR

2013 BILL

9.4.13

Regen

1 AN ACT *to create* 942.09 (1) (d) and 942.09 (3m) of the statutes; relating to:
2 distributing a sexually explicit image without consent and providing a penalty.

Analysis by the Legislative Reference Bureau

Under current law, no one may photograph, videotape, or otherwise capture an image of a nude or partially nude person (depicted person) without the depicted person's knowledge and consent. A person who does so, or who possesses, reproduces, or distributes the image with the knowledge that the image was captured without the depicted person's knowledge or consent, is generally guilty of a Class I felony, and may be fined up to \$10,000, imprisoned for up to three years and six months, or both.

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Because this bill creates a new crime or revises a penalty for an existing crime, the Joint Review Committee on Criminal Penalties may be requested to prepare a report concerning the proposed penalty and the costs or savings that are likely to result if the bill is enacted.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:



State of Wisconsin
2013 - 2014 LEGISLATURE



LRB-2771/2
PJH:wlj&eev:rs

Handwritten initials: "Mr" and "djs" with lines pointing to the text above.

2013 BILL

Handwritten word: "today"

Handwritten initials: "STW"

Handwritten text in a circle: "Cole Cat"

1 AN ACT *to create* 942.09 (1) (d) and 942.09 (3m) of the statutes; **relating to:**
2 distributing a sexually explicit image without consent and providing a penalty.

Analysis by the Legislative Reference Bureau

Handwritten text in a circle: "(distribute)"

Under current law, no one may photograph, videotape, or otherwise capture an image of a nude or partially nude person (depicted person) without the depicted person's knowledge and consent. A person who does so, or who possesses, reproduces, or distributes the image with the knowledge that the image was captured without the depicted person's knowledge or consent, is generally guilty of a Class I felony, and may be fined up to \$10,000, imprisoned for up to three years and six months, or both.

Handwritten text in a circle: "Inset analysis"

Under this bill, no one may reproduce, distribute, exhibit, publish, transmit, or otherwise disseminate an image of a person who is nude or partially nude or who is engaging in sexually explicit behavior without the consent of the person, regardless of whether the depicted person consented to the capture of the image. A person who does so is guilty of a Class A misdemeanor and may be fined up to \$10,000, imprisoned for up to nine months, or both.

Because this bill creates a new crime or revises a penalty for an existing crime, the Joint Review Committee on Criminal Penalties may be requested to prepare a report concerning the proposed penalty and the costs or savings that are likely to result if the bill is enacted.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

**2013-2014 DRAFTING INSERT
FROM THE
LEGISLATIVE REFERENCE BUREAU**

LRB-2771/2ins
PJH:wlj&eev:rs

Insert Analysis

Under the bill, the prohibition does not apply if the person depicted consented to the distribution for commercial purposes. The bill creates exceptions for parents or legal guardians who distribute otherwise legal representations of their minor children for noncommercial purposes, for law enforcement officers acting in their official capacity, and for persons who distribute the representations for the purpose of reporting or assisting with the investigation of a crime. ✓
✓
✓
✓

INSERT 2.17:

3. A person who is not the actor and who reproduces, distributes, exhibits, publishes, transmits, or otherwise disseminates the representation to a law enforcement officer or agency for the purpose of reporting a crime or for the purpose of assisting a law enforcement officer or agent in an investigation or prosecution of a crime. ✓

Barman, Mike

From: Bates, Katherine
Sent: Friday, October 11, 2013 3:20 PM
To: LRB.Legal
Subject: Draft Review: LRB -2771/3 Topic: Distributing a nude depiction without consent

Please Jacket LRB -2771/3 for the ASSEMBLY.