

# THE NONCONSENSUAL DISSEMINATION OF DEEPPAKE PORNOGRAPHY: A DEEP DIVE INTO WHY MORE LEGISLATION IS NEEDED TO PROTECT VICTIMS

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## I. INTRODUCTION

In 2018, Rana Ayyub, an Indian investigative journalist, was the subject of the nonconsensual dissemination of deepfake pornographic videos in an effort to discredit her work.<sup>2</sup> Rana first discovered the pornographic video when a friend sent it to her.<sup>3</sup> When she opened the video, she was shocked to see her face but realized that it was not her body depicted in the video.<sup>4</sup> After Rana received no answers from law enforcement, the United Nations finally intervened and wrote to the Indian government asking them to protect her.<sup>5</sup> After that, the dissemination slowed, but the video still affects her.<sup>6</sup> Unfortunately, Rana Ayyub is only one of the countless victims affected by the nonconsensual dissemination of deepfake technology.

Deepfakes have become prevalent in the digital age, but there has been little legislation to help combat the dissemination of unethical deepfake images and videos. Part II of this Note will discuss how deepfakes are created and how they have been ethically and unethically used. Part III of this Note will discuss the concerns surrounding current legislation. Part IV will propose a whole new landscape concerning legislation on the unlawful dissemination of deepfake pornography

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<sup>2</sup> Rana Ayyub, *I Was The Victim Of A Deepfake Porn Plot Intended To Silence Me*, HUFFINGTON POST (Nov. 21, 2018), [https://www.huffingtonpost.co.uk/entry/deepfake-porn\\_uk\\_5bf2c126e4b0f32bd58ba316](https://www.huffingtonpost.co.uk/entry/deepfake-porn_uk_5bf2c126e4b0f32bd58ba316).

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

including imposing state and federal laws and the need for public education on deepfake pornography and dissemination.

## II. WHAT DEEPAKES ARE AND HOW THEY ARE USED

Deepfakes are artificial images or videos that have been altered or manipulated by machine learning to “misrepresent someone as doing or saying something that was not actually done or said.”<sup>7</sup> First, a substantial amount of data, often in the form of images or videos, is collected for the target person or object.<sup>8</sup> This data is used to train the deep learning model to understand the facial features, expressions, and other characteristics of the target.<sup>9</sup> Then the collected data is preprocessed to extract relevant features and ensure consistency in the dataset, which may involve cropping images, aligning facial landmarks, and normalizing pixel values.<sup>10</sup>

Most often, deepfakes are created by using Generative Adversarial Networks (“GANs”). GANs consist of two networks: the generator and the discriminator.<sup>11</sup> The generator and discriminator are both trained using the cache previously collected cache of images and recordings.<sup>12</sup> It is the generator’s job to generate data based on a user’s prompt, starting with random noise and refining its output over time.<sup>13</sup> After the generator has obtained the data from the prompt, it then sends the data to the discriminator.<sup>14</sup> The discriminator evaluates the content

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<sup>7</sup> *Deepfake*, MERRIAM-WEBSTER (2023); *What the heck is a deepfake?*, INFORMATION SECURITY AT THE UNIVERSITY OF VIRGINIA, <https://security.virginia.edu/deepfakes> (last visited Sept. 26, 2023).

<sup>8</sup> Shweta Goyal, *GANs — A Brief Introduction to Generative Adversarial Networks*, MEDIUM (Jun. 2, 2019), <https://medium.com/analytics-vidhya/gans-a-brief-introduction-to-generative-adversarial-networks-f06216c7200e>.

<sup>9</sup> *Increasing Threat of Deepfake Identities*, DEPARTMENT OF HOMELAND SECURITY (2021), <https://www.dhs.gov/sites/default/files/2022-10/AEP%20DeepFake%20PHASE2%20FINAL%20corrected20221006.pdf>.

<sup>10</sup> *Id.*

<sup>11</sup> Goyal, *supra* note 8.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

generated by the generator and tries to calculate the differences between the original data from the cache and the generated data.<sup>15</sup> After the discriminator collects its data, it sends the data back to the generator.<sup>16</sup> The performance of the GAN is evaluated using a loss function.<sup>17</sup> The goal is to minimize the difference between the generated content and real content.<sup>18</sup> The generator aims to produce content that is indistinguishable from real data, while the discriminator aims to correctly classify real and fake content. The trained model may go through a fine-tuning process to enhance the quality of the generated content and make it more convincing.<sup>19</sup> The more users let the GAN run, the more convincing the deepfake will be.<sup>20</sup> The final deepfake video or image is then created using the trained model and can be shared or distributed.

#### A. ETHICAL AND UNETHICAL USES OF DEEPAKE TECHNOLOGY

Not all deepfakes are bad. Deepfakes can be used ethically and unethically. This Section discusses how deepfakes can be useful when they are created and used ethically, and how hurtful deepfakes can be when they are created unethically.

##### i. *Ethical Uses of Deepfake Technology*

Ethical deepfake usage has been prominent in the entertainment industry. For example, deepfake technology was used in *Furious 7* after franchise star Paul Walker tragically passed away.<sup>21</sup> In November 2013, Walker passed away after filming only a small portion of the film.<sup>22</sup> It was important for the film's creators to re-create Walker as closely as possible.<sup>23</sup> In a later

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<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> Jason Brownlee, *A Gentle Introduction to Generative Adversarial Network Loss Functions*, MACHINE LEARNING MASTERY (July 12, 2019), <https://machinelearningmastery.com/generative-adversarial-network-loss-functions/>.

<sup>18</sup> *Increasing Threat of Deepfake Identities*, DEPARTMENT OF HOMELAND SECURITY (2021), <https://www.dhs.gov/sites/default/files/2022-10/AEP%20DeepFake%20PHASE2%20FINAL%20corrected20221006.pdf>.

<sup>19</sup> *Id.*

<sup>20</sup> Goyal, *supra* note 8.

<sup>21</sup> Joanna Robinson, *Here Are Three Paul Walker Furious 7 Scenes That Proved Especially Hard to Digitally Create*, VANITY FAIR (Oct. 20, 2015), <https://www.vanityfair.com/hollywood/2015/10/paul-walker-furious-7-scenes-digitally-recreated>.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

interview, Joe Letteri, Weta Digital senior VFX supervisor, stated “[W]e had to complete a performance—what Paul Walker would have done if he’d been able to continue. And it had to be his performance.”<sup>24</sup> To achieve the best possible results, the film’s creators used old footage of Walker, scans of Walker’s brothers, and an actor that matched Walker’s build.<sup>25</sup> When the film was released in 2015, the tribute to Paul Walker was well-received by *Fast & Furious* fans.<sup>26</sup>

Ethical deepfake technology is also used in medical research. An example of this is using deepfake technology to “train a digital system to recognize tumors or other abnormalities” that are otherwise difficult to detect.<sup>27</sup> Using this technology allows medical professionals to catch tumors and abnormalities sooner and hopefully give their patients faster and more accurate diagnoses.

Ethical deepfake usage can also be beneficial in the education sector. For example, deepfake technology can bring historical figures back to life and give students a more engaging and interactive lesson.<sup>28</sup> For example, former president John F. Kennedy was scheduled to deliver a speech at the Dallas Trade Mart in Texas, but before he could, he was assassinated, and the speech was never heard—until recently.<sup>29</sup> CereProc, a company specializing in advanced speech synthesis research, analyzed 831 speeches and built JFK’s voice by splitting the recordings into 116,777 small phonetic units.<sup>30</sup> Nearly fifty-five years later, CereProc used the small phonetic units to reconstruct the exact speech former president John F. Kennedy was supposed to deliver at the

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<sup>24</sup> *Id.*

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

<sup>26</sup> Brandon Griggs, *Paul Walker fans choke up at ‘Furious 7’ finale*, CNN ENTERTAINMENT (Apr. 7, 2015), <https://www.cnn.com/2015/04/06/entertainment/paul-walker-furious-ending-feat/index.html>.

<sup>27</sup> Greg Goth, *Medical Deepfakes Are the Real Deal*, MEDICAL DEVICE AND DIAGNOSTIC INDUSTRY ONLINE (Sept. 27, 2022), <https://www.mddionline.com/artificial-intelligence/medical-deepfakes-are-real-deal>.

<sup>28</sup> Ashish Jaiman, *Positive Uses Cases of Synthetic Media (aka Deepfakes)*, MEDIUM (Aug. 14, 2020), <https://towardsdatascience.com/positive-use-cases-of-deepfakes-49f510056387>.

<sup>29</sup> W&V, *The Times: JFK Unsilenced (Grand Prix Cannes Lions 2018)*, YOUTUBE (June 27, 2018), <https://www.youtube.com/watch?v=wZF59wIIBLI&t=99s>.

<sup>30</sup> *JFK Unsilenced*, CEREPROC, <https://www.cereproc.com/en/jfkunsilenced> (last visited Oct. 2, 2023).

Dallas Trade Mart in 1963.<sup>31</sup> This is an example of one of the many ways educators can use deepfake technology to let students learn about historical events in a creative way.

ii. *Unethical Uses of Deepfake Technology*

While deepfake technology can be used ethically, there are a plethora of unethical uses as well. For example, nonconsensual dissemination of deepfake pornography has become prevalent in the digital age. Among other states, New York defines deepfake pornography as “creating fake sexually explicit media using someone’s likeness.”<sup>32</sup> Noelle Martin, an Australian woman, was a victim of deepfake pornography.<sup>33</sup> In 2012, Noelle received an anonymous email saying “there’s deepfakes of you.”<sup>34</sup> After watching the video, Noelle thought the video was convincing even though she knew it was not her body.<sup>35</sup> Noelle went to Australian government agencies and hired a private investigator, but every answer was the same: nothing could be done because there were no specific laws that dealt with deepfake pornography.<sup>36</sup> Noelle Martin went on to work in the legal sector and even started a campaign that resulted in making image-based abuse a criminal offense in Australia in 2017.<sup>37</sup>

Teenagers are also falling victim to unethical deepfake technology usage. In a case from 2021, a mother used deepfake technology to harass three cheerleaders on her daughter’s cheer team.<sup>38</sup> Using a fake phone number, the mother sent the victims photos and videos that were altered by deepfake technology.<sup>39</sup> In an attempt to incriminate the three cheerleaders, the various deepfake

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<sup>31</sup> *Id.*

<sup>32</sup> Michelle Hinchey, *Hinchey Bill to Ban Non-Consensual Deepfake Images Signed into Law*, THE NEW YORK STATE SENATE NEWSROOM (Oct. 2, 2022), <https://www.nysenate.gov/newsroom/press-releases/2023/michelle-hinchey/hinchey-bill-ban-non-consensual-deepfake-images>.

<sup>33</sup> Daniella Scott, *Deepfake Porn Nearly Ruined My Life*, ELLE (Feb. 6, 2020), <https://www.elle.com/uk/life-and-culture/a30748079/deepfake-porn/>.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> Christina Morales, *Pennsylvania Woman Accused of Using Deepfake Technology to Harass Cheerleaders*, N.Y. TIMES (Mar. 14, 2021), <https://www.nytimes.com/2021/03/14/us/raffaella-spone-victory-vipers-deepfake.html>.

<sup>39</sup> *Id.*

images showed depictions of the teenagers being nude, drinking alcohol, and vaping.<sup>40</sup> In one anonymous message, the mother told at least one girl to commit suicide.<sup>41</sup> The mother was eventually found guilty on three counts of misdemeanor cyber harassment and was sentenced to three years of probation.<sup>42</sup> She was also ordered to pay \$3,755.25 in restitution to the three victims.<sup>43</sup>

Unethical uses of deepfake technology not only affect individuals. It can also affect entire nations. Recently, there has been an uprise in the use of deepfake technology to interfere with elections, national security, and international relations. For example, a deepfake video depicting Ukrainian President Volodymyr Zelenskyy demanding Ukrainian troops to surrender to Russia was widely circulated on social media and news outlets.<sup>44</sup> Luckily, the video was quickly removed by social media platforms before any significant damage could be done.<sup>45</sup> The use of unethical deepfakes to national turmoil is not limited to foreign countries. There are many examples of unethical deepfakes that have happened right here in the United States. In May 2023, a deepfake purporting to show an explosion at the Pentagon in Washington, D.C. was widely circulated on Twitter (now known as X).<sup>46</sup> The deepfake caused nationwide confusion, even triggering a temporary, but noticeable, dip in the stock market.<sup>47</sup> In another example, a highly manipulated video of Nancy Pelosi appearing to be impaired went viral on social media in 2019.<sup>48</sup> The video

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<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> Katie Katro, *Bucks County mother gets probation in harassment case involving daughter's cheerleading rivals*, ABC 6 PHILADELPHIA (June 9, 2022), <https://6abc.com/raffaella-spone-bucks-county-pa-cheerleaders-harassment-case-victory-vipers-squad/11939419/>.

<sup>43</sup> *Id.*

<sup>44</sup> Bobby Allyn, *Deepfake video of Zelenskyy could be 'tip of the iceberg' in info war, experts warn*, NATIONAL PUBLIC RADIO (Mar. 16, 2022), <https://www.npr.org/2022/03/16/1087062648/deepfake-video-zelenskyy-experts-war-manipulation-ukraine-russia>.

<sup>45</sup> *Id.*

<sup>46</sup> Donie O'Sullivan & Jon Passantino, *'Verified' Twitter accounts share fake image of 'explosion' near Pentagon, causing confusion*, CNN BUSINESS (May 23, 2023), <https://www.cnn.com/2023/05/22/tech/twitter-fake-image-pentagon-explosion/index.html>.

<sup>47</sup> *Id.*

<sup>48</sup> Jeff Pegues, *Doctored Nancy Pelosi video highlights threat of "deepfake" tech*, CBS NEWS (May 26, 2019), <https://www.cbsnews.com/news/doctored-nancy-pelosi-video-highlights-threat-of-deepfake-tech-2019-05-25/>.

was widely circulated by members of the Republican party in an effort to undermine her position as Speaker of the House.<sup>49</sup> With the 2024 presidential election in sight, the Federal Election Commission (FEC) is brainstorming potential ways to regulate deepfakes in political campaign advertisements.<sup>50</sup> Further, individual states are enacting their laws to help combat the dissemination of campaign advertisements that use deepfake technology.

### **III. THERE ARE NOT ENOUGH LAWS, REGULATIONS, AND SAFEGUARDS IN PLACE TO PROTECT DEEPPAKE PORNOGRAPHY VICTIMS.**

Because deepfake pornography is a relatively new concept, there are not a lot of laws in place to combat the issue. There are also not a lot of courts that have prosecuted deepfake pornography perpetrators. This Part will discuss the limited deepfake pornography laws that are currently in place, individuals who have been prosecuted after disseminating deepfake pornography, and a civil intentional infliction emotional distress claim.

#### **A. CURRENT STATE LAWS**

As of October 2023, only ten states have laws in place to help prevent the circulation of deepfake materials relating to nonconsensual pornography.<sup>51</sup> In 2019, Texas<sup>52</sup>, California<sup>53</sup>, Georgia<sup>54</sup>, and Virginia<sup>55</sup> were the first states to pass laws regulating deepfakes. New York regulation followed in 2020.<sup>56</sup> In 2021, Hawaii amended its violation of privacy statute to include

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<sup>49</sup> Joan Donovan & Britt Paris, *Beware the Cheapfakes*, SLATE (June 12, 2019), <https://slate.com/technology/2019/06/drunken-pelosi-deepfakes-cheapfakes-artificial-intelligence-disinformation.html>.

<sup>50</sup> Ali Swenson, *FEC moves toward potentially regulating AI deepfakes in campaign ads*, PBS (Aug. 10, 2023), <https://www.pbs.org/newshour/politics/fec-moves-toward-potentially-regulating-ai-deepfakes-in-campaign-ads>.

<sup>51</sup> Jorja Siemons, *Deepfake Ads Strain Pre-AI Campaign Laws, Puzzling US Regulators*, BLOOMBERG LAW (July 17, 2023), <https://news.bloomberglaw.com/privacy-and-data-security/deepfake-ads-rock-pre-ai-campaign-laws-puzzling-us-regulators>.

<sup>52</sup> S.B. 751, 86<sup>th</sup> Leg. (Tex. 2019)

<sup>53</sup> A.B. 602 (Cal. 2019)

<sup>54</sup> GA. CODE ANN. § 16-11-90 (2022).

<sup>55</sup> VA. CODE ANN. § 18.2-386.2 (2019).

<sup>56</sup> N.Y. CIV. RIGHTS LAW § 52-c (McKinney) (2021).

the usage of deepfake technology.<sup>57</sup> Also in 2021, Wyoming passed its statutory provision regarding the dissemination of deepfake pornography.<sup>58</sup> In 2023, Washington<sup>59</sup>, Minnesota<sup>60</sup>, and Louisiana<sup>61</sup> passed and enacted its deepfake pornography statutes. Illinois deepfake law has been signed into law and goes into effect January 1, 2024.<sup>62</sup> Currently, Massachusetts,<sup>63</sup> New Jersey,<sup>64</sup> and Wisconsin<sup>65</sup> have proposed legislation that is moving through the respective states' House of Representatives and Senate.

In the ten states that have laws prohibiting the dissemination of deepfake pornography, many of the statutes have a provision that defines “deepfake.” For example, Louisiana defines deepfake as “any audio or visual media in an electronic format . . . that is created, altered, or digitally manipulated in a manner that would falsely appear to a reasonable observer to be an authentic record of the actual . . . conduct of the individual or replace an individual’s likeness with another individual . . . .”<sup>66</sup> The remaining states that define “deepfake” have similar definitions. The range of punishment, however, varies from state to state. In Wyoming, for example, the dissemination of deepfake pornography is a misdemeanor punishable by not more than one-year imprisonment, a fine not exceeding \$5,000, or both.”<sup>67</sup> If convicted in Hawaii, however, the

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<sup>57</sup> HAW. REV. STAT. ANN. § 711-1110.9 (2021).

<sup>58</sup> WYO. STAT. ANN. § 6-4-306 (2021).

<sup>59</sup> WASH. REV. CODE ANN. § 42.62.020 (2023).

<sup>60</sup> MINN. STAT. ANN. § 604.32 (2023); MINN. STAT. ANN. § 617.262 (2023).

<sup>61</sup> LA. STAT. ANN. § 14:73.13 (2023).

<sup>62</sup> *Measure to crack down on harmful deepfakes signed into law thanks to Edly-Allen*, ILLINOIS SENATE DEMOCRATS (July 28, 2023), <https://www.illinoissenatedemocrats.com/caucus-news/84-senator-mary-edly-allen-news/5086-measure-to-crack-down-on-harmful-deepfakes-signed-into-law-thanks-to-edly-allen>.

<sup>63</sup> H.B. 72, 193<sup>rd</sup> Leg. (Mass. 2023).

<sup>64</sup> S.B. 3926, 220<sup>th</sup> Leg. (2022).

<sup>65</sup> S.B. 553, 2023 Leg. (Wis. 2023).

<sup>66</sup> LA. REV. STAT. ANN. § 14:73.13(C)(1) (2023).

<sup>67</sup> WYO. STAT. ANN. § 6-4-306(c) (2021).

dissemination of deepfake pornography is a felony punishable by imprisonment not exceeding five years, a fine not exceeding \$10,000, or both.<sup>68</sup>

As seen above, there are a lot of states that still need to adopt deepfake pornography laws. States must adopt relevant laws before the dissemination of deepfake pornography gets out of hand. Part IV of this Note will further discuss the importance of these laws.

#### B. THE PROSECUTION OF INDIVIDUALS DISSEMINATING DEEPAKE PORNOGRAPHY

As of late 2023, there is no research to support that a defendant has been prosecuted under a deepfake pornography-specific statute. Because deepfake pornography is a relatively new concept, there have also not been many cases that address the issue. However, defendants have been charged and prosecuted for producing deepfake pornography using other statutes such as sexual exploitation of a minor, sexual harassment, stalking, and child pornography.

In November 2022, a Utah man was charged with forcible sexual abuse and five felony counts of sexual exploitation of a minor after he used deepfake technology to transpose children's faces onto the bodies of women in pornographic material.<sup>69</sup> Based on extensive research, a disposition has not been reached in this case and no further information is available. In another case in early 2023, a New York court sentenced Patrick Casey to six months in prison, ten years of probation, and lifetime status as a sex offender after he was convicted of creating deepfake pornography of former middle school and high school classmates.<sup>70</sup> Following Carey's conviction, Nassau County District Attorney Anne Donnelly proposed the Digital Manipulation Protection Act to New York legislators. The Act would make sexually explicit deepfake images illegal no matter

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<sup>68</sup> HAW. REV. STAT. ANN. § 711-1110.9(4) (2021); HAW. REV. STAT. ANN. § 706-660(b) (2022); HAW. REV. STAT. ANN. § 706-640(c) (2022).

<sup>69</sup> Pat Reavy, *Lehi man charged with putting children's faces on pornographic videos*, KSL BROADCASTING (Nov. 22, 2022), <https://www.ksl.com/article/50524040/lehi-man-charged-with-putting-childrens-faces-on-pornographic-videos>.

<sup>70</sup> Carolyn Gusoff, *Patrick Carey sentenced to 6 months for "deepfaking" images of young women, putting them on porn site*, CBS NEW YORK (Apr. 19, 2023), <https://www.cbsnews.com/newyork/news/patrick-carey-sentenced-to-6-months-for-deepfaking-images-of-young-women-putting-them-on-porn-site/>.

how old the victim is.<sup>71</sup> In October 2023, New York Governor Kathy Hochul signed a bill into law that criminalizes the dissemination of nonconsensual deepfake images.<sup>72</sup>

As previously discussed with Rana Ayyub and Noelle Martin, the dissemination of deepfake pornography is a worldwide concern. In another case out of Quebec, Canada, a man was sentenced to prison after creating synthetic child pornography using artificial intelligence.<sup>73</sup> In April 2023, Steven Larouche pleaded guilty to creating at least seven deepfake videos depicting child pornography.<sup>74</sup> In the ruling, Judge Benoit Gagnon wrote that he believed this was the first Canadian case involving deepfakes of child sexual exploitation.<sup>75</sup> Also in his ruling, Judge Gagnon stated that he “worries what will happen as criminals use the technology to put the faces of children whose images they find on social media onto videos of other children being sexually assaulted.”<sup>76</sup>

### C. CIVIL CASES

In multiple states, plaintiffs have been able to establish a sufficient IIED claim when the defendant disseminated pornographic videos of the plaintiff without her consent.<sup>77</sup> In a case out of Michigan, three women brought an intentional infliction of emotional distress claim (among other claims) against the defendant, their ex-boyfriend, after he secretly videotaped each woman engaging in intimate acts of sexual relations with him.<sup>78</sup> After the trial court found that the women established a valid IIED claim, the defendant appealed and argued that (1) his conduct (i.e., the nonconsensual pornographic recording of the women) was not extreme and outrageous and (2) the

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<sup>71</sup> Michael Malaszczyk, *Donnelly proposes new legislation following Seaford man's sentencing for 'deepfake' porn*, LONG ISLAND HERALD (Apr. 18, 2023), <https://www.liherald.com/merrick/stories/donnelly-proposes-new-legislation-following-sentencing-of-seaford-man-patrick-carey,174253>.

<sup>72</sup> Hinchey, *supra* note 32.

<sup>73</sup> Jacob Serebrin, *Quebec man who created synthetic, AI-generated child pornography sentenced to prison*, CBC NEWS (Apr. 26, 2023), <https://www.cbc.ca/news/canada/montreal/ai-child-abuse-images-1.6823808>.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> See *Lewis v. LeGrow*, 670 N.W.2d 675 (Mich. App. 2003); *Del Mastro v. Grimado*, No. CIV.A. BER-C-388-03E, 2005 WL 2002355 (N.J. Super. Ch. Div. Aug. 19, 2005); and *Waterbury v. New York City Ballet, Inc.*, 168 N.Y.S.3d 417 (N.Y. App. Div. 1st Dept. 2022).

<sup>78</sup> *Lewis*, 670 N.W.2d at 680.

women did not show that he intended to inflict emotional distress.<sup>79</sup> The Michigan Court of Appeals emphasized that specific intent is not the only way to prove the defendant's intent.<sup>80</sup> The Court stated that a plaintiff can also show that the defendant's "conduct was so reckless that 'any reasonable person would know emotional distress would result.'"<sup>81</sup> With this, the Michigan Court of Appeals rejected the defendant's argument because a reasonable person and jury would conclude that a woman would suffer severe emotional distress after realizing a man secretly videotaped her performing sexual acts with him.<sup>82</sup> The Court found no error on behalf of the trial court and affirmed the decision.<sup>83</sup>

As mentioned above, the dissemination of deepfake pornography is a relatively new issue and there are not a lot of cases discussing the repercussions for defendants. More examples of victims seeking relief for the dissemination of nonconsensual pornography are included in Part V of this Note.

#### **IV. TO COMBAT THE UNLAWFUL DISSEMINATION OF DEEFAKE PORNOGRAPHY, THERE MUST BE A WHOLE NEW LEGAL FRAMEWORK PUT INTO PLACE.**

As of late 2023, there are not many ways for a victim to seek justice for the unlawful dissemination of deepfake pornography. This needs to change. There is no current federal legislation that prohibits deepfake pornography, very few states have deepfake pornography laws, and not many individuals understand what a deepfake is and the gravity it holds. This Section will discuss a new framework that should be put into place before the dissemination of deepfake pornography gets completely out of control.

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<sup>79</sup> *Id.* at 689.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.* (quoting *Haverbush v. Powelson*, 551 N.W.2d 206 (Mich. App. 1996)).

<sup>82</sup> *Id.* at 689-90.

<sup>83</sup> *Id.* at 697.

#### A. FEDERAL LEGISLATION

The dissemination of nonconsensual pornography is illegal in most states, but those laws do not protect deepfake pornography victims because it is not the victim's body being portrayed in the video, just their face.<sup>84</sup> While victims can bring other causes of action to recover damages for nonconsensual dissemination of deepfake pornography, a more uniform statute would be ideal. Victims should not have to spend their time and money sorting and fighting through tortious causes of action in hopes that one will stick. It is only logical that a statute prohibiting the nonconsensual dissemination of deepfake pornography should be a federal one because, in today's digital age, the dissemination of this pornography occurs over the internet.

A new federal bill is currently making its way through the United States House of Representatives that could help the victims depicted in the nonconsensual dissemination of deepfake pornography. The bill, formally known as 116 H.R. 3106, is cited as the "Preventing Deepfakes of Intimate Images Act," and it aims to prohibit the disclosure of intimate digital depictions.<sup>85</sup> In part, the bill reads:

[A]n individual who is the subject of an intimate digital depiction that is disclosed, in or affecting interstate or foreign commerce or using any means or facility of interstate or foreign commerce, without the consent of the individual, where such disclosure was made by a person who knows that, or recklessly disregards whether, the individual has not consented to such disclosure, may bring a civil action against that person in an appropriate district court of the United States.<sup>86</sup>

Further, in language nearly identical to the above, a later section of the bill sets forth a criminal cause of action.<sup>87</sup> In federal cases, the Federal Bureau of Investigation ("FBI") is the lead agency

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<sup>84</sup> Justin Sherman, "Completely horrifying, dehumanizing, degrading": One woman's fight against deepfake porn, CBS NEWS (Oct. 14, 2021), <https://www.cbsnews.com/news/deepfake-porn-woman-fights-online-abuse-cbsn-originals/>.

<sup>85</sup> 118 H.R. 3106, 118<sup>th</sup> Cong. (1<sup>st</sup> Sess. 2023).

<sup>86</sup> 118 H.R. 3106 § 1309A(b)(1), 118<sup>th</sup> Cong. (1<sup>st</sup> Sess. 2023).

<sup>87</sup> 118 H.R. 3106 § 2252D(a), 118<sup>th</sup> Cong. (1<sup>st</sup> Sess. 2023).

for investigating and enforcing the law. The investigation of the dissemination of deepfake pornography is not a new task for federal agents. During the summer of 2023, the FBI published a public service announcement stating that the agency was receiving an increased amount of complaints of criminals using deepfake technology to create pornographic material by using images found on victims' social media accounts.<sup>88</sup> Deepfake pornography already being on the FBI's and the Department of Homeland Security's radar shows how much of a threat it is to individuals across the country.

#### B. STATE LEGISLATION

Legislation prohibiting the dissemination of deepfake pornography should not be a sole issue for federal courts. Every state and United States territory must impose similar laws to help combat the dissemination of deepfake pornography. In states that have yet to impose deepfake pornography laws, Minnesota sets out a solid framework of what a dissemination of deepfake pornography law should look like. In part, Minnesota law states:

- (a) A cause of action against a person for the nonconsensual dissemination of a deep fake exists when:
  - (1) a person disseminated a deep fake with knowledge that the depicted individual did not consent to its public dissemination;
  - (2) The deep fake realistically depicts any of the following:
    - (i) the intimate parts of another individual presented as the intimate parts of the depicted individual;
    - (ii) Artificially generated intimate parts presented as the intimate parts of the depicted individual; or
    - (iii) The depicted individual engaging in a sexual act; and
  - (3) The depicted individual is identifiable:
    - (i) From the deep fake itself, by the depicted individual or by another individual; or
    - (ii) From the personal information displayed in connection with the deep fake.<sup>89</sup>

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<sup>88</sup> Kevin Collier, *FBI warns about deepfake porn scams*, NBC NEWS (June 7, 2023), <https://www.nbcnews.com/tech/security/fbi-warns-deepfake-porn-scams-rcna88190>.

<sup>89</sup> MINN. STAT. ANN. § 604.32 (2023).

Similar to the pending federal legislation, Minnesota also has a nearly identical statute criminalizing the dissemination of deepfake pornography.<sup>90</sup> This statutory framework should be used in other jurisdictions because of the details it includes. The thorough language used in the statute makes it difficult for critics to bring constitutional challenges because the statute specifically targets obscene materials. Historically, laws restricting the dissemination of obscene materials have been upheld by the Supreme Court of the United States.<sup>91</sup>

### C. THE NEED FOR EDUCATION ON DEEPPAKES

Because the use of artificial intelligence and deepfake technology is increasing, the public needs to understand deepfakes and learn how to differentiate between real and fake content. Alongside new laws and regulations prohibiting the dissemination of unethical deepfakes, better education about the topic is a must.<sup>92</sup> Individuals need to enhance their digital literacy to protect their privacy and prevent the spread of misinformation online.<sup>93</sup>

Digital literacy cannot be taught in a day—it is learned over time.<sup>94</sup> Digital literacy is broken down into three core components: (1) using tools and creating digital content, (2) sharing and interacting online, and (3) safety and wellbeing online.<sup>95</sup> These skills are valuable for not only navigating the broader digital landscape with confidence but also recognizing deepfakes.

Misinformation is a growing problem in the digital age, and deepfakes can amplify this issue.<sup>96</sup> By educating individuals about the existence of deepfakes and how they can be created,

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<sup>90</sup> MINN. STAT. ANN. § 617.262 (2023).

<sup>91</sup> U.S. v. Alvarez, 567 U.S. 709 (2012).

<sup>92</sup> Matt Burgess, *Deepfake Porn Is Out of Control*, WIRED (Oct. 16, 2023), <https://www.wired.com/story/deepfake-porn-is-out-of-control/>.

<sup>93</sup> Jade Blue, *More than just using computers: understanding and developing Digital Literacy with our new guide*, CAMBRIDGE PRESS (Apr. 7, 2022), <https://www.cambridge.org/elt/blog/2022/04/07/understanding-developing-digital-literacy/>.

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> Lisa Kaplan, *How campaigns can protect themselves from deepfakes, disinformation, and social media manipulation*, BROOKINGS (Jan. 10, 2019), <https://www.brookings.edu/articles/how-campaigns-can-protect-themselves-from-deepfakes-disinformation-and-social-media-manipulation/>.

society can develop a more discerning and cautious approach to online information.<sup>97</sup> To help slow the spread of misinformation online, users should read or watch the content carefully and not engage with knowingly false information.<sup>98</sup>

As previously discussed in this Note, deepfake technology can be misused to create nonconsensual content and place individuals in compromising situations that can have severe consequences for the privacy and mental health of those targeted.<sup>99</sup> By raising awareness about the risks associated with deepfakes, individuals can take precautions to safeguard their personal information and digital footprint.<sup>100</sup>

## **V. THE PRESENT: HOW DEEFAKE PORNOGRAPHY VICTIMS CAN SEEK RELIEF IN THE MEANTIME**

### **A. CIVIL REMEDIES**

Victims living in states that do not have specific deepfake pornography laws are not completely out of luck. There are many civil causes of actions that victims can pursue to recover damages from the perpetrator. This Part will discuss several possible remedies available to deepfake pornography victims.

#### *i. Revenge Pornography*

Forty-eight out of fifty states have laws prohibiting nonconsensual (i.e., revenge) pornography.<sup>101</sup> The terms “revenge pornography” and “nonconsensual pornography” are often

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<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> Judge Bernice B. Donald & Ronald J. Hedges, *Deepfakes Bring New Privacy and Cybersecurity Concerns*, CORPORATE COUNSEL BUSINESS JOURNAL (Sept. 25, 2020), <https://ccbjournal.com/articles/deepfakes-bring-new-privacy-and-cybersecurity-concerns>.

<sup>100</sup> Jon Healey, *Real-time deepfakes are a dangerous new threat. How to protect yourself*, LOS ANGELES TIMES (May 11, 2023), <https://www.latimes.com/business/technology/story/2023-05-11/realtime-ai-deepfakes-how-to-protect-yourself>.

<sup>101</sup> Chance Carter, *An Update on the Legal Landscape of Revenge Porn*, NATIONAL ASSOCIATION OF ATTORNEYS GENERAL (Nov. 16, 2021), [https://www.naag.org/attorney-general-journal/an-update-on-the-legal-landscape-of-revenge-porn/#identifier\\_0\\_21493](https://www.naag.org/attorney-general-journal/an-update-on-the-legal-landscape-of-revenge-porn/#identifier_0_21493).

used interchangeably. Nonconsensual pornography is described as a “sexually graphic image or video of an individual distributed without the consent of the person depicted in the media.”<sup>102</sup> For this Note, any reference to revenge pornography includes nonconsensual pornography.

The following is Illinois’ revenge pornography statute:

A person commits non-consensual dissemination of private sexual images when he or she:

- (1) intentionally disseminates an image of another person:
  - (A) who is at least 18 years of age; and
  - (B) who is identifiable from the image itself or information displayed in connection with the image; and
  - (C) who is engaged in a sexual act or whose intimate parts are exposed, in whole or in part; and
- (2) obtains the image under circumstances in which a reasonable person would know or understand that the image was to remain private; and
- (3) knows or should have known that the person in the image has not consented to the dissemination.<sup>103</sup>

In 2019, this law was challenged in *People v. Austin*.<sup>104</sup> In *Austin*, the defendant was charged with the nonconsensual dissemination of private sexual images (*i.e.*, revenge pornography) under section 11-23.5 of the Illinois Criminal Code.<sup>105</sup> After the defendant filed a motion to dismiss, the circuit court dismissed the charges stating that the statute was unconstitutional because it was content-based and subject to strict scrutiny.<sup>106</sup> Disagreeing with the circuit court, the Illinois Supreme Court ruled that the revenge pornography statute was subject to intermediate scrutiny because (1) the statute was “a content-neutral time, place, and matter restriction” and (2) it regulated a private matter.<sup>107</sup>

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<sup>102</sup> *Id.* (citing Danielle K. Citron & Mary A. Franks, *Criminalizing Revenge Porn*, 49 WAKE FOREST L. REV. 345, 346 (2014)).

<sup>103</sup> 720 ILL. COMP. STAT. ANN. 5/11-23.5 (2015).

<sup>104</sup> *People v. Austin*, 155 N.E.3d 439 (Ill. 2019).

<sup>105</sup> *Id.* at 448.

<sup>106</sup> *Id.* at 449.

<sup>107</sup> *Id.* at 456.

To meet the intermediate scrutiny standard, a “law must serve an important or substantial government interest unrelated to the suppression of free speech and . . . must be narrowly tailored to serve that interest without unnecessarily interfering with first amendment freedoms.”<sup>108</sup> In its analysis, the Illinois Supreme Court reasoned that the revenge pornography statute served a substantial government interest because “[i]t is a traditional exercise of the States’ police powers to protect the health and safety of their citizens.”<sup>109</sup> The Court further concluded that the statute was narrowly tailored to protect Illinois residents from nonconsensual dissemination of private sexual images because, without section 11-23.5, the governmental interest would be “achieved less effectively.”<sup>110</sup> Finally, by looking at the definitions and exemptions from the statute, the Court found that the revenge pornography statute did not burden more speech than necessary.<sup>111</sup> With these findings, the Illinois Supreme Court held that the revenge pornography statute satisfied intermediate scrutiny and was deemed constitutional.<sup>112</sup>

Many arguments have been made about the constitutionality of revenge pornography statutes, but it is a common trend among courts to uphold these laws because the statutes are narrowly tailored to serve the substantial government interest in preventing the nonconsensual dissemination of private sexual images.<sup>113</sup> Massachusetts<sup>114</sup> and South Carolina<sup>115</sup> are the only states that do not have laws prohibiting the dissemination of revenge pornography. In the remaining

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<sup>108</sup> *Id.* at 459.

<sup>109</sup> *Id.* at 460 (quoting *Hill v. Colorado*, 530 U.S. 703, 715 (2000)).

<sup>110</sup> *Id.* at 462.

<sup>111</sup> *Id.* at 466.

<sup>112</sup> *Id.*

<sup>113</sup> See *Indiana v. Katz*, 179 N.E.3d 431 (Ind. 2022), *State v. VanBuren*, 214 A.3d 791 (Vt. 2019), and *State v. Casillas*, 952 N.W.2d 629 (Minn. 2020)

<sup>114</sup> Kerry Kavanaugh, *Survivors urge MA lawmakers to finally ban nonconsensual pornography*, BOSTON 25 NEWS (Sept. 12, 2023), <https://www.boston25news.com/news/local/survivors-urge-ma-lawmakers-finally-ban-nonconsensual-pornography/CHFX4ZOS4FGC5HMQOFLZ3SV4MA/>. (Massachusetts legislators have attempted to pass revenge pornography laws multiple times but have failed.)

<sup>115</sup> A bill is currently making its way through the South Carolina House of Representatives to prohibit the dissemination of revenge pornography. H.R. 3058 (S.C. 2023).

states that have enacted legislation prohibiting the dissemination of revenge pornography but do not yet have legislation prohibiting the dissemination of nonconsensual deepfake pornography, using revenge pornography as a cause of action may be the best option for deepfake pornography victims.

*ii. Intentional Infliction of Emotional Distress*

The Restatement (Second) of Torts outlines the cause of action for the intentional infliction of emotional distress (IIED). To be successful in an IIED claim, the plaintiff must prove that (1) the defendant's conduct was extreme and outrageous; (2) the defendant intended, or was substantially certain, that the conduct would cause the plaintiff harm; and (3) the defendant's conduct caused severe emotional distress.<sup>116</sup> To meet the first element, the defendant's conduct must be "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community."<sup>117</sup>

Victims who are depicted in deepfake pornography are likely to have a similar IIED claim to that of nonconsensual dissemination of pornography victims. Deepfake pornography victims must also establish that the defendant's actions went beyond the bounds of decency to cause extreme emotional harm. The claim can likely be proven by showing that the victim was depicted in the deepfake pornography without his or her consent and was done for the specific purpose of causing severe emotional distress by humiliating the victim.

*iii. Defamation*

All fifty states, Puerto Rico, and the United States Virgin Islands have statutes that establish a valid cause of action for defamation.<sup>118</sup> A statement is considered defamatory if the statement

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<sup>116</sup> RESTATEMENT (SECOND) OF TORTS § 46 (1965).

<sup>117</sup> *Robertson v. D.C.*, 269 A.3d 1022, 1033 (D.C. App. 2022) (quoting *Kerrigan v. Britches of Georgetowne, Inc.*, 705 A.2d 624, 628 (D.C. 1991)).

<sup>118</sup> *Defamation*, LEXIS 50-STATE SURVEY, <https://plus.lexis.com/document/?pdmfid=1530671&crd=8ef9d727-3e21-4b3a-a889-c2cb01858fef&pddocfullpath=%2Fshared%2Fdocument%2Fanalytical-materials%2Furn%3AcontentItem%3A599T-DMP1-JBM1-M3VR-00000-00&pdtocnodeidentifier=ABEAABAAB&ecomp=tzJk&prid=f1dab4c5-fed5-411e-9e77-b482bc4ca0ae>.

harms the reputation of another.<sup>119</sup> To establish a defamation cause of action, four elements must be met to create liability:

- (1) a false and defamatory statement concerning another;
- (2) an unprivileged publication to a third party;
- (3) fault amounting at least to negligence on the part of the publisher; and
- (4) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication.<sup>120</sup>

If the defamatory statement targets a public figure, the public figure must also prove that the defendant made the defamatory statement with actual malice.<sup>121</sup> A statement is made with actual malice when it is made “with knowledge that [the statement] was false or with reckless disregard of whether it was false or not.”<sup>122</sup> This makes it more difficult for public figures to establish a valid defamation cause of action.

In *Patel v. Hussain*, the jury found in favor of the plaintiff’s defamation, intentional infliction of emotional distress, and other claims after her ex-boyfriend posted revenge pornography after they broke up.<sup>123</sup> The jury further rewarded the plaintiff with damages totaling \$500,000.<sup>124</sup> However, on appeal, the Court stated that the trial court should have disregarded the jury’s award of \$50,000 in the defamation claim because the jury “found that the published material was substantially true.”<sup>125</sup> It is important to emphasize that this was a revenge pornography case. Had the pornographic material been deepfake pornography, the plaintiff could have easily proven that the published material was not substantially true. If deepfake pornography

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<sup>119</sup> RESTATEMENT (SECOND) OF TORTS § 559 (1965).

<sup>120</sup> RESTATEMENT (SECOND) OF TORTS § 558 (1965).

<sup>121</sup> *New York Times Co. v. Sullivan*, 376 U.S. 254, 280 (1964).

<sup>122</sup> *Id.*

<sup>123</sup> *Patel v. Hussain*, 485 S.W.3d 153, 157 (Tex. App. 2016).

<sup>124</sup> *Id.*

<sup>125</sup> *Id.* at 173-74.

victims are not successful in civil suits, the victims could also file a copyright claim under the Digital Millennium Copyright Act.

#### B. THE DIGITAL MILLENNIUM COPYRIGHT ACT

Victims depicted in deepfake pornography can also use the Digital Millennium Copyright Act (DMCA) as a legal mechanism to get videos removed from websites.<sup>126</sup> In 1998, Congress passed the Digital Millennium Copyright Act which, in part, created a notice-and-takedown system that “allows copyright owners to inform online service providers about infringing material so it can be taken down. . . .”<sup>127</sup> To file a valid claim under the DMCA, the victim must provide a substantial part of the following information to the designated agent of the Internet service provider:

- a. A physical or electronic signature of a person authorized to act on behalf of the owner of an exclusive right that is allegedly infringed.
- b. Identification of the copyrighted work claimed to have been infringed . . . .
- c. Identification of the material that is claimed to be infringing or to be the subject of infringing activity and that is to be removed or access to which is to be disabled, and information reasonably sufficient to permit the service provider to locate the material.
- d. Information reasonably sufficient to permit the service provider to contact the complaining party, such as an address, telephone number, and, if available, an electronic mail address at which the complaining party may be contacted.
- e. A statement that the complaining party has a good faith belief that use of the material in the manner complained of is not authorized by the copyright owner, its agent, or the law.
- f. A statement that the information in the notification is accurate, and under penalty of perjury, that the complaining party is authorized to act on behalf of the owner of an exclusive right that is allegedly infringed.<sup>128</sup>

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<sup>126</sup> Burgess, *supra* note 92.

<sup>127</sup> *The Digital Millennium Copyright Act*, U.S. COPYRIGHT OFFICE, <https://www.copyright.gov/dmca/> (last visited Nov. 1, 2023); *see also* 17 U.S.C. § 512 (c)(2)-(3).

<sup>128</sup> 17 U.S.C. § 512 (c)(3)(A) (2010).

While these requirements may seem daunting to victims of deepfake pornography, websites, such as DMCA.com, make it easy to file a claim.<sup>129</sup> DMCA.com offers two takedown options: one that is handled almost entirely by their “takedown team” and one that is a do-it-yourself option.<sup>130</sup> For the professionally managed takedown option, which is recommended for individuals, victims only need to provide the infringing URL, source URL, and specific copyright infringement details.<sup>131</sup> After the takedown team receives this information, they take care of the other necessary tasks such as conducting research, contacting the website owner and internet service provider, and sending the takedown notice.<sup>132</sup> Although this service costs \$199 per infringing website, it is the smartest option for victims who might not know how to start the takedown process.<sup>133</sup>

It is important to note that while the Digital Millennium Copyright Act is under United States Copyright law, a DMCA takedown does not always require that the content be copyrighted to file a claim.<sup>134</sup> In other words, if the claimant is the subject depicted in the photo or video, the claimant still has reason to process a takedown notice and the content be removed.<sup>135</sup> Because of this, a claim under the DMCA is the best option for victims depicted in deepfake pornography to get the content removed from a particular website. If an internet service provider does not comply with a DMCA takedown notice, they are at risk of “losing their statutory immunity and protections under the Act.”<sup>136</sup>

### C. CONSTITUTIONAL AND STATUTORY CONCERNS

#### i. *First Amendment*

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<sup>129</sup> *Protecting Copyrighted Content Online: Understanding the Legal Process for Content Removal*, DMCA, <https://www.dmca.com/FAQ/What-is-a-DMCA-Takedown> (last visited Nov. 1, 2023).

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

Many critics argue that deepfakes are protected under the First Amendment of the United States Constitution. In part, the First Amendment prohibits Congress from enacting laws prohibiting the exercise of free speech.<sup>137</sup> While the First Amendment does “demand that content-based restrictions on speech be presumed invalid . . .,” the Government has the burden of showing the restriction’s constitutionality.<sup>138</sup> In the content-based restrictions that have been upheld, some of the historical categories include obscenity, defamation, and child pornography.<sup>139</sup> In a case where the defendant used deepfake technology to alter sexually explicit photographs of adults to display the face of a child, the Second Circuit Court of Appeals held that child pornography created by deepfake technology was not protected speech under the First Amendment.<sup>140</sup> If a traditional deepfake pornography law is challenged under the First Amendment, courts will likely take this same purview based on past precedents on deepfake child pornography and preventing obscenity.

ii. *Section 230*

In 1996, President Bill Clinton signed the Communications Decency Act of 1995 into law which was codified as 47 U.S.C. § 230 (“Section 230”).<sup>141</sup> Section 230 states that “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.”<sup>142</sup> In a later part, Section 230 grants civil immunity to internet service providers if the provider took “any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, . . . filthy, . . . harassing, or otherwise objectionable, whether or not such material is constitutionally protected. . . .”<sup>143</sup> For victims of deepfake pornography, this means that so long as

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<sup>137</sup> U.S. CONST. amend. I.

<sup>138</sup> *Alvarez*, 567 U.S. at 709 (quoting *Ashcroft v. American Civil Liberties Union*, 542 U. S. 656, 660 (2004)).

<sup>139</sup> *Id.*

<sup>140</sup> *U.S. v. Hotaling*, 634 F.3d 725, 726 (2d Cir. 2011).

<sup>141</sup> *Section 230 Legislative Timeline*, ELECTRONIC FRONTIER FOUNDATION, <https://www.eff.org/issues/cda230/legislative-history/timeline#main-content> (last visited Oct. 3, 2023).

<sup>142</sup> 47 U.S.C. § 230(c)(1) (2018).

<sup>143</sup> 47 U.S.C. § 230(c)(2)(A) (2018).

an internet service provider acts in good faith to restrict access to pornographic deepfake material, they cannot be sued as seen in two separate revenge pornography cases.<sup>144</sup> This, however, does not mean that individuals who disseminate deepfake pornography have civil immunity. Section 230 *only* protects the internet service provider, so victims can still seek civil judgments from the original poster.

## **VI. CONCLUSION**

Think back to Rana Ayyub, the Indian investigative journalist who was a victim of deepfake pornography in an effort to discredit her work. If her case had transpired in the United States under the proposed legal framework laid out in this Note was in place, the individual who created and posted the deepfake pornographic material could have been prosecuted under state law, or even federal law, for the unlawful dissemination of deepfake pornography. Rana could have also had a valid civil cause of action against the individual. If any of those options were unsuccessful for whatever reason, Rana Ayyub could have civilly sued the deepfake pornography creator for the dissemination of revenge pornography, defamation, or the intentional infliction of emotional distress. She could have also filed a copyright claim under the Digital Millennium Copyright Act in effort to remove the deepfake pornography from individual websites. Deepfake pornography is not going away. If anything, this is just the beginning of it. It is critical for legislators to impose laws that prohibit the dissemination of deepfake pornography before it gets completely out of hand.

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<sup>144</sup> Barnes v. Yahoo!, Inc., 570 F.3d 1096 (9th Cir. 2008); GoDaddy.com, LLC v. Toups, 429 S.W.3d 752 (Tex. App. 2014).

## APPENDIX A

State	Definition	Statute
<b>California</b>	<p><b>CAL. GOV'T CODE § 11547.5.</b>  “Deepfake” means audio or visual content that has been generated or manipulated by artificial intelligence which would falsely appear to be authentic or truthful and which features depictions of people appearing to say or do things they did not say or do without their consent.</p>	
<b>Louisiana</b>	<p><b>LA. REV. STAT. ANN. § 14:73.13(C).</b>  “Deepfake” means any audio or visual media in an electronic format, including any motion picture film or video recording, that is created, altered, or digitally manipulated in a manner that would falsely appear to a reasonable observer to be an authentic record of the actual speech or conduct of the individual or replace an individual’s likeness with another individual and depicted in the recording.</p>	<p><b>LA. REV. STAT. ANN. § 14:73.13(B)(1).</b>  Any person who, with knowledge that the material is a deepfake that depicts another person, without consent of the person depicted, engaging in sexual conduct, knowingly advertises, distributes, exhibits, exchanges with, promotes, or sells any sexual material shall be punished by imprisonment at hard labor for not less than ten nor more than thirty years, a fine of not more than fifty thousand dollars, or both.</p>
<b>Texas</b>	<p><b>TEX. PENAL CODE § 21.165(A)(1).</b>  “Deep fake video” means a video, created with the intent to deceive, that appears to depict a real person performing an action that did not occur in reality.</p>	<p><b>TEX. PENAL CODE § 21.165(B).</b>  A person commits an offense if, without the effective consent of the person appearing to be depicted, the person knowingly produces or distributes by electronic means a deep fake video that appears to depict the person with the person’s intimate parts exposed or engaged in sexual conduct.</p>
<b>Georgia</b>	<p><b>GA. CODE ANN. § 16-11-90(B)(1).</b>  A person violates this Code section if he or she, knowing the content of a transmission or post, knowingly and without the consent of the depicted person: Electronically transmits or posts, in one or more transmissions or posts, a photograph or video which depicts nudity or sexually explicit conduct of an adult, including a falsely created videographic or still image, when the transmission or post is harassment or causes financial loss to the depicted person, serves no legitimate purpose to the depicted person, and is transmitted or posted (A) To a website, peer-to-peer file-sharing site, thumbnail gallery, movie gallery post, linked list, live webcam, web page, or message board that advertises or promotes its service as showing, previewing, or distributing sexually explicit conduct; or (B) Via any other electronic means that does not fall within subparagraph (A) of this paragraph</p>	
<b>Minnesota</b>	<p><b>MINN. STAT. ANN. § 617.262(b).</b>  “Deep fake” means any video recording, motion-picture film, sound recording, electronic image, or</p>	<p><b>MINN. STAT. ANN. § 617.262(2).</b>  It is a crime to intentionally disseminate a deep fake when:</p>

	<p>photograph, or any technological representation of speech or conduct substantially derivative thereof:</p> <p>(1) that is so realistic that a reasonable person would believe it depicts speech or conduct of an individual; and</p> <p>(2) the production of which was substantially dependent upon technical means, rather than the ability of another individual to physically or verbally impersonate such individual.</p>	<p>(1) the actor knows or reasonably should know that the depicted individual did not consent to the dissemination;</p> <p>(2) the deep fake realistically depicts any of the following:</p> <ul style="list-style-type: none"> <li>(i) the intimate parts of another individual presented as the intimate parts of the depicted individual;</li> <li>(ii) artificially generated intimate parts presented as the intimate parts of the depicted individual; or</li> <li>(iii) the depicted individual engaging in a sexual act; and</li> </ul> <p>(3) the depicted individual is identifiable:</p> <ul style="list-style-type: none"> <li>(i) from the deep fake itself, by the depicted individual or by another individual; or</li> <li>(ii) from the personal information displayed in connection with the deep fake.</li> </ul>
<p><b>Virginia</b></p>	<p><b>VA. CODE ANN. § 18.2-386.2.</b></p> <p>A. Any person who, with the intent to coerce, harass, or intimidate, maliciously disseminates or sells any videographic or still image created by any means whatsoever that depicts another person who is totally nude, or in a state of undress so as to expose the genitals, pubic area, buttocks, or female breast, where such person knows or has reason to know that he is not licensed or authorized to disseminate or sell such videographic or still image is guilty of a Class 1 misdemeanor. For purposes of this subsection, “another person” includes a person whose image was used in creating, adapting, or modifying a videographic or still image with the intent to depict an actual person and who is recognizable as an actual person by the person’s face, likeness, or other distinguishing characteristic.</p>	
<p><b>Wyoming</b></p>	<p><b>WYO. STAT. ANN. § 6-4-306(A)(III).</b></p> <p>“Image” means a photograph, film, videotape, recording, digital file or any other recording, <i>including a computer generated image that purports to represent an identifiable person.</i></p>	<p><b>WYO. STAT. ANN. § 6-4-306(B).</b></p> <p>A person eighteen (18) years of age or older is guilty of the offense of disseminating an intimate image if the person:</p> <ul style="list-style-type: none"> <li>(i) Disseminated an intimate image of another person;</li> <li>(ii) Knew or should have known that the depicted person had a reasonable expectation that the image would remain private and the depicted person did not expressly give consent for the image’s dissemination; and</li> </ul>

		(iii) Intended: (A) To humiliate, harm, harass, threaten or coerce another; or (B) For sexual gratification or arousal of others or of the person disseminating the intimate image.
<b>Hawaii</b>	<b>HAW. REV. STAT. ANN. § 711-1110.9(1).</b> The person intentionally creates or discloses or threatens to disclose an image or video of <i>a composite fictitious person depicted in the nude . . .</i> that includes the recognizable physical characteristics of a known person so that the image or video appears to depict the known person and not a composite fictitious person, with intent to substantially harm the depicted person with respect to that person’s health, safety, business, calling, career, education, financial condition, reputation, or personal relationships, or as an act of revenge or retribution.	