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Sexual Exploitation in the Digital Age: Non-Consensual Pornography and What Washington Can Do to Stop It

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SEXUAL EXPLOITATION IN THE DIGITAL AGE
NON-CONSENSUAL PORNOGRAPHY AND WHAT WASHINGTON CAN DO TO STOP IT

A background report on House Bill 1788 prepared for the Washington State House Public Safety Committee by Farah Ali, Brian Conley, Heather Lewis and Charlotte Lunday of the University of Washington School of Law, Technology Law and Public Policy Clinic
Executive Summary

‘Revenge pornography’ is the distribution of sexually explicit or nude photographs of another person without their consent. The names ‘revenge pornography’ and ‘revenge porn’ are misleading because they imply that these disseminations are categorized by a desire for revenge. This is not necessarily the case. Victims’ advocates consider these acts to be a form of sexual exploitation and abuse and generally refer them as incidents of ‘non-consensual pornography’.

Both genders can be victims of revenge pornography. A survey of one website dedicated to showcasing revenge pornography showed that 26 percent of the featured Washington State victims were male and 74 percent were female. Victims face real and significant harm as a result of having their images shared, and currently can only seek to address these losses in Washington State civil courts. This limitation places the burden of up-front costs of litigation costs on victims. Additionally, targets of non-consensual pornography must prove that their images were posted with malicious intent, rather than allowing victims to demonstrate the harms that they incurred as a result of these actions.

Criminalizing non-consensual pornography would remove some of the cost burden from victims and would hold harassers accountable for their sexual violations. Furthermore, if the penalty for the criminal law is at least a gross misdemeanor, a victim who has experienced severe emotional distress may be able to qualify for Washington’s Crime Victim Compensation program for some mental health expenses.

House Bill 1788
What is “Revenge Pornography”? 

‘Revenge pornography’ is the distribution of sexually explicit or nude images of another person without their consent. The terms ‘revenge pornography’ and ‘revenge porn’ are misleading because they imply that a desire for revenge is what unites perpetrators and motivates the dissemination of intimate material. This is not necessarily the case. Much of this content is shared by spurned ex-spouses or partners, but hackers, and those who secretly record/photograph others without their knowledge or consent, and even images originally obtained without consent through the use of hidden cameras, phone or computer hacking, or even recording sexual assaults can all be forms of revenge pornography. Additionally, images that are shared with or taken by a lover within the context of an intimate relationship – if shared with others outside of the relationship without the consent of the pictured partner may be revenge pornography. Giving one person permission to view your body does not mean that you implicitly give all persons that same permission.

Fig. 1: Incidents of revenge pornography in Washington State from one of many revenge porn websites.
Victims of Revenge Pornography

Both genders can be victims of revenge pornography. We took a snapshot of one revenge pornography website and determined that 26 percent of personally identifiable victims living in Washington State were male, 74 percent were female.

Fig. 2: Incidents of revenge pornography in Washington State from revenge porn website www.myex.com

One particularly notable case is that of Holly Jacobs. In 2009 she was a PhD student living in Miami. At that time personal, very intimate photos – photos that she had shared only with her boyfriend of several years went viral. Soon they were on hundreds of websites specializing in revenge porn. Attached to the photos was her full name, her phone number and email address. Some of these photos were emailed directly to her bosses. She tried for four years to have the images and identifying information removed, but eventually concluded that the only effective way to disassociate herself from the images was to change her name.
Revenge Pornography Causes Real and Significant Harm to its Victims

Revenge pornography isn’t simply an ‘irritation’ or an ‘embarrassment’ for its victims. Rather, this form of sexual abuse causes real, quantifiable harm. Holly Jacobs was a PhD student when someone deliberately uploaded her private photos. This compromised her professional working life—photos were submitted to her employer. The photos jeopardized her future earnings, as many prospective clients.

Why Current Options Are Insufficient For Victims

Although there are a variety of civil remedies that can be applied to non-consensual pornography, these remedies are largely inadequate. Civil remedies burden victims with the up-front costs of litigation, which is too expensive for victims. Litigation can be financially taxing for anyone, but victims of non-consensual pornography often suffer financial and employment losses that make as a result of non-consensual pornography. [STATISTICS]. Despite the losses victims suffer, harassers are often insolvent.

Copyright law can help victims have their images removed. Eighty percent of intimate images are “selfies,” meaning the person depicted also took the image, and therefore owns the copyright. However, copyright law does not allow a victim to face his or her harasser and hold him or her responsible for the harm done. Furthermore, Holly Jacobs, a cyber civil rights advocate, had her intimate photographs uploaded to more than 300 websites. Copyright notice-and-takedown procedures allowed her to have some of those images removed, but the sheer number of copies made it impossible to have all images removed. Jacobs inevitably had to change her name so that search results of her name would not be filled with explicit images. In addition, when a website refuses to take down the images, in order to sue for copyright infringement, the victim must file the copyright of the image that was meant to be private.

Other criminal statutes may apply to non-consensual pornography violations. Washington’s cyberstalking law, RCW 9.61.260, for instance, has recently been used to prosecute a harasser, but this law is vulnerable to a constitutional challenge. Under the language of the statute, a person could be guilty of cyberstalking if he or she intends to embarrass someone and anonymously makes an electronic communication to that person or to a third person using indecent language. The Electronic Frontier Foundation pointed out that a bad Yelp review could qualify under this language.

Identity theft, RCW 9.35.020, can also apply in some situations when a harasser posts certain financial or identifying information with the images with the intent to commit a crime. Although sometimes harassers caption images with the depicted person’s social security number or driver’s license number, the intent requirement severely limits the applicability of the identity theft crime if the harasser intends nothing more than to invade the victim’s privacy.
What Are the Benefits of Criminalizing Non-consensual Pornography?

Professor Mary Anne Franks from the University of Miami School of Law has argued, “While non-consensual pornography can constitute a violation of privacy, an infringement of copyright, or both, it is also 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 of a form of sexual abuse.” She has also pointed out that other criminal laws, such as those regarding voyeurism and child pornography, illustrate that physical contact is not a “prerequisite for criminal punishment.” Rather, these criminal laws recognize the harms inherent in non-consensual sexual use, and they seek to deter that conduct.

A criminal non-consensual pornography law would deter some would-be perpetrators, and it would relieve victims of the burden of costly litigation and would hold harassers accountable for their sexual violations. Furthermore, if the penalty for the criminal law is at least a gross misdemeanor, a victim who has experienced severe emotional distress may be able to qualify for Washington’s Crime Victim Compensation program for some mental health expenses.

Professor Danielle Keats Citron of the University of Maryland School of Law wrote about Holly Jacob’s struggle with local police after her images and videos surfaced online: the officers believed the woman’s ex-boyfriend owned the images and could do what he wanted with them, leaving them powerless to act on her behalf. A criminal non-consensual pornography law would reduce confusion and empower officers to investigate non-consensual pornography violations.

Why should non-consensual pornography be criminalized?

Criminalizing non-consensual pornography is appropriate given the nature of the crime and current is in line with Washington law practice. Non-consensual pornography, as Professor Mary Anne Franks from the University of Miami School of Law argues, is not simply “a violation of privacy, an infringement of copyright, or both, [but] is also an act of sexual use without consent. When such sexual use is inflicted on an individual’s 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 of a form of sexual assault.” Washington law has not made this physical versus non-physical contact distinction. For example, This distinction is born out by Washington law. RCW 9A.44.115 criminalizes voyeurism, a sexual offense that involves no physical contact, but is nonetheless codified as a sex offense.

Some may argue The argument that voyeurism is distinct from non-consensual pornography because the act of viewing or recording was non-consensual ignores modern understanding of consent. However, consent to one specific act is not automatic consent to another. This nuance was acknowledged by the Washington legislature when it recently amended RCW 9A.44.060, rape in the third degree, to remove the exception that law contained for spouses. As
a result, in Washington a wedding band does not bind its wearer to her rapist. A spouse, just like anyone else, must ensure that “at the time of the act of sexual intercourse or sexual contact there are actual words or conduct indicating freely given agreement to have sexual intercourse or sexual contact.” RCW 9A.44.010(7). A person may have consented, in the privacy of her intimate relationship, to the taking of pictures or videos for use within the relationship, but not to their dissemination.

Acknowledging the nuances of consent is only one way this legislature has sought to protect victims of sex offenses; the legislature has also enacted rules for Washington courts to follow in order to avoid further victimization. For instance, Washington adopted Evidence Rule 412, which closely tracks its federal equivalent in disallowing evidence of previous sexual behavior or comments of victims of sex offenses in civil cases, and its criminal law corollary, 9A.44.020(2). As the advisory note to the federal version of this rule states, the purpose of such rules is to protect “a victim’s privacy and to come forward to report criminal acts.” The legislature extended the rule to civil cases in order to “protect alleged victims against invasions of privacy, potential embarrassment, and unwarranted sexual stereotyping.” The federal and state legislatures have acknowledged the unique challenges posed by sex offenses for victims and has sought to protect them.

Criminalizing non-consensual pornography also provides clarity for officers responding to incidents. Furthermore, if the penalty for the criminal law is at least a gross misdemeanor, a victim who has experienced severe emotional distress may be able to qualify for Washington’s Crime Victim Compensation program for some mental health expenses. In the past, this has proven to help victims of other sexual offenses such as ___ and ___ cope and move forward from this crime.

The penalty proposed by HB 1788 is no more severe than that imposed on those guilty of voyeurism. A class C felony acknowledges the damage done to victims and the gravity of the sexual offense. A purely civil remedy would inevitably fail to punish or deter violators who are judgment-proof and would reduce the seriousness of the problem in the eyes of the public. We do not apply property law to a woman’s body in the case of a sexual assault or rape; similarly, why should copyright should not be her only remedy when she is exposed to the world?

What Should Lawmakers Consider When Drafting Non-Consensual Pornography Legislation?

_The law should be inclusive of all victims._

A non-consensual pornography law should be drafted to include both physical and non-physical images. It should include language that can encompasses advances in changing technology. Non-consensual pornography takes many forms. For instance, victims may be fully or partially
unclothed, or they may be completely clothed, but performing a sexual act. Sexual acts can include traditional intercourse or manual or oral contact. (Note, current verbiage of the bill left out heterosexual sex) They may also be images that involve exchanges of bodily fluids. In each of these circumstances, victims can experience the same types and severity of harm. Thus, the law should be drafted broadly enough to account for all of these activities.

Furthermore, consent should be defined in a manner that recognizes that some individuals are coerced or extorted into allowing intimate images to be shared. Domestic violence statutes [CITE] refer to “freely given” consent and allow HHS advocates to argue that a victim was under duress when consenting to a [WAS it a sexual act?]. Similarly, a non-consensual pornography law should cover victims who did not meaningfully consent.

The law should also recognize that a person may consent to the distribution of images to some parties, but not to others. Just like an individual may be welcome in someone’s home at one time, does not mean the individual is always welcome there, or that the individual could invite others to the home without the owner’s prior approval, consent may be limited in scope. The law should define the crime as pertaining both to distributions made in the absence of consent and to those outside the scope of consent. Recognizing this nature of consent recognizes that individuals should have complete autonomy of their bodies and their sexuality.

Finally, the law should not focus on delineate a required motive but instead on harm. Many intimate images are acquired through hacking and distributed for a multitude of reasons. Although non-consensual pornography is commonly called “revenge porn” and invokes an idea of the harasser as a spurned ex-lover—which is sometimes the case—drafting legislation that requires that the perpetrator intend to cause harm limits the law's applicability to only those with a particular motive and reduces its effectiveness. The proper mens rea should be “knowingly”: A person should be guilty of violating the law if they knowingly disseminate intimate images of another person when that person had a reasonable expectation of privacy and the perpetrator knew or should have known that the person depicted had not consented to the dissemination.

The law should apply to the conduct of minors

In Oklahoma, a teenaged girl was drugged and raped. The perpetrator filmed the act and shared the video with his friends. These friends continued to distribute the footage to peers. Some of them emailed the video to the girl’s parents along with slurs about the girl’s alleged promiscuity. This girl suffered not only the trauma of being raped, but she and her family were tormented by the explicit images disseminated online. Minors’ actions can and do cause harm. In this case, tremendous harm.

A non-consensual pornography law would criminalize the distribution of the video in the example above. However, it would not criminal teenaged sexting, entirely. If a minor were to
send an intimate image of him or herself to another, that minor would have consented to sharing the image with the recipient. However, that recipient may be liable for continuing to share the image without consulting the sender. In this case--and even for the original sender--child pornography laws could also apply. If a minor were charged with a violation of the child pornography statutes, the consequences could be at least as serious, and, in many cases, harsher. Furthermore, every teenager who has ever sent a sexually explicit image of him or herself to another person is vulnerable having this image shared with others later in their life. [EXAMPLE Stories in footnote].

The Legislature may limit application to minors by adding an additional motive requirement or by exempting those under eighteen entirely, as Illinois has done. However, teenagers have been the victim of non-consensual pornography, and teenagers have been perpetrators of it too. Our recommendation would, therefore, be to extend the law’s application to minors, but allow for a graduated sentencing structure so that courts may impose sentences based on the facts of each case and the perpetrator’s age and maturity (and intent?).

_The law should be narrowly-tailored to avoid conflicts with Federal and Constitutional Law._

The First Amendment and the Communications Decency Act § 230 pose preemption risks for state non-consensual pornography law. Under the First Amendment, the law must be further a compelling state interest and be narrowly-tailored to accomplish that interest. Thus, the law must allow for the dissemination of images in some circumstances. The law must not criminalize the sharing of images that were acquired when the individual was voluntarily nude in a public or commercial setting, or when the distribution of the images are in the public interest, shared with law enforcement or medical professionals, or other lawful public purposes. The law must also not extend to persons who distribute images when they have no reason to know that the person depicted had not consented to the distribution of the image. By including these exceptions, the law will be narrowly-tailored to deter and punish the sexual harassment of non-consensual pornography victims.

In addition, the Communications Decency Act limits the liability of “interactive service providers” for third party content. This means, that website operators, webhosts, telecommunications companies and others cannot be criminalized for the dissemination of intimate images, when the dissemination is made by a third party. Under Communications Decency Act jurisprudence, interactive service providers can only be held liable for their own acts and material contributions to illegality. Thus, a non-consensual pornography law should include a provision stating that it is not to be construed in any way inconsistent with the Communications Decency Act.
How Do HB 1272 and HB 1788 Compare?

Currently, two bills in the Washington state legislature seek to criminalize non-consensual pornography this year with HB 1272 and HB 1788. Of these, HB 1788 is superior because it is inclusive of more victims, is less likely to face constitutional and federal legal challenges, and because it provides additional civil protections for victims.

Summary of HB 1272

To paraphrase, HB 1272 criminalizes non-consensual pornography when the harasser (1) intends to cause another person harm and (2) distributes images revealing intimate areas (those typically covered by undergarments) of that other person (3) when the perpetrator knew or should have known those images were meant to remain private, and (4) that other person experiences emotional distress. This bill does a few things well: a court may order the destruction of the intimate images as it could for voyeuristic images, it uses a “reasonable person standard” to determine the circumstances in which an image could be shared, and it penalizes both physical and electronic distributions. Nevertheless, this bill is insufficient in a couple of important respects: it is under-inclusive of victims, it conflicts with federal and constitutional law, and it creates a victim-on-trial scenario.

Under-inclusivity of Victims

Although the language of the statute properly criminalizes the distribution of images in which the subject’s intimate areas are shown, it does not address distributions of images in which the person or persons depicted are engaged in a sexual act, but no intimate areas are shown. Because the distributions of each type of image is equally as damaging, this bill should be amended to include other sexually explicit images that do not contain nudity.

Because the statute requires that the perpetrator intends to cause emotional distress, the law does not cover distributions made for other reasons. This is problematic because ex-partners seeking revenge are not the only individuals who engage in non-consensual pornography. Instead, many perpetrators are hackers. Although some hackers may intend to cause the victim emotional distress, others may be motivated for other reasons, such as earning money or page views. The law does not adequately cover these purposes.

Vulnerabilities to Federal and Constitutional Challenges

HB 1272 also raises concerns about its constitutionality and conflicts with federal law for three reasons: it has no public interest exception, it does not exempt images taken of those voluntarily exposed in public or commercial spaces, it does not except images that were
unwittingly distributed as opposed to knowingly distributed, and it does not adequately exclude interactive service providers.

A public interest exception would exempt distributions when the distribution is made to law enforcement, for educational or news-reporting purposes, or for other disclosures made for lawful public purposes. The exception may also exempt disclosures for medical purposes. Such disclosures are protected by the First Amendment. Although a motive requirement may limit the law’s application to some disclosures made in the public interest, HB 1272 otherwise has no public interest exception. An example of why this exception is needed, is the Anthony Weiner scandal from 2011. Given some of the headlines attached to Weiner’s compromising Twitter photographs, it is not hard to imagine that at least some of the entities intended to shame or humiliate Weiner. However, that purpose is secondary to a greater purpose of informing the public of a political candidate’s lapse of judgment. Without a public interest exception, this law risks being struck down as unconstitutional. In fact, the ACLU brought a constitutional challenge against Arizona’s non-consensual pornography law because it lacked a public interest exception.

This law does not exempt distributions of images captured of voluntarily nude persons in public or commercial settings. Although it may be said that, in such setting, it is not reasonable for a perpetrator to have known that the image was meant to be private. Most non-consensual pornography laws expressly exempt images captured in these settings, so that a person is not criminalized for forwarding commercial pornography. This exception provides additional protection from constitutional challenge. In addition, because the law criminalized the distribution of images without reference to whether a person “knowingly distributed” the images, it would cover even inadvertent distributions. These drafting issues risk getting the law struck down for constitutional purposes.

Finally, the law does not except interactive computer service providers as defined in the Communications Decency Act, 47 U.S.C. § 230(f)(2). These providers include, but are not limited to, internet service providers, some telephone companies, website operators, and web hosts. The Communications Decency Act prohibits states from holding website operators liable for the acts of third parties. Without this exception, this law faces federal preemption.

**Victims on Trial**

By requiring the victim to experience emotional harm as an element of the crime, the prosecution would have to put forth evidence that the victim experienced emotional harm. This could involve a victim testifying about the harm and being subject to cross-examination that would imply that the victim did not suffer emotional distress, or did not suffer enough emotional distress. Furthermore, if a victim does not suffer a great deal emotionally, he or she may still endure significant social and professional consequences. This provision does not recognize those harms. Moreover, the inquiry into the victim’s emotional suffering ignores the harm inherent in non-consensual pornography: sexual use without consent. In similar criminal
laws, there is no requirement that the victim show suffering. There should not be such a requirement in this statute either.

**Summary of HB 1788**

HB 1788 criminalizes the distribution of images depicting another identifiable person who is either engaged in sexual contact or whose intimate areas were exposed when the perpetrator both acquired the images in circumstances where the perpetrator knew or reasonably should have known the images was meant to remain private and when the perpetrator knew or should have known the person depicted did not consent to the distribution. HB 1788 also creates a private right of action and allows for pseudonymous litigation so the victim can exert his or her rights without further association him or herself with the intimate images.

For the most part, HB 1788 adequately addresses the appropriate drafting considerations: it contains exceptions for disclosures made in the public interest, for images acquired in public and commercial settings, and for interactive service providers; it applies to the conduct of minor; and it includes depictions of sexual acts rather than just nudity. Most importantly, HB 1788 recognizes that perpetrators have an array of motives for non-consensual pornography and criminalizes all instances of knowing distributions made without the depicted person’s consent. Nevertheless, some minor changes should be made to refine the language and make the law more inclusive of all victims.

*Consent Should Be Defined*

Currently, HB 1788 does not define consent. We propose the following definition: “freely given actions or statements that a reasonable person would perceive as affirmative permission.” By inserting this language, a perpetrator who coerced or extorted consent will not be shielded from law enforcement by that consent.

*“Identifiable” Should Include Data By Which a Third Party Could Identify the Victim*

The law criminalizes the non-consensual distribution of images that contain an “identifiable person,” that is someone who can be identified from either the image or from information included with the image. The term “identifiable person” is included for practical purposes: if the person depicted is not identifiable, one cannot know whether the person consented to the distribution. HB 1788 defines “identifiable characteristics” for the purposes of pseudonymous litigation, but for the purposes of the criminal offense, “identifiable person” should be defined to be a person whose identity can be deduced by a third party from a face in the image, or any content, sound, or other data included with the image. This definition incorporates the evolving nature technology and of personally identifiable information.

*“Intimate Parts” and “Sexual Contact” Should be More Inclusive*
Currently, HB 1788 would not criminalize the non-consensual distribution of images in which people were clothed but engaged in sexual intercourse. It would also not criminalize the non-consensual distributions of images depicting anal regions or sexual acts involving the exchange of bodily fluids. Furthermore, “female adult nipple” should be re-phrased as “mature female nipple” or “developed female nipple” to include depictions of minors. Because images of all of these types of intimate parts and sexual acts can be equally damaging, the definitions of intimate parts and sexual contact should be defined to incorporate these images.

**OUR RECOMMENDATION:** WE URGE YOU TO PASS HB 1788 WITH THE MINOR CHANGES SUGGESTED ABOVE BECAUSE IT PROVIDES SUBSTANTIAL PROTECTIONS TO WASHINGTON CITIZENS AGAINST NON-CONSENSUAL PORNOGRAPHY AND IS WELL-DRAFTED TO AVOID CONFLICTS WITH EXISTING LAWS.
1272 - Voyeurism
- Type of crime
  - 1st - misdemeanor
  - 2nd - gross misdemeanor
  - 3rd - Class C
- Language
  - overly broad
  - doesn’t have exceptions ie. public interest
    - no minor exception
1788 - New Section
- Type of crime
  - Class C Felony
- Language
  - includes exceptions including public interest and police investigation
- Allows for civil remedies as well
  - allows for remedies to make victim whole again
  - allows for victims to feel safe and protect their privacy
- Accounts for communication decency Act