

Inadequate Remedies for Unprecedented Harm:

The Need for Legal Innovation to Address Deepfake Pornography

by Anne Nelson

Deepfake pornography (DFP) is a novel, intentional, malicious form of “image-based abuse”.¹ Nevertheless, it is without a clear legal definition, a suitable cause of action, or adequate remedies. Duly concerned, the Women and Equalities Committee petitioned the British government “to criminalize all nonconsensual creation and distribution of intimate sexual images.”² British MP Jess Phillips thereafter declared, “inaction [is] no longer an option.”³ Absent U.S. Congressional action, California has stepped in to legally define multiple causes of action, injuries, and viable remedies. The effectiveness of this new law is demonstrated in the case of *Batson v. Underroad*.

A comparison of previously existing causes of action with those under California’s new DFP law illustrates the need for legal innovation. From the facts provided in this case, Ms. Batson claims intentional infliction of emotional distress, invasion of privacy, and defamation. In total, these laws comprise ten required elements to sustain their causes of action.⁴ For intentional infliction of emotional distress, liability and damages will be assessed only if Ms. Batson proves

¹ Sophie Gallagher, *MPs Maria Miller and Jess Phillips On Why ‘Upskirting’ Bill Doesn’t Go Far Enough*, HUFFPOST (November 15, 2018), https://www.huffingtonpost.co.uk/entry/mps-maria-miller-and-jess-phillips-on-cyberflashing-we-are-sleepwalking-into-a-crisis_uk_5bebee0ee4b0783e0a1df199?utm_campaign=share_email&ncid=other_email_o63gt2jcad4&guccounter=1.

² *Id.*

³ Sophie Gallagher, *What Are Deepfakes, Are They Illegal, And Can They Be Stopped?*, HUFFPOST (September 10, 2019), https://www.huffingtonpost.co.uk/entry/what-is-deep-fake-pornography-and-is-it-illegal-in-the-uk_uk_5bf4197ce4b0376c9e68f8c5?guccounter=1.

⁴ *Intentional Infliction of Emotional Distress—Essential Factual Elements* (Jury Instructions), (Last accessed Feb. 25, 2020) <https://www.justia.com/trials-litigation/docs/caci/1600/1600/>; Cal. Civ. Code § 1708.8, California Legislative Information (Last accessed Feb. 25, 2020), https://leginfo.ca.gov/faces/codes_displayText.xhtml?division=3.&part=3.&lawCode=CIV&division=3.&title=&part=3.&chapter=&article=; *California Elements of Defamation*, Digital Media Law Project (Last accessed Feb. 25, 2020), <http://www.dmlp.org/legal-guide/california-defamation-law>.

all of the elements.⁵ If Ms. Batson does prove intentional infliction of emotional distress, then compensatory and punitive remedies are available to her.⁶ However, intentional infliction of emotional distress relies heavily on her *reaction* to the abuse to establish liability. Conversely, no remedies are available to Ms. Batson under invasion of privacy and defamation. Because DFP is a virtual invasion and not a physical one, invasion of privacy does not apply.⁷ Likewise, a DFP video may not qualify as a published statement of fact, thus invalidating a claim for defamation.⁸

In contrast, California's recent DFP law (California Civil Code § 1708.86) has streamlined the elements necessary to establish liability. Section 1708.86 provides that if the defendant either created or disseminated DFP, he is liable. There is no need under § 1708.86 to prove ten separate elements for causes of action to exist. If creation or dissemination is proven, the court is justified in assuming damages due to DFP's intentional and malicious nature. Crucially, § 1708.86 focuses on Mr. Underroad's actions and not on Ms. Batson's reaction to establish liability. Additionally, California Civil Code § 1708.86 provides clear definitions, suitable causes of action, and remedies specific to DFP. Ms. Batson's main cause of action is that Mr. Underroad allegedly created or disclosed sexually explicit material without her written consent.⁹

Defenses available to Mr. Underroad include law enforcement proceedings, legal proceedings, and reporting a breach of law.¹⁰ If the DFP video is found to be a parody or

⁵ *Intentional Infliction of Emotional Distress—Essential Factual Elements*, supra.

⁶ *California's Law on "Intentional Infliction of Emotional Distress"*, Shouse California Law Group (Last accessed February 28, 2020), <https://www.shouselaw.com/personal-injury/intentional-infliction>.

⁷ *Intentional Infliction of Emotional Distress—Essential Factual Elements*, supra.

⁸ *California Elements of Defamation*, supra.

⁹ Cal. Civ. Code § 1708.86, California Legislative Information (Last accessed Feb. 25, 2020), https://leginfo.ca.gov/faces/codes_displayText.xhtml?division=3.&part=3.&lawCode=CIV&division=3.&title=&part=3.&chapter=&article=.

¹⁰ *Id.*

addresses a genuine public interest, these circumstances are also potential defenses.¹¹ However, even if Mr. Underroad had included a disclaimer in the video, a disclaimer does not constitute a defense.¹²

Remedies available to Ms. Batson include economic and noneconomic damages caused by the DFP's disclosure, including damages for emotional distress.¹³ She could also recover punitive damages, attorney's fees and costs, and injunctive relief.¹⁴ If Mr. Underroad acted with malice, Ms. Batson could be awarded up to \$150,000.¹⁵ Critically, the remedies in § 1708.86 are cumulative and won't preclude any other remedies.¹⁶ If a court finds that Mr. Underroad created or disseminated the DFP video, Ms. Batson will likely prevail.

The need for nation-wide DFP legislation is dire. California has set the bar in developing causes of action and remedies specific to and for DFP victims. The rest of the nation must follow.

¹¹ Id.

¹² Id.

¹³ Id.

¹⁴ Id.

¹⁵ Id.

¹⁶ Id.