

MAKING A FEDERAL CASE OUT OF REVENGE PORN

By: Jack Greiner on November 29, 2017 on graydon.law

Revenge porn is an unfortunate online development. It is the product of bad choices, breach of trust and easy access to the internet. All of which adds up to humiliation and embarrassment for its victims.

And, victims apparently can come in all ages, genders and professions. Recent news has focused on Congressman [Joe Barton from Texas](#), who apparently had had a three year relationship with a woman not his wife. In the course of the relationship, Barton provided her with “inappropriate photographs and videos.” Barton was concerned enough with the prospect of the woman releasing the material that he threatened to have the Capitol Hill Police initiate an investigation.

But at this point, there is no federal statute that deals with revenge porn. But one may be on its way. Senators Kamala Harris (D-CA), Richard Burr (R-NC) and Amy Klobuchar (D-MN) have introduced the “Ending Nonconsensual Online User Graphic Harassment Act of 2017” or the “[ENOUGH Act.](#)” I wonder if there are Senate employees who are paid specifically to come up with catchy names for legislation. “ENOUGH” rivals “CAN-SPAM” on this scale.

The bill would make it a crime for anyone to:

“[K]nowingly use any means or facility of interstate or foreign commerce to distribute an intimate visual depiction of an individual— “(1) with knowledge of or reckless disregard for— “(A) the lack of consent of the individual to the distribution; “(B) the reasonable expectation of the individual that the depiction would remain private; and “(C) harm that the distribution could cause to the individual; and “(2) without an objectively reasonable belief that such distribution touches upon a matter of public concern.” It also criminalizes a threat to engage in the conduct.

An “intimate visual depiction is any visual depiction — “(A) of an individual who is reasonably identifiable from the visual depiction itself or information displayed in connection with the visual depiction; “(B) in which— “(i) the individual is engaging in sexually explicit conduct; or “(ii) the naked genitals or post-pubescent female nipple of the

individual are visible; “(C) in which the content described in subparagraph (B) is not simulated;”

The bill excludes from its coverage internet service providers unless the provider “intentionally solicits, or knowingly and predominantly distributes, content that the provider of the communications service has actual knowledge is in violation of this section.”

And the bill has teeth. Anyone who violates the law is subject to a fine and 5 years in prison.

Some state revenge porn statutes have been struck down for violating the First Amendment. But the federal statute is likely to survive a challenge. It addresses a compelling interest and appears to use the least restrictive means. Victims of this nasty practice may have some relief.