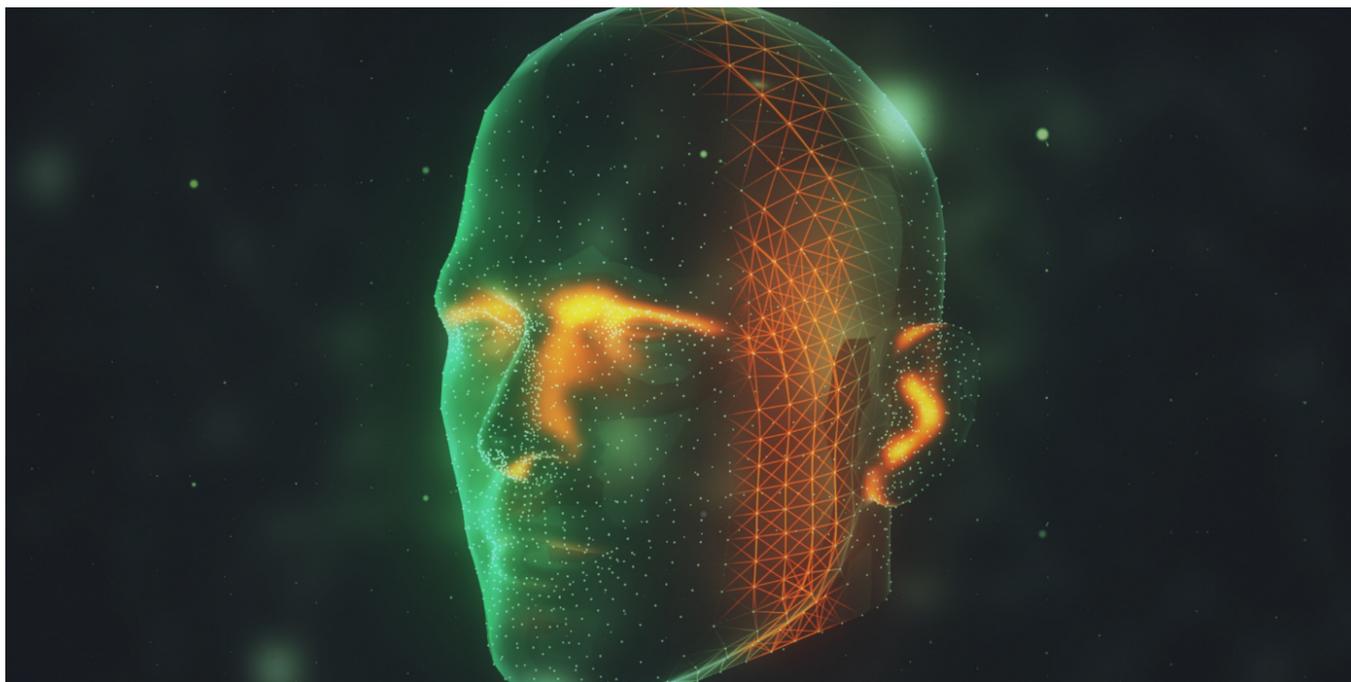
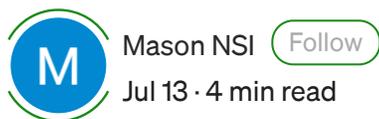


# Hawaii Outlaws Some Deepfakes



By *Matthew F. Ferraro*, NSI Visiting Fellow

On June 23, 2021, Hawaii joined a growing number of states in barring certain deepfakes — realistic synthetic media that is either manipulated or wholly generated by artificial intelligence. Hawaii targets non-consensual deepfake pornography, when a non-consenting person’s face is placed on a nude body to create a believable pornographic image.

Nonconsensual pornography is already a fixture on the Internet. How the government responds to this existing challenge will have important implications for how it counters the dangers synthetic media poses to national-security — to the threat, say, of a

believable video of President Biden announcing a missile strike on North Korea that goes viral before it's debunked.

Hawaii's law (Act N<sup>o</sup>2021-59, "Relating to Privacy" [PDF]) expands the crime of violation of privacy in the first degree, a Class C Felony, which is punishable by up to five years' imprisonment and a fine of up to \$10,000.

The new law makes it a crime to create, disclose, or threaten to disclose an image or video of a "composite fictitious person" either nude or engaged in sexual conduct "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." A defendant must act with the "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."

The law does not apply if the depicted person was voluntarily nude or the material was created pursuant to "a voluntary commercial transaction." The law also exempts platforms from liability, called electronic communication services and remote computing services.

Hawaii's law empowers a court to "order the destruction of any recording" violating the law. It is unclear how that provision will apply to material widely distributed across the Internet.

This law responds to a privacy law task force established by the Hawaii legislature in 2019, which recommended that the State "protect the privacy of a person's likeness by adopting laws that prohibit the unauthorized use of deep fake technology."

Hawaii joins California, Maryland, New York, Texas, Virginia and Wyoming in barring some deepfakes, typically either nonconsensual deepfake pornography or deepfakes targeting politicians before elections. State houses are considering similar bills across the country.

Hawaii's law is significant in several ways:

**First**, Hawaii's *definition* of violative material is unique. The law focuses on how the barred image *looks* (like a known person and not "a composite fictitious person"). By

contrast, most deepfake laws focus at least in part on how an image is made. For example, New York bans some images showing someone who appears “as a result of digitization, to be giving a performance they did not actually perform.” “Digitization” means a realistic depiction of a person with “computer-generated nude body parts” or engaging in sexual conduct. Texas’ law bars a video “created with artificial intelligence” that “appears to depict a real person performing an action that did not occur in reality” — a definition so broad that politicians have claimed run-of-the-mill campaign ads violated it. Wyoming bans any nonconsensual sexually explicit “computer generated image that purports to represent an identifiable person.” And the federal Deepfake Report Act defines “digital content forgery technology” as “the use of emerging technologies, including artificial intelligence and machine learning techniques, to fabricate or manipulate” images.

**Second**, the law *requires specific intent* — a defendant must act with a particular state of mind. Almost all deepfake bills include a similar limitation, although the Hawaii law both narrows its applicability by requiring such intent and broadens it by including a laundry-list of the harms a defendant can wish to inflict.

**Third**, Hawaii’s law *does not provide carveouts for permissible deepfakes*, as most similar laws do. For example, New York’s law barring nonconsensual deepfake pornography exempts material that is disclosed in the course of reporting on unlawful activity, material that is a matter of “legitimate public concern,” of political or newsworthy value, or constitutionally protected commentary. California’s law barring nonconsensual deepfake pornography includes the same exceptions.

**Fourth**, Hawaii (like Maryland, Texas, Virginia, and Wyoming) makes violations a *crime, not a civil wrong*. Thus, the state, not private litigants, brings cases, and the penalties can include incarceration. Conversely, California’s and New York’s nonconsensual deepfake pornography laws establish only private rights of action for victims.

Looking forward, courts will need to develop these laws through litigation. At this writing, no known cases have been brought under deepfake statutes. These laws will beta-test government responses to deepfakes in other contexts. If they are successful, we may see similar regulations of deepfakes that target business, politics, and national security. If they are not, the government may need to look towards approaches that

prioritize detection technologies, analytical thinking, or deterrence that goes beyond criminalization.

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