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## Nonconsensual Pornography: An Old Crime Updates Its Software

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# Nonconsensual Pornography: An Old Crime Updates Its Software\*

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## Abstract

This Note proposes a statute that considers social media and the Internet. The proposed statute is advantageous because it understands how perpetrators abuse social media and the Internet and implements the protections that victims deserve from the legal system. When society understands the harms and “[w]hen there is no outlet for these images, no audience for these images, and no desire to post these images, that is when the images will cease to cause harm to victims.” The lessons from the criminalization of other forms of gender abuse indicate that society needs to change its attitude toward crimes that predominately harm women by accepting the harms as legitimate. Therefore, in addition to proposing a model statute, this Note suggests that other solutions, such as education and the positive use of social media, should be used in conjunction with the statute. Part I discusses the history of nonconsensual pornography and how the Internet has created obstacles for victims. Part II discusses the current legal state and how states have approached the problem inconsistently. Part III proposes a statute and other solutions to be used in conjunction.

**KEYWORDS:** Nonconsensual, Pornography, Crime, Software

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## INTRODUCTION

“In 2016, privacy for our most vulnerable, intimate images is still not a right.”<sup>1</sup>

It is the middle of the night. You get up, check your email, Facebook page, and then Google yourself.<sup>2</sup> But your search does not end there. In the past, you sent a sexually explicit image to an ex-paramour. You were under the impression that the image would remain private, but have since discovered that the image was disclosed without your consent. Your private, sexually explicit image was posted to multiple social media platforms and websites. So you continue your searches. You open Instagram and run searches for

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<sup>1</sup> Kristen V. Brown, *Whoa, We Might Finally Get a Federal Law Making Revenge Porn Illegal*, FUSION (July 15, 2016, 2:33 PM), <http://fusion.net/story/325638/jackie-speier-revenge-porn-bill/> [<https://perma.cc/T2G3-YE3C>].

<sup>2</sup> See Annmarie Chiarini, *I Was a Victim of Revenge Porn. I Don't Want Anyone Else to Face This*, GUARDIAN (Nov. 19, 2013), <https://www.theguardian.com/commentisfree/2013/nov/19/revenge-porn-victim-maryland-law-change> [<https://perma.cc/82S7-BRTU>].

your name and various hashtags. You open Twitter and run a similar search. You check websites that solicit private, intimate images. You try to fall back to sleep, but before putting your head down again, you run these searches once, twice, maybe even three times more.

The Internet has changed the way society communicates and in turn, has created an opportunity for a new category of crimes. Specifically, the Internet has exacerbated nonconsensual pornography as a form of gender abuse and an invasion of privacy.<sup>3</sup> Victims of nonconsensual pornography are predominately women.<sup>4</sup> Historically, crimes against women were not recognized as legitimate, and the harms were dismissed as trivial and nonexistent.<sup>5</sup> This pattern and attitude parallels the fight to criminalize other gender offenses, such as domestic violence and workplace harassment. There are other parallels among domestic violence, workplace harassment, and nonconsensual pornography, including victim blaming, victim suffering, and consent being taken out of context.<sup>6</sup>

The harms victims suffer are exacerbated by the unique nature of the Internet and social media. Images that are disclosed without consent can become viral in a matter of seconds and, once they are available online, it is nearly impossible to guarantee that they are removed.<sup>7</sup> Disclosing images of women without their consent is not a new concept. Instead of hard-copy photographs, images are now disclosed via the Internet. This has presented challenges for both victims and lawmakers.<sup>8</sup>

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<sup>3</sup> See *infra* Section I.C.

<sup>4</sup> Danielle Keats Citron & Mary Anne Franks, *Criminalizing Revenge Porn*, 49 WAKE FOREST L. REV. 345, 353 (2014).

<sup>5</sup> See Danielle Keats Citron, *Law's Expressive Value in Combating Cyber Gender Harassment*, 108 MICH. L. REV. 373, 392–95 (2009). For example, it was initially challenging to convict men under rape laws because they required evidence of “‘utmost’ physical resistance by the woman,” and workplace harassment was considered “‘natural’” behavior when it was first described as sex discrimination. *Id.*

<sup>6</sup> See *infra* Section I.B.

<sup>7</sup> See *infra* notes 324–25 and accompanying text.

<sup>8</sup> See *infra* Part II.

As the law currently stands,<sup>9</sup> thirty-five states take different approaches to criminalizing revenge porn.<sup>10</sup> Some states have tried to use existing statutes while others have drafted new ones.<sup>11</sup> Some states classify the crime as a misdemeanor or a felony,<sup>12</sup> while others classify it as a sexual offense or an invasion of privacy.<sup>13</sup> These inconsistencies have led to unpredictable results among the states.<sup>14</sup> But the harms a victim experiences from an image that is posted from a computer in New York, and later viewed in New York, will not be different when the same exact image is accessed from a smart phone in Alaska. Given this, there is a need for a consistent approach to nonconsensual pornography. At its core, non-consensual pornography is a digital invasion of privacy and should be recognized as such.<sup>15</sup>

Considering the nature of the Internet, this crime needs to be addressed immediately. The options of where to publish the images are constantly growing.<sup>16</sup> In the states without laws, such as Rhode Island, there is no legal recourse for victims who wish to remove photos posted online.<sup>17</sup> Until there is a new law, the photos remain

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<sup>9</sup> The author researched current laws at the time this Note was written in February 2017.

<sup>10</sup> *35 States + DC Have Revenge Porn Laws*, CYBER C.R. INITIATIVE, <https://www.cybercivilrights.org/revenge-porn-laws/> [<https://perma.cc/D39K-6JWQ>] (last visited Apr. 7, 2017) [hereinafter *Revenge Porn Laws*]. This Note uses the terms “nonconsensual pornography” and “revenge porn” interchangeably.

<sup>11</sup> See *infra* notes 131–32.

<sup>12</sup> See *infra* notes 138–40.

<sup>13</sup> See *infra* note 145 and accompanying text.

<sup>14</sup> See *infra* Section II.B.1.

<sup>15</sup> Once nonconsensual pornography is recognized as a digital invasion of privacy, there will likely be less opposition to the existing and proposed laws by organizations like the American Civil Liberties Union who claim that some revenge porn statutes are unconstitutional and overbroad. See *infra* Section II.C.

<sup>16</sup> See Mitchell Osterday, Note, *Protecting Minors from Themselves: Expanding Revenge Porn Laws to Protect the Most Vulnerable*, 49 *IND. L. REV.* 555, 556 (2016) (arguing that a Facebook page displaying nude images was “likely made possible because today’s teenagers live in a connected world with instant access to pictures, videos, and updates from an ever-expanding list of websites, social networking sites, and third-party smartphone applications”).

<sup>17</sup> See Steven Yoder, *Why Is It So Hard to Write a Decent Revenge Porn Law?*, *VICE* (Aug. 2, 2016, 3:00 PM), <http://www.vice.com/read/why-is-it-so-hard-to-write-a-decent-revenge-porn-law> [<https://perma.cc/DL9C-CXT5>].

public.<sup>18</sup> The longer society trivializes the harm, the more difficult it will be to win the fight in the future.<sup>19</sup> The trend of revenge porn is not going away any time soon. A recent study from the Center for Innovative Public Health Research<sup>20</sup> concluded that as many as one in twenty-five Americans, or ten million people, have been “faced or threatened with revenge porn.”<sup>21</sup> Therefore, laws need to be enacted to effectively deter future posters and adequately protect victims.<sup>22</sup>

This Note proposes a statute that considers social media and the Internet. The proposed statute is advantageous because it understands how perpetrators abuse social media and the Internet and implements the protections that victims deserve from the legal system. When society understands the harms and “[w]hen there is no outlet for these images, no audience for these images, and no desire to post these images, that is when the images will cease to

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<sup>18</sup> *See id.*

<sup>19</sup> *See* Citron, *supra* note 5, at 410 (“[P]arents and educators have an important responsibility to teach the young about cyber harassment’s harms because the longer we trivialize cyber gender harassment, the more difficult it will become to eradicate. It is certainly possible that if we act now, future generations might view cyber gender harassment as a disgraceful remnant of the net’s early history.”).

<sup>20</sup> The Center for Innovative Public Health Research is a non-profit, public health research incubator that aims to “promote positive human development through the creation and implementation of innovative and unique technology-based research and health education programs.” *About Us*, CTR. FOR INNOVATIVE PUB. HEALTH RES., <https://innovativepublichealth.org/about> [<https://perma.cc/X5HM-LNRG>] (last visited Apr. 14, 2017).

<sup>21</sup> Claire Landsbaum, *1 in 25 Americans Has Faced or Been Threatened with Revenge Porn, Study Finds*, N.Y. MAG.: CUT (Dec. 14, 2016, 5:16 PM), <http://nymag.com/thecut/2016/12/10-million-americans-have-been-threatened-with-revenge-porn.html> [<https://perma.cc/K769-VK7Q>]; *see* AMANDA LENHART ET AL., DATA & SOC’Y RESEARCH INST., NONCONSENSUAL IMAGE SHARING: ONE IN 25 AMERICANS HAS BEEN A VICTIM OF “REVENGE PORN” 4 (2016), [https://datasociety.net/pubs/oh/Nonconsensual\\_Image\\_Sharing\\_2016.pdf](https://datasociety.net/pubs/oh/Nonconsensual_Image_Sharing_2016.pdf) [<https://perma.cc/DRM5-4HGE>].

<sup>22</sup> *See* Samantha Kopf, Note, *Avenging Revenge Porn*, 9 AM. U. MODERN AM. 22, 30 (2014) (“It is undeniable that people will continue to take intimate photos, relationships will continue to fail, and scorned lovers will continue to seek revenge. Allowing for imposition of criminal punishments on people who post pornographic photos of non-consenting individuals on the Internet should serve to deter others from engaging in this same behavior in the future. In addition to deterrence, criminal sanctions will incapacitate offenders, remove them from society, and protect victims from the danger that they post. In this manner, the law could release victims from the grasps of their offenders and allow them to return to some semblance of normalcy.”).

cause harm to victims.”<sup>23</sup> The lessons from the criminalization of other forms of gender abuse indicate that society needs to change its attitude toward crimes that predominately harm women by accepting the harms as legitimate. Therefore, in addition to proposing a model statute, this Note suggests that other solutions, such as education and the positive use of social media, should be used in conjunction with the statute. Part I discusses the history of non-consensual pornography and how the Internet has created obstacles for victims. Part II discusses the current legal state and how states have approached the problem inconsistently. Part III proposes a statute and other solutions to be used in conjunction.

## I. NONCONSENSUAL PORNOGRAPHY

In order to understand what makes this Note’s proposed statute beneficial and effective, it is necessary to recognize the issue of nonconsensual pornography. Section I.A provides Internet statistics on revenge porn and discusses their overall significance. Section I.B describes the parallels between nonconsensual pornography and other gender offenses, such as domestic violence and workplace harassment. Section I.C returns to the Internet and explains its unique role in nonconsensual pornography.

### A. Internet Statistics

The Internet, smartphones, and social media applications are constantly changing how society interacts with each other.<sup>24</sup> In December 2016, Facebook reported an average of 1.23 billion daily users, including 1.15 billion mobile daily users.<sup>25</sup> Of Twitter’s 313 million monthly users, eighty-two percent are mobile users.<sup>26</sup> In-

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<sup>23</sup> Sarah E. Driscoll, Comment, *Revenge Porn: Chivalry Prevails as Legislation Protects Damsels in Distress over Freedom of Speech*, 21 ROGER WILLIAMS U. L. REV. 75, 116 (2016).

<sup>24</sup> See Richard Chused, *Appropriate(d) Moments*, 26 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 103, 159 (2015) (“[T]echnology has dramatically altered the ways in which moments may be appropriated, and perhaps even more importantly, distributed.”).

<sup>25</sup> *Company Info*, FACEBOOK NEWSROOM, <http://newsroom.fb.com/company-info/> [<https://perma.cc/PH89-NC5V>] (last visited Mar. 9, 2017). The numbers are even higher for monthly users: 1.86 billion monthly active users and 1.74 billion mobile monthly active users. *Id.*

<sup>26</sup> *Company*, ABOUT TWITTER, <https://about.twitter.com/company> [<https://perma.cc/52BB-X4E9>] (last visited Mar. 9, 2017).



stagram boasts more than 300 million daily users who upload more than 95 million photos and daily videos and hit “like” on photos 4.2 billion times a day.<sup>27</sup> As of September 24, 2016, more than 150 million daily Snapchat users use the application to “send more than one billion snaps<sup>28</sup> a day and watch more than 10 billion videos.”<sup>29</sup> In 2017, this may be the new way in which society communicates with one another,<sup>30</sup> but some of the associated problems are a revival and exacerbation of old issues. Specifically, the fight against nonconsensual pornography parallels the movement to recognize and criminalize domestic violence and other crimes that predominately target women, like workplace harassment.<sup>31</sup> Given such, the public, legislators, and judiciary need to look to the past in order to finally recognize and legitimize protections for victims of nonconsensual pornography.<sup>32</sup>

### B. *Parallels with Other Gender Offenses*

Historically, harms that predominately target women and girls have been tolerated, trivialized, and dismissed by society.<sup>33</sup> Victims

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<sup>27</sup> *Instagram Today: 500 Million Windows to the World*, INSTAGRAM: PRESS (June 21, 2016), <https://instagram-press.com/2016/06/21/instagram-today-500-million-windows-to-the-world/> [<https://perma.cc/VV3K-4M4A>]; Sydney Parker, *A Long List of Instagram Statistics That Marketers Need to Know*, HOOTSUITE: BLOG (Nov. 3, 2016), <https://blog.hootsuite.com/instagram-statistics/> [<https://perma.cc/W8VK-R2ZP>].

<sup>28</sup> A snap is an image or video taken on Snapchat that users send on the platform. Users can set a maximum viewing time of ten seconds. See Larry Magid, *What Is Snapchat and Why Do Kids Love It and Parents Fear It? (Updated)*, FORBES (May 1, 2013, 4:14 PM), <https://www.forbes.com/sites/larrymagid/2013/05/01/what-is-snapchat-and-why-do-kids-love-it-and-parents-fear-it/#445510d14fce> [<https://perma.cc/Q7DK-V49R>].

<sup>29</sup> Seth Stevenson, *Snapchat Releases First Hardware Product, Spectacles*, WALL ST. J. (Sept. 24, 2016, 9:56 AM), <http://www.wsj.com/articles/snapchat-releases-first-hardware-product-spectacles-1474682719> [<https://perma.cc/LC7U-NJAW>].

<sup>30</sup> *Id.* (“‘People wonder why their daughter is taking 10,000 photos a day,’ says [Snap Inc. CEO Evan] Spiegel. ‘What they don’t realize is that she isn’t preserving images. She’s talking.’”).

<sup>31</sup> See *infra* Section I.B.

<sup>32</sup> Since the enactment of the Violence Against Women Act, there has been a fifty-one percent increase in reporting of domestic violence, and an average of eighteen percent more calls made to the domestic violence hotline. *The Violence Against Women Act of 2005 Summary of Provisions*, NAT’L NETWORK TO END DOMESTIC VIOLENCE, <http://nnev.org/downloads/Policy/VAWA2005FactSheet.pdf> [<https://perma.cc/57T2-649B>] (last visited Mar. 9, 2017).

<sup>33</sup> See Citron & Franks, *supra* note 4, at 347 (2014) (citing Danielle Keats Citron, *Law’s Expressive Value in Combating Cyber Gender Harassment*, 108 MICH. L. REV. 373, 392–95

of nonconsensual pornography have been treated no differently. Nonconsensual pornography, like domestic violence, is a “vicious form of sex discrimination” that “violates legal and social commitments to equality” and “denies women and girls control over their own bodies and lives.”<sup>34</sup> Given that ninety percent of revenge porn victims are female, it seems rational that the life cycle of the crime parallels similar gender offenses against women such as domestic abuse and workplace harassment.<sup>35</sup>

The following four sections explain in detail certain aspects of nonconsensual pornography that are similar to other gender offenses. Section I.B.1 explains how consent is taken out of context; Section I.B.2 discusses the problem of victim blaming; Section I.B.3 describes how nonconsensual pornography is a form of gender abuse that perpetuates society’s message that women are inferior to men; and Section I.B.4 explains the harms of nonconsensual pornography in greater detail.

### 1. Consent

Gender crimes against women, including nonconsensual pornography, begin with the issue of consent. But, as with cases of sexual assault and harassment, a victim’s limited or specific consent is often expanded beyond its context.<sup>36</sup> Consent to sharing an image with a partner is stretched to mean consent to sharing the image with the public at large.<sup>37</sup> Releasing nude images of women without their consent is not a new phenomenon. In the 1980s,

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(2009)); Kristen V. Brown, *Why Did It Take So Long to Ban Revenge Porn?*, *FUSION* (June 29, 2015, 8:00 AM), <http://fusion.net/story/157734/revenge-porn-bans-were-long-time-coming/> [<https://perma.cc/PUN9-F2BH>] (“Like so many of the indignities women have endured throughout history, revenge porn victims were told that their struggle was one to be suffered in silence. [Revenge porn] sits at the nexus of so many issues that have plagued women for eternity—the exploitation of our bodies, men’s ownership of them, shaming our sexuality.”).

<sup>34</sup> Citron & Franks, *supra* note 4, at 353.

<sup>35</sup> *Id.* (citing CYBER CIVIL RIGHTS INITIATIVE, CCRI’S 2013 NONCONSENSUAL PORNOGRAPHY (NCP) RESEARCH RESULTS (2013), <https://www.cybercivilrights.org/ncpstats/> [<https://perma.cc/L5FT-ALC9>]). Even though there are men who are victims of nonconsensual pornography, this Note only discusses female victims since they make up the vast majority.

<sup>36</sup> *See id.* at 348.

<sup>37</sup> *See id.*

readers submitted nude photos of women to *Hustler* magazine for its “Beaver Hunt” issue.<sup>38</sup> Some of these images were submitted without the women’s knowledge or consent.<sup>39</sup> When these women discovered their published images, they sued and a number of courts found *Hustler* magazine liable for invasion of privacy, requiring *Hustler* “to compensate the women for the emotional distress the magazine had caused.”<sup>40</sup> Although it is still possible for sexually explicit images to be publicly distributed even without the Internet, as seen with the *Hustler* example, it is indisputable that the Internet and social media enlarge the problem and expedite the process.<sup>41</sup>

The Internet has enabled modern-day versions of *Hustler* magazine’s “Beaver Hunt” through websites that specifically solicit indecent material. For example, “Is Anyone Up,” a website designed for spurned paramours to upload sexually explicit images of their partners, received as many as 350,000 individual visitors per day<sup>42</sup> and thirty million views per month before it was shut down in 2012.<sup>43</sup> In addition to the thousands of websites that solicit and encourage submissions of such material, nonconsensual pornography is sent through email and text message, as well as social media platforms.<sup>44</sup> By taking advantage of the Internet, the images can reach exponentially more viewers than ever before.<sup>45</sup>

Private images can be disclosed to the public via social media in a variety of ways, depending on the application in which they are

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<sup>38</sup> Emily Poole, Comment, *Fighting Back Against Non-Consensual Pornography*, 49 U.S.F.L. REV. 181, 186 (2015).

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

<sup>40</sup> *Id.* (citing *Wood v. Hustler Magazine, Inc.*, 736 F.2d 1084, 1093–94 (5th Cir. 1984)).

<sup>41</sup> See Taylor E. Gissell, Comment, *Felony Count 1: Indecent Disclosure*, 53 HOUS. L. REV. 273, 276 & n.23 (2015) (citing “*Revenge Porn*” Banned in California, CBS NEWS (Oct. 2, 2013, 12:43 PM), <http://www.cbsnews.com/news/revenge-porn-banned-in-california/> [<https://perma.cc/424A-93WM>]).

<sup>42</sup> See *id.* at 278.

<sup>43</sup> Poole, *supra* note 38, at 182.

<sup>44</sup> Mary Anne Franks, *How to Defeat ‘Revenge Porn’: First, Recognize It’s About Privacy, Not Revenge*, HUFFINGTON POST: BLOG (June 22, 2015, 8:22 AM), [http://www.huffingtonpost.com/mary-anne-franks/how-to-defeat-revenge-porn\\_b\\_7624900.html](http://www.huffingtonpost.com/mary-anne-franks/how-to-defeat-revenge-porn_b_7624900.html) [<https://perma.cc/LVP4-PPAW>].

<sup>45</sup> See Citron & Franks, *supra* note 4, at 350 (“The Internet provides a staggering means of amplification, extending the reach of content in unimaginable ways.”).

uploaded. For example, on Facebook, Twitter, and Instagram, perpetrators can: (a) create an account posing as the depicted person and upload the images themselves;<sup>46</sup> (b) upload the images to their own accounts and tag<sup>47</sup> the depicted person; or (c) use hashtags<sup>48</sup> with the images. An option available exclusively on Facebook is to post the images on another user's profile page.<sup>49</sup> On Snapchat, a user can send a snap or upload an image through the "memories" feature<sup>50</sup> from either their own account or a fake account acting as the depicted person. With all four platforms, a perpetrator can log in to the depicted person's account<sup>51</sup> and choose security settings

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<sup>46</sup> This can also happen with an email account. See Beth Dalbey, *Michigan Woman Wins \$500,000 Award in Revenge Porn Case*, TROY PATCH (Aug. 26, 2016, 1:04 PM), <http://patch.com/michigan/troy/michigan-woman-wins-500-000-award-revenge-porn-case> [<https://perma.cc/QX5E-LH26>]. In this Michigan case, the victim's ex-boyfriend created a Gmail account impersonating the woman and emailed a photographer to send nude photographs taken during a private modeling session. Because the photographer believed the emails were coming from the victim, he sent the pictures and the ex-boyfriend posted them on revenge porn websites, after which the victim's friends saw the images floating around online and told her about them. The court awarded the victim \$500,000 in monetary damages and "granted a permanent injunction against the ex-boyfriend and required him to destroy the photos and never republish them to third-party websites." *Id.*

<sup>47</sup> To tag an image means to link another user's name to the image so that it comes up under images or posts that they are tagged in. *What Is Tagging and How Does It Work?*, FACEBOOK, <https://www.facebook.com/help/124970597582337/> [<https://perma.cc/ML2T-9SQB>] (last visited Apr. 19, 2017).

<sup>48</sup> The purpose of a hashtag is to group all related images together, which results in a spread of information that is likely faster than without the use of a hashtag and has the greater potential to go viral. The hashtag also allows other users to use the hashtag as a search term (this is what likely contributes to the viral nature). Additionally, when searching for a hashtag on Instagram (also known as a tag), related hashtags appear for users to click on to search further. For example, searching for "#nipple" reveals related searches for "#nipples," "#nipplesout," and "#nipplegang." See Rebecca Hiscott, *The Beginner's Guide to the Hashtag*, MASHABLE (Oct. 8, 2013), <http://mashable.com/2013/10/08/what-is-hashtag/#zRlOhnWFcPqw> [<https://perma.cc/7MEX-RJWM>].

<sup>49</sup> See David Ovalle, *'Revenge Porn' Nets Miami Beach Man 30 Days Jail, 5 Years' Probation*, MIAMI HERALD (Mar. 18, 2016, 12:52 PM), <http://www.miamiherald.com/news/local/community/miami-dade/miami-beach/article66871647.html> [<https://perma.cc/4MR4-XKNR>].

<sup>50</sup> Memories is a feature on Snapchat that allows a user to upload and send an image or video previously taken on his phone. See *How to Use Memories*, SNAPCHAT SUPPORT, <https://support.snapchat.com/en-US/article/using-memories> [<https://perma.cc/A5GE-3WA7>] (last visited Apr. 19, 2017).

<sup>51</sup> See Nina Bahadur, *Victims of 'Revenge Porn' Open Up on Reddit About How It Impacted Their Lives*, HUFFINGTON POST (Jan. 10, 2014, 8:50 AM), <http://www.huffingtonpost.com>

that make the image available to the public or to a select list of followers. Additionally, the image can be recirculated, or shared, through the platform's respective ways, either directly through the application or by downloading or taking a "screenshot"<sup>52</sup> of the image on Snapchat and re-uploading it.

## 2. Victim Blaming

Similar to other gender offenses, victims of nonconsensual pornography are often blamed for the disclosure of their private images.<sup>53</sup> Instead of telling men not to "violate the privacy of a woman who trusted you enough to share herself with you in a playfully sexual context," young girls are told to not send nudes.<sup>54</sup> By victim blaming,<sup>55</sup> and essentially punishing women for sending these images, the belief that women are "sluts" and should be shamed,

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com/2014/01/09/venge-porn-stories-real-impact\_n\_4568623.html [https://perma.cc/U5YA-YN7M] ("My ex logged into my Facebook and took naked pictures that I had sent to my new [partner] over messenger and posted them for all to see . . . My family saw, my friends saw, my Facebook got shut down for nudity and it took forever to get back.").

<sup>52</sup> Since an image disappears on Snapchat after a certain amount of time (a maximum of ten seconds), a user who receives the images can take a screenshot by holding down two buttons on their phone. The user receives a notification when someone has taken a screenshot of their image. See *What Do the Different Icons Mean?*, SNAPCHAT SUPPORT, <https://support.snapchat.com/en-US/article/icon-index> [https://perma.cc/FHN9-DU5V] (last visited Apr. 19, 2017). However, there are ways to circumvent this notification feature. See, e.g., Sophie Curtis, *This Simple Trick Will Let You Screenshot a Snapchat Message Without Notifying the Sender*, MIRROR (Feb. 12, 2016, 5:16 PM), <http://www.mirror.co.uk/tech/simple-trick-you-screenshot-snapchat-7359269> [https://perma.cc/5J37-D3NJ].

<sup>53</sup> See Jenny Trout, *The Sexual Violence of Non-Consensual Nudity*, HUFFINGTON POST: BLOG (Sept. 2, 2014, 1:26 PM), [http://www.huffingtonpost.com/jenny-trout/the-sexual-violence-of-non-consensual-nudity\\_b\\_5745440.html](http://www.huffingtonpost.com/jenny-trout/the-sexual-violence-of-non-consensual-nudity_b_5745440.html) [https://perma.cc/CP9L-ZLWC] ("It serves her right, for treating a nice guy like dirt . . . [s]he was a b--, 'is accepted as reasonable justification for inflicting sexual harm."). As with physical sexual violence, women are both "expected to ignore" the feeling of degradation by "aggressive male sexuality forced upon them," and expected to understand that they brought the sexual harm on themselves. *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> In the context of nonconsensual pornography, victim blaming occurs when others blame the victim for initially sending the image to another. Some victims have been told they have no right to complain when their "'stupid' decision came back to bite [them]" and that they are "responsible for their nude photos appearing online." DANIELLE KEATS CITRON, *HATE CRIMES IN CYBERSPACE* 77 (1st ed. 2014).

whereas men are “studs” and are applauded.<sup>56</sup> Historically, society has ignored harms suffered “where women could have ostensibly mitigated the injury.”<sup>57</sup> For example, victims of domestic violence are criticized for not leaving their abusers, and women are told to change supervisors or jobs if they are harassed at work.<sup>58</sup> When women are victims of nonconsensual pornography, they are told they should not have taken the pictures in the first place if they did not want them on the Internet.<sup>59</sup>

### 3. The Form of Abuse and the Message Sent

Disclosing private images without consent is a form of gender abuse.<sup>60</sup> The relatively recent movement to criminalize nonconsensual pornography reflects a similar willingness to tolerate crimes against women in the past.<sup>61</sup> Moreover, the delay in criminalization sends an overall message about how women are treated and viewed, which has consequences for both women and society as a whole.<sup>62</sup> Disseminating private images is a way for the perpetrator to show power and assert control over the victim and her life because of the consequences resulting from online disclosure.<sup>63</sup> When victims try to leave abusive relationships, their abusers use the private images as leverage and threaten to expose the images to perpetuate a cycle of control.<sup>64</sup> The abusers often act on their threats as soon as their partners muster the strength to leave the relation-

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<sup>56</sup> Poole, *supra* note 38, at 193 (“When women are punished for behavior in which men can freely engage, their freedoms are curtailed, and they become less than men.”).

<sup>57</sup> See Citron, *supra* note 5, at 393.

<sup>58</sup> See *id.* at 393–94.

<sup>59</sup> See Erica Goode, *Victims Push Laws to End Online Revenge Posts*, N.Y. TIMES (Sept. 23, 2013), <http://www.nytimes.com/2013/09/24/us/victims-push-laws-to-end-online-revenge-posts.html> [<https://perma.cc/KN9W-ZUA5>] (“‘The moment the story is that she voluntarily gave this to her boyfriend, all the sympathy disappears,’ [Mary Anne Franks] said.”); Trout, *supra* note 53.

<sup>60</sup> See Brown, *supra* note 33.

<sup>61</sup> See *id.* (“Crimes that disproportionately affect women often require decades of tragedy before they are recognized as criminal.”).

<sup>62</sup> See *id.* (“Revenge porn, our society has been slow to admit, is just another form of domestic abuse.”).

<sup>63</sup> See Goode, *supra* note 59 (“It’s just an easy way to make people unemployable, undatable [sic] and potentially at physical risk,” said Danielle Citron.”).

<sup>64</sup> See Citron & Franks, *supra* note 4, at 351.

ship.<sup>65</sup> In one case, a victim's boyfriend asked her to send nude pictures and told her that if she did not want to "that meant that [she did not] trust him, which meant that [she did not] love him."<sup>66</sup> She sent the pictures, believing he would not share them with anyone else, and then found them online over a year after their breakup.<sup>67</sup>

By permitting the behavior in the above scenario and trivializing its harms, society reinforces gender stereotypes and "instill[s] the notion that online spaces constitute male turf."<sup>68</sup> This cultural mind-set of permitting gender abuse<sup>69</sup> creates problems for victims of nonconsensual pornography. Significantly, by not acknowledging how harmful online harassment is to its victims, society "belies reality."<sup>70</sup> Further, when victims try to report crimes, police officers frequently do not recognize a harm and tell victims there is nothing they can do.<sup>71</sup> By not taking this harm seriously, law enforcement inhibits victims from coming forward after they discover their images on the Internet.<sup>72</sup> This flippant attitude by law enforcement is reminiscent of the barriers female victims of domestic violence and workplace harassment faced before their harms were recognized as legitimate and social.<sup>73</sup>

#### 4. Harms

The fight against domestic violence and other gender crimes required a cultural shift within society. Specifically, those involved in the legal system needed to recognize the crimes, predominantly against women, as causing legitimate harm to victims who deserve

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<sup>65</sup> *Id.*

<sup>66</sup> Goode, *supra* note 59.

<sup>67</sup> *Id.*

<sup>68</sup> Citron, *supra* note 5, at 390-91 ("Cyber harassment stakes out the [I]nternet as a male space in the same way that sexual harassment does in the workplace.").

<sup>69</sup> *See id.* at 392.

<sup>70</sup> *Id.* at 396.

<sup>71</sup> *See* Chiarini, *supra* note 2. For example, Annmarie Chiarini's ex-boyfriend started an eBay auction for a CD with naked images of her, and the images were all over the Internet. Chiarini explained to a police officer that her images had been posted online and she was in danger of being stalked. However, the officer told her no crime had been committed and to call if something happened. *Id.*

<sup>72</sup> *See id.*

<sup>73</sup> *See* Citron, *supra* note 5, at 392 ("Just as society dismissed sexual harassment in the workplace and domestic violence as trivialities until advocates, courts, and policymakers signaled their harmfulness to women . . .").

protection under the law.<sup>74</sup> Once judges recognized sexual and workplace harassment as sex discrimination, the harms were considered legitimate.<sup>75</sup> Victims of nonconsensual pornography experience many similar harms.<sup>76</sup> For example, a recent Cyber Civil Rights Initiative (“CCRI”)<sup>77</sup> survey revealed that ninety-three percent of victims suffered “significant emotional distress” and forty-two percent “sought out psychological services.”<sup>78</sup> In addition, because personal information like names and contact information frequently accompany the images posted online, victims are at a higher risk of stalking and physical attacks.<sup>79</sup> The same CCRI survey reported that fifty-nine percent of victims had their full name posted and forty-nine percent had their social network information or a “screenshot” of their social network profile included.<sup>80</sup> By including such personal information, perpetrators essentially invite others to contact the victim, instilling fear in the victim of additional contact or confrontation from others, both online and offline.<sup>81</sup>

<sup>74</sup> *Id.* at 394–95 (“Feminist activists and lawyers gave a name to domestic violence and made it a problem, whereas before it had been buried by societal indifference.”).

<sup>75</sup> “Similarly, judicial recognition of sexual harassment as a form of sex discrimination in the late 1970s paved the way for the de-trivialization of such abuse.” *Id.* Before workplace harassment was recognized as sex discrimination, “judges, employers, husbands, and victims dismissed it as universal ‘natural’ behavior.” *Id.* at 393.

<sup>76</sup> *Id.* at 390. Victims of both online and workplace sexual harassment suffer from emotional distress that manifests itself in physical forms, such as “anorexia nervosa, depression, and suicide.” *Id.*

<sup>77</sup> CCRI is a non-profit organization that serves “thousands of victims around the world” and advocates “for technological, social, and legal innovation to fight online abuse.” *About*, CYBER C.R. INITIATIVE, <https://www.cybercivilrights.org/welcome/> [<https://perma.cc/68GL-FS9R>] (last visited Apr. 14, 2017).

<sup>78</sup> Of the 1,606 survey respondents, 361 were victims. MARY ANNE FRANKS, CYBER CIVIL RIGHTS INITIATIVE, DRAFTING AN EFFECTIVE ‘REVENGE PORN’ LAW: A GUIDE FOR LEGISLATORS 11–12 (Sept. 22, 2016), <https://www.cybercivilrights.org/guide-to-legislation/> [<https://perma.cc/ND2K-PDXX>].

<sup>79</sup> See Alix I. Cohen, Comment, *Nonconsensual Pornography and the First Amendment: A Case for a New Unprotected Category of Speech*, 70 U. MIAMI L. REV. 300, 340 (2015) (citing Danielle Keats Citron & Mary Anne Franks, *Criminalizing Revenge Porn*, 49 WAKE FOREST L. REV. 345, 350–51 (2014)).

<sup>80</sup> See FRANKS, *supra* note 78, at 11 (stating that, of the postings, twenty-six percent had their email address, sixteen percent had their home address, fourteen percent had their work address, and twenty percent had their phone number visible).

<sup>81</sup> Citron & Franks, *supra* note 4, at 351 (describing a victim who was too scared to leave her house after finding her nude photographs online). Forty-nine percent of victims have been harassed or stalked online by users that have seen their material, and thirty percent have been harassed or stalked outside of the Internet, in person, or over the



The publication of the images also has tangible impacts on the victims' social and professional lives.<sup>82</sup> The CCRI survey found that twenty-six percent of victims closed their Facebook accounts, fifty-four percent had difficulty focusing at work or school, and forty-two percent have had to explain the situation to professional or academic supervisors, coworkers, or colleagues.<sup>83</sup> Employment harm—including damaged reputation, a loss in customers, and even a loss of a job or employment opportunity—“can destroy a woman's career.”<sup>84</sup> In a 2010 study commissioned by Microsoft, almost eighty percent of employers acknowledged that they used online reputations to reject seventy-percent of their applicants.<sup>85</sup>

Beyond the employment setting, victims can experience fear so debilitating that it keeps them from leaving their house.<sup>86</sup> Others have suffered the dissolution of close friendships or family relationships.<sup>87</sup> In an effort to avoid or escape some of these harms, victims have found it necessary to change their identity.<sup>88</sup> One victim changed her name to dissociate herself from some sexually explicit

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phone by users that have seen their material online. FRANKS, *supra* note 78, at 12. Twenty-five percent have had to close down an email address and create a new one due to receiving harassing, abusive, or obscene messages. *Id.*

<sup>82</sup> See FRANKS, *supra* note 78, at 12 (stating that eighty-two percent said they suffered significant impairment in social, occupational, or other important areas of functioning due to being a victim). Notably, courts are concerned with the consequences of child pornography—“avoiding psychological distress and preventing injuries to one's personal life and career”—and these are the very same harms that (adult) victims experience. Layla Goldnick, Note, *Coddling the Internet: How the CDA Exacerbates the Proliferation of Revenge Porn and Prevents a Meaningful Remedy for Its Victims*, 21 CARDOZO J. L. & GENDER 583, 594 (2015).

<sup>83</sup> FRANKS, *supra* note 78, at 12.

<sup>84</sup> Sarah Bloom, Note, *No Vengeance for 'Revenge Porn' Victims: Unraveling Why This Latest Female-Centric, Intimate-Partner Offense Is Still Legal, and Why We Should Criminalize It*, 42 FORDHAM URB. L.J. 233, 242 (2014). Just like female employees escape hostile work environments and sexual harassment by leaving their jobs or requesting a transfer, women shut down “income-generating [web]sites or limit access to their blogs to avoid cyber abuse.” Citron, *supra* note 5, at 386.

<sup>85</sup> Citron & Franks, *supra* note 4, at 352 (citing CROSS-TAB, ONLINE REPUTATION IN A CONNECTED WORLD 1, 3, 8 (2010), [https://www.job-hunt.org/guides/DPD\\_Online-Reputation-Research\\_overview.pdf](https://www.job-hunt.org/guides/DPD_Online-Reputation-Research_overview.pdf) [<https://perma.cc/EZ5C-ZSRN>]).

<sup>86</sup> See Cohen, *supra* note 79, at 341; see also Goode, *supra* note 59 (describing a victim who was stalked by a man who sat outside her house in a car).

<sup>87</sup> See Goode, *supra* note 59.

<sup>88</sup> In the CCRI survey, only three percent legally changed their names, even though forty-two percent had considered it. FRANKS, *supra* note 78, at 12.

online photos only to later find them linked to her new name.<sup>89</sup> One additional problem identified by the CCRI survey was that fifty-one percent of victims have had suicidal thoughts as a result of nonconsensual pornography.<sup>90</sup> Indeed, a number of young victims have taken their own lives after finding pictures of their sexual assaults or other sexually explicit images on social media platforms.<sup>91</sup>

### C. *The Internet Is Unique*

The Internet poses unique challenges to fighting nonconsensual pornography. Section I.C.1 describes how the Internet exacerbates the harm revenge porn victims experience, and Section I.C.2 proposes that revenge porn is not a new crime at all, but rather an exacerbation of a long-standing crime.

#### 1. How the Internet Exacerbates Harm

The harm experienced by victims of nonconsensual pornography is exacerbated by the unique nature of the Internet (including social media) because it facilitates an exponential growth in publication. Mary Anne Franks,<sup>92</sup> who a leader in the fight against nonconsensual pornography, outlined four reasons why cyber harassment can be more damaging than real-life harassment: (1) the veil of anonymity, (2) amplification, (3) permanence, and (4) virtual

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<sup>89</sup> See Goode, *supra* note 59.

<sup>90</sup> See FRANKS, *supra* note 78, at 13.

<sup>91</sup> See *id.* at 14–15 (detailing case studies of two girls who committed suicide after photos of their sexual assaults were shared online). In June 2016, a fifteen-year-old girl took her own life after her ex-boyfriend posted a nude video of her in the shower to Twitter. Kate Briquelet & Katie Zavadski, *Nude Snapchat Leak Drove Teen Girl to Suicide*, DAILY BEAST (June 10, 2016, 4:35 PM), <http://www.thedailybeast.com/articles/2016/06/09/leak-of-nude-snapchat-drove-teen-girl-to-suicide.html> [https://perma.cc/BM9V-3BUV]. In another case, after an image of a victim's breasts was posted to Facebook, the victim was "embarrassed, . . . worried about losing her job, believed she needed psychological help but lacked the money for treatment, and . . . felt so bad that she told her mother she wanted to 'get in the car and go kill [herself].'" *People v. Iniguez*, 202 Cal. Rptr. 3d 237, 246 (Cal. App. Dep't Super. Ct. 2016).

<sup>92</sup> Mary Anne Franks, the Vice-President and Legislative and Tech Policy Director of the Cyber Civil Rights Initiative, authored the first model criminal statute on revenge porn. *Faculty: Mary Anne Franks*, U. MIAMI L. SCH., <http://www.law.miami.edu/faculty/mary-anne-franks> [https://perma.cc/3YLK-DQ39] (last visited Mar. 10, 2017).

captivity and publicity.<sup>93</sup> For example, one victim said: “I am victimized every time someone types my name into the computer.”<sup>94</sup> Another victim stated: “It just makes me feel like a piece of meat [that is] being passed around for a profit.”<sup>95</sup> When an image is posted online, the viewer gains complete control of the image and the amount of time they spend viewing the image.<sup>96</sup> Moreover, the images “often dominate Internet searches for victims’ names” and are “easily accessible to everyone a victim knows.”<sup>97</sup> With the click of a button, the image can be shared again and again as it continues to be seen by users further down the chain. The journey an image takes online can be summarized as “unchartered, unpredictable, and uncontrollable.”<sup>98</sup>

Victims of nonconsensual pornography experience abuse that extends beyond cyberspace. Just as domestic violence and workplace harassment are not contained in their respective environments,<sup>99</sup> the same is true for revenge porn. Even if the victim turns off her computer,<sup>100</sup> the impact of the image lingers in other aspects of her life. This is because it is impossible for anyone to “un-see” the image.<sup>101</sup> By including personal information, such as home or work addresses, with the images, viewers are invited to take the abuse beyond cyberspace.<sup>102</sup>

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<sup>93</sup> See Mary Anne Franks, *Unwilling Avatars: Idealism and Discrimination in Cyberspace*, 20 COLUM. J. GENDER & L. 224, 255–56 (2011).

<sup>94</sup> Goldnick, *supra* note 82, at 591 n.46.

<sup>95</sup> This is what Jennifer Lawrence said in response to her cloud account being hacked and her nude images going public. Brown, *supra* note 33.

<sup>96</sup> Chused, *supra* note 24, at 171.

<sup>97</sup> Franks, *supra* note 44.

<sup>98</sup> Chused, *supra* note 24, at 172. The author discussed his ability to find and search for images that were said to no longer be available online, illustrating how difficult it is to “control their further distribution or to remove them.” *Id.* at 171.

<sup>99</sup> See Citron, *supra* note 5, at 401.

<sup>100</sup> See *id.* at 398.

<sup>101</sup> Kopf, *supra* note 22, at 29.

<sup>102</sup> When users uploaded an image to Is Anyone Up, they were prompted to include “the subject’s full name, city of residence, profession, and social media page links” which “almost guaranteed that the images would show up in a Google search of the subject’s name.” Poole, *supra* note 38, at 182 (citing Alex Morris, *Hunter Moore: The Most Hated Man on the Internet*, ROLLING STONE (Nov. 13, 2012), <http://www.rollingstone.com/culture/news/the-most-hated-man-on-the-internet-20121113> [<https://perma.cc/46MD-AMR6>]). On another website, MyEx.com, visitors can search for specific victims by name and city of residence and leave comments on the pictures. Gissell, *supra* note 41, at 279.

Although there are multiple possible motives for posting an image, perhaps the only reason for attaching personal information is arguably to amplify the injury by lighting a path for other viewers to continue the harassment.<sup>103</sup> The viral nature of the Internet ensures that the abuse follows the victim.<sup>104</sup> In one case, a teenage girl sent her boyfriend a topless photo of herself while they were dating.<sup>105</sup> After they ended the relationship, he sent the image to friends, who sent it to other friends.<sup>106</sup> When the police intervened days later, over 200 students had already received the image.<sup>107</sup> In another case, the victim's coworkers received Facebook and Instagram requests from profiles that featured her nude images, which led her to discover a website with sixty-two such images of her.<sup>108</sup> The victim described feeling "damaged beyond repair," adding that "[t]he paranoia, fear and constant anxiety attacks made [her] feel like [she] did not deserve to live even one day in peace."<sup>109</sup>

## 2. Old Crime, New Name

The growth of the Internet and social media has exacerbated a long-standing gender crime with a new name: "revenge porn."<sup>110</sup> Despite its relatively recent appearance in traditional dictionaries, the first known usage of the term "revenge porn" was in 2007, even though the nonconsensual disclosure of nude images of women were reported as early as the 1980s.<sup>111</sup> Although there is no

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<sup>103</sup> See Poole, *supra* note 38, at 185.

<sup>104</sup> See Clay Calvert, *Revenge Porn and Freedom of Expression: Legislative Pushback to an Online Weapon of Emotional and Reputational Destruction*, 24 *FORDHAM INTELL. PROP. MEDIA & ENT. L.J.* 673, 675–76 (2014) ("[W]hen hurtful images are posted online, the chances for harm are exacerbated by . . . 'the viral nature of the [I]nternet.'" (quoting *Marsh v. Cty. of San Diego*, 680 F.3d 1148, 1155 (9th Cir. 2012) (Kozinski, C.J.)).

<sup>105</sup> Osterday, *supra* note 16, at 562.

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

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

<sup>108</sup> Ovalle, *supra* note 49.

<sup>109</sup> *Id.*

<sup>110</sup> According to Daniel Suvor, who at the time was the policy chief for California Attorney General Kamala Harris, the former state Attorney General "sees this as the next front in the violence against women category of crime" and "as the [twenty-first] century incarnation of domestic violence and assaults against women, now taken online." Brown, *supra* note 33.

<sup>111</sup> See Emily Brewster, *A Thing About Words: 2,000 New Words and Senses Added to Merriam-Webster Unabridged*, *MERRIAM-WEBSTER UNABRIDGED: BLOG* (Apr. 20, 2016),

agreed upon legal definition of revenge porn,<sup>112</sup> Merriam-Webster's dictionary defines revenge porn as "sexually explicit images of a person posted online without that person's consent especially as a form of revenge or harassment."<sup>113</sup>

The component terms of "revenge porn" themselves present a number of problems that affect one's ability to fully understand and combat the problem. Most importantly, the term "revenge" does not accurately describe the phenomenon because images can be distributed for any number of reasons. For example, ex-partners can distribute the images for profit.<sup>114</sup> The images can also be distributed by acquaintances,<sup>115</sup> friends,<sup>116</sup> strangers, roommates, or

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<http://unabridged.merriam-webster.com/blog/2016/04/fomo-hella-microloan-and-more-than-1400-other-new-words-added-to-merriam-webster-unabridged/> [https://perma.cc/C63X-JUZN]. Similarly, sexual harassment in the workplace was a pervasive practice before given its own word in the 1970s. Citron, *supra* note 5, at 376.

<sup>112</sup> See Calvert, *supra* note 104, at 676.

<sup>113</sup> *Revenge Porn*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/revenge%20porn> [https://perma.cc/T3E6-EJXC] (last visited Apr. 14, 2017); see also Brewster, *supra* note 111. When Merriam-Webster announced this year's additions to the dictionary, it noted that the editors monitor words for years before adding them and that the recognition as dictionary-worthy terms is influenced and pushed by various fields. Brewster, *supra* note 111. With revenge porn, for example, the term's first known use was in 2007, and technology pushed its addition to the dictionary. *Id.* Notably, the Oxford English Dictionary definition includes some form of intent. See *Revenge Porn*, OXFORD DICTIONARIES, [https://en.oxforddictionaries.com/definition/revenge\\_porn](https://en.oxforddictionaries.com/definition/revenge_porn) [https://perma.cc/M7PM-MSX5] (last Mar. 13, 2017). Oxford defines "revenge porn" as "[r]evealing or sexually explicit images or videos of a person posted on the Internet, typically by a former sexual partner, without the consent of the subject and in order to cause them distress or embarrassment." *Id.*

<sup>114</sup> See Citron & Franks, *supra* note 4, at 387.

<sup>115</sup> See Jeremy Arias, *Frederick Man Charged with Violating Maryland 'Revenge Porn' Law*, FREDERICK NEWS-POST (Apr. 1, 2016), [http://www.fredericknewspost.com/news/crime\\_and\\_justice/cops\\_and\\_crime/frederick-man-charged-with-violating-maryland-revenge-porn-law/article\\_e0590338-85eb-5b15-a0f4-2860311f4e38.html](http://www.fredericknewspost.com/news/crime_and_justice/cops_and_crime/frederick-man-charged-with-violating-maryland-revenge-porn-law/article_e0590338-85eb-5b15-a0f4-2860311f4e38.html) [https://perma.cc/5SV8-NKC5].

<sup>116</sup> A article published in 2016 described an incident in which a victim's childhood friend had posted images online:

[An Illinois woman] found topless photos of herself posted on Snapchat and Facebook without her consent. Then she received a threatening voicemail from someone who said, "There are a million more like this out in public." The explicit photos were also being posted on public websites and sent directly via e-mail to the victim's family and several other people . . .

Samantha Allen, *She Posted Explicit Images of a Lifelong Friend*, DAILY BEAST (Mar. 18, 2016, 6:15 PM), <http://www.thedailybeast.com/articles/2016/03/18/she-posted-explicit->

classmates, in which case the action is a form of bullying and not necessarily revenge. The consensus in the scholarly community is that the term “nonconsensual pornography” better captures the phenomenon of “the distribution of private, sexually explicit material without consent.”<sup>117</sup>

Regardless of what the phenomenon is called, nonconsensual pornography is a form of cyber gender harassment, abuse, and domestic violence. At its core, cyber gender harassment involves behavior toward a particular woman whose gender is targeted in “threatening and degrading ways.”<sup>118</sup> It is a form of harassment that interferes with a woman’s “agency, livelihood, identity, dignity, and well-being.”<sup>119</sup> The growth of the Internet and social media directly correlates with the growth in nonconsensual pornography<sup>120</sup> and “[b]y seemingly existing everywhere, and yet physically locatable nowhere, the Internet presents interesting enforcement problems”<sup>121</sup> that has made fighting this crime a challenge.

## II. THE CURRENT LAW

As the law stands today, the existing legal options are inadequate. Thus, specific revenge porn statutes are needed. Many states have either attempted to use existing statutes or created new ones. Either way, there is no consistent approach, which has led to variable results among the states. Moreover, in addition to being a form of gender abuse, nonconsensual pornography is a digital invasion of privacy and is not given the same legal protections as other privacy crimes. The need for a consistent approach is obvious, es-

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images-of-a-lifelong-friend.html [https://perma.cc/CNE8-RFLG]. The perpetrator was charged under Illinois’ revenge porn law. *See id.*

<sup>117</sup> Franks, *supra* note 44.

<sup>118</sup> Citron, *supra* note 5, at 378.

<sup>119</sup> *Id.* at 384.

<sup>120</sup> Kopf, *supra* note 22, at 22 (“For perhaps the first time in history, the word instantaneous truly means in an instant; one instantaneous decision—a tweet, a Facebook post—can irreparably damage a person’s reputation for life.”); C. Calhoun Walters, Note, *A Remedy for Online Exposure: Recognizing the Public-Disclosure Tort in North Carolina*, 37 *CAMPBELL L. REV.* 419, 428 (2015) (“The growth of revenge porn in the United States is directly related to the growth in technology and the use of social media.”).

<sup>121</sup> Goldnick, *supra* note 82, at 592.

pecially given the borderless nature of the crime. Proposed and existing laws are critiqued as unconstitutional but this too is an inconsistent issue. Section II.A addresses the existing approaches; Section II.B discusses the need for a consistent approach; and Section II.C describes First Amendment concerns.<sup>122</sup>

### A. Existing Approaches

The existing approaches to protecting victims of nonconsensual pornography are extremely inconsistent and inadequate. Section II.A.1 explains the inadequacy of the current options, and Section II.A.1 summarizes the different approaches currently endorsed by various states.

#### 1. Inadequacy of Current Legal Options

There are a variety of reasons why existing legal options are inadequate and specific revenge porn statutes are needed. Although the movement to criminalize revenge porn is relatively recent, there is extensive literature on current civil remedies and their respective issues that render the options insufficient.<sup>123</sup> For example, section 230 of the Communications Decency Act (“CDA”) legally immunizes websites from liability for images posted by their users.<sup>124</sup> Section 230 acts as a significant hurdle for victims trying to remove their discovered images from these various websites.<sup>125</sup> In addition to a proposed solution to amend the CDA,<sup>126</sup> the existing literature discusses actions in defamation, tort, and contract, as

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<sup>122</sup> These First Amendment concerns are important because existing and proposed statutes have been successfully challenged as unconstitutional on First Amendment grounds. *See infra* Section II.C.

<sup>123</sup> *See generally* Citron & Franks, *supra* note 4; Bloom, *supra* note 84; Adrienne N. Kitchen, Note, *The Need to Criminalize Revenge Porn: How a Law Protecting Victims Can Avoid Running Afoul of the First Amendment*, 90 CHI.-KENT L. REV. 247 (2015); Kopf, *supra* note 22; Justin Pitcher, Comment, *The State of the States: The Continuing Struggle to Criminalize Revenge Porn*, 2015 BYU L. REV. 1435 (2015).

<sup>124</sup> *See* Bloom, *supra* note 84, at 253–54.

<sup>125</sup> For other issues with existing remedies, see Kitchen, *supra* note 123, at 257–59; Kopf, *supra* note 22, at 24–25; and Pitcher, *supra* note 123, at 1440–52. *See generally* Citron & Franks, *supra* note 4; Bloom, *supra* note 84.

<sup>126</sup> Goldnick, *supra* note 82, at 589.

well as the creation of a new First Amendment category of unprotected speech,<sup>127</sup> among others.<sup>128</sup>

Further, victims of nonconsensual pornography face specific hurdles associated with the Internet. Many of these older statutes, written without the Internet in mind, are not sufficient to address the current problems associated with nonconsensual pornography. For example, images appearing on the Internet can go viral within seconds.<sup>129</sup> Moreover, once an image is published online, it is nearly impossible to guarantee that it is permanently removed from the Internet, even if a victim is successful in having the original post removed.<sup>130</sup> In response to some of these difficulties, states have used or amended existing laws,<sup>131</sup> or introduced new laws<sup>132</sup> to criminalize nonconsensual pornography. However, states take a variety of approaches and therefore are inconsistent among each other regarding behavior that is permitted or prohibited.

## 2. Different Approaches

As of April 7, 2017, thirty-five states and the District of Columbia have laws criminalizing revenge porn, although all states treat the crime differently.<sup>133</sup> Various statute titles include: “Disorderly [C]onduct,”<sup>134</sup> “Sexual [C]yberharassment,”<sup>135</sup> “Disclosure of [P]rivate [I]mages,”<sup>136</sup> and “Non-[C]onsensual [D]issemination of [P]rivate [S]exual [I]mages.”<sup>137</sup> Depending on the state, the crime

<sup>127</sup> See generally Cohen, *supra* note 79.

<sup>128</sup> This Note does not intend to spend time on why these other options are inadequate; instead, it focuses on how to make an effective law going forward since there is already extensive literature on why these approaches do not work.

<sup>129</sup> Photos distributed online can potentially reach “thousands, even millions of people, with a click of a mouse.” Citron & Franks, *supra* note 4, at 350; Osterday, *supra* note 16, at 561 (“The Internet [is] a place where images can go viral within minutes of publication . . .”); see also Chiarini, *supra* note 2 (describing the author’s own experience as a victim of revenge porn where a website that featured her images “had been up for 14 days and had been viewed over 3,000 times”).

<sup>130</sup> See *infra* notes 324–25 and accompanying text.

<sup>131</sup> N.J. STAT. ANN. § 2C:14-9 (West 2016).

<sup>132</sup> 720 ILL. COMP. STAT. 5/11-23.5 (2016).

<sup>133</sup> See *Revenge Porn Laws*, *supra* note 10.

<sup>134</sup> CAL. PENAL CODE § 647 (West 2016).

<sup>135</sup> FLA. STAT. § 784.049 (2016).

<sup>136</sup> N.C. GEN. STAT. § 14-190.5A (2015).

<sup>137</sup> 720 ILL. COMP. STAT. 5/11-23.5.



may be classified as a felony<sup>138</sup> or a misdemeanor;<sup>139</sup> for some states, it depends on the presence of certain factors.<sup>140</sup> For example, “Violation of [P]rivacy” is a misdemeanor in Delaware, but the act qualifies as a felony when aggravating factors are present.<sup>141</sup> In Georgia, “Invasion of Privacy” is a misdemeanor only for first-time offenders; a subsequent violation is considered a felony.<sup>142</sup> Moreover, some of the thirty-five states, such as New Jersey, punish perpetrators under existing statutes instead of enacting new ones.<sup>143</sup> In sum, of the thirty-six jurisdictions that criminalize non-consensual pornography, twenty-five define it as a misdemeanor<sup>144</sup> and eight define it as a felony. Three states do not denote such offenses as either felonies or misdemeanors.<sup>145</sup>

In addition to enacted legislation, scholars and other writers have proposed model statutes as well as written guides on what makes an effective revenge porn law.<sup>146</sup> On CCRI’s website, Mary Anne Franks provides “A Guide for Legislators” on drafting an effective law with the crucial elements in mind.<sup>147</sup> Carrie Goldberg, a lawyer who specializes in fighting nonconsensual pornography, also offers a similar guide on her website.<sup>148</sup> Goldberg uses the Illi-

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<sup>138</sup> Revenge porn is a felony in the District of Columbia, Hawaii, Idaho, Illinois, Kansas, Nevada, New Hampshire, and North Carolina. *Revenge Porn Laws*, *supra* note 10.

<sup>139</sup> Revenge porn is a misdemeanor in Alaska, Arkansas, California, Colorado, Connecticut, Georgia, Maryland, Michigan, North Dakota, Oklahoma, Pennsylvania, Tennessee, Texas, Utah, Vermont, Virginia, Washington, and Wisconsin. *Id.*

<sup>140</sup> Revenge porn is elevated from a misdemeanor to a felony charge if certain factors are present in Arizona, Delaware, Florida, Minnesota, New Mexico, Oregon, and South Dakota. *Id.*

<sup>141</sup> DEL. CODE ANN. tit. 11, § 1335(c) (2016).

<sup>142</sup> GA. CODE ANN. § 16-11-90(c) (2016).

<sup>143</sup> N.J. STAT. ANN. § 2C:14-9(1)(c) (West 2016).

<sup>144</sup> This elevates to a felony in seven states based on a variety of factors. *See, e.g.*, DEL. CODE ANN. tit. 11, § 1335; *see also supra* note 140.

<sup>145</sup> Revenge porn is an unspecified offensive in Louisiana, a Class D crime in Maine, and a third-degree crime in New Jersey. *See Revenge Porn Laws*, *supra* note 10.

<sup>146</sup> *See* FRANKS, *supra* note 78; Kitchen, *supra* note 123, at 293–99; Osterday, *supra* note 16, at 575–76; Carrie Goldberg, *What Makes an Effective Revenge Porn Law*, C.A. GOLDBERG L., <http://www.cagoldberglaw.com/what-makes-an-effective-revenge-porn-law/> [<https://perma.cc/7A5Z-V87V>] (last visited Mar. 14, 2017). *See generally* Citron & Franks, *supra* note 4.

<sup>147</sup> FRANKS, *supra* note 78.

<sup>148</sup> Goldberg, *supra* note 146.

nois law—which she describes as the strongest—as a model<sup>149</sup> to describe the “anatomy” of an effective law as follows: (1) it does not require motive; (2) it includes selfies<sup>150</sup> among the vehicles whose use could constitute prohibited conduct; (3) it specifies strong punishments; (4) it does not encompass “just nudity;” (5) it includes downstream distributors; (6) it honors the First Amendment; and (7) it allows for an individual to be identifiable from the information posted with the image,<sup>151</sup> also known as doxing.<sup>152</sup>

### *B. The Need for a Consistent Approach*

There is a need for a consistent approach to the criminalization of nonconsensual pornography. A federal law, such as the proposed Intimate Privacy Protection Act (“IPPA”), is an obvious solution, but has been met with opposition and has yet to pass. Because of the variety of approaches states have taken, the results among them are inconsistent, which presents an additional hurdle to victims. Section II.B.1 outlines the different results reached in various cases in different states because of the varied approaches, and Section II.B.2 addresses the notion that society values privacy in other contexts and nonconsensual pornography should be treated no differently.

#### 1. Lessons from Various Cases and States

The following cases illustrate how different state approaches to a statute can impact the outcome. First, without a direction to interpret the statute broadly or in accordance with its stated purposes, it is possible that savvy criminals can escape liability through loopholes. To illustrate, in 2015, George Zimmerman posted a

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<sup>149</sup> Allen, *supra* note 116 (“In contrast to other states, Illinois’ revenge porn law includes sexually explicit selfies, disregards the motive for posting the images, and provides a harsh penalty for offenders. It has been called ‘the country’s strongest anti-revenge porn legislation yet.’”).

<sup>150</sup> A selfie is a picture someone takes of themselves. *Selfie*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/selfie> [https://perma.cc/CXJ8-UFJZ] (last visited Apr. 19, 2017).

<sup>151</sup> Goldberg, *supra* note 146.

<sup>152</sup> Doxing is defined as “search[ing] for and publish[ing] private or identifying information about (a particular individual) on the Internet, typically with malicious intent.” *Dox*, OXFORD DICTIONARIES, <https://en.oxforddictionaries.com/definition/doxing> [https://perma.cc/TU43-E942] (last visited Mar. 14, 2017).

nude picture of his ex-girlfriend—after obscuring her nipples—on his Twitter feed.<sup>153</sup> Under Florida’s revenge porn statute, Zimmerman could not be charged because the somewhat sanitized image did not fit within the statute’s technical definition of “nudity.”<sup>154</sup> Although his actions clearly fit within the spirit of Florida’s revenge porn law, it did not violate the letter of the law.<sup>155</sup> Unless courts are permitted to construe statutory definitions in accordance with a statute’s stated purpose, circumvention is possible in certain cases.

Conversely, in *People v. Iniguez*, the defendant was charged with distributing a private image for posting images on Facebook.<sup>156</sup> After a jury trial, and a conviction, the defendant argued on appeal that posting an image on Facebook does not fall under a dictionary definition of “distribute.”<sup>157</sup> As part of its analysis, the Appellate Division of the Superior Court looked to the reasons the California law was enacted and determined there were “indications that posting images on public [w]eb sites was *precisely* one of the evils the statute sought to remedy.”<sup>158</sup> As a result, the court concluded that the posting of the photograph on a public Facebook page consti-

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<sup>153</sup> Kristen V. Brown, *George Zimmerman’s Nude Tweets of His Ex Weren’t Revenge Porn—But He May Still Get in Trouble*, FUSION (Dec. 8, 2015, 7:41 PM), <http://fusion.net/story/242928/george-zimmermans-nude-tweets-of-his-ex-werent-technically-nude/> [https://perma.cc/2UJD-Z79J]. In 2013, George Zimmerman was acquitted of killing Trayvon Martin.

<sup>154</sup> *Id.*

<sup>155</sup> *Id.* The Florida statute defines nudity as “the showing of the human male or female genitals, pubic area, or buttocks with less than a fully opaque covering; or the showing of the female breast with less than a fully opaque covering of any portion thereof below the top of the nipple . . . .” FLA. STAT. § 847.001(9) (2016). Given this definition, an image, such as the one Zimmerman posted, that does not include nipples does not come within the statute’s purview. Based on other information the legislature included in the statute, however, this is arguably behavior that should have been a violation. For example, the statute explains that protecting against “sexual cyberharassment” is compelling because it is becoming a common practice that causes significant harm. *See* FLA. STAT. § 784.049(1)(b) (2016).

<sup>156</sup> 202 Cal. Rptr. 3d 237, 245 (Cal. App. Dep’t Sup. Ct. 2016).

<sup>157</sup> *Id.* The defendant cited Black’s Law Dictionary, which defines distribute as “to deliver.” *Id.* (citing *Distribute*, BLACK’S LAW DICTIONARY (9th ed. 2009)). The defendant also argued for the court to use a definition of distribute found within a federal statute and other state statutes barring distribution of child pornography. *Id.* (citing 18 U.S.C. § 2252 (2012); CAL. PENAL CODE § 313.1 (West 2015)).

<sup>158</sup> *Id.*

tuted “substantial evidence” that the defendant had “distributed” the photograph.<sup>159</sup> This approach is different than the one taken in Florida, where there was no leeway for interpretation, even though the spirit of the law was violated.<sup>160</sup> An understanding of how Facebook works enabled the court to reach a decision that effectuated the legislative intent.<sup>161</sup>

A New York court reached a seemingly opposite result, however, because it failed to understand how Twitter works. In *People v. Barber*, the defendant posted naked pictures of his girlfriend on his Twitter feed and then emailed them to her employer and sister.<sup>162</sup> Under the applicable statute, only publicly displayed images were sanctionable.<sup>163</sup> Notably, the court reasoned that posting an image on Twitter and emailing the image to a small number of individuals are both “private acts.”<sup>164</sup> Under the statute, the images had to be displayed publicly; so, because Twitter is a “subscriber-based social networking service,”<sup>165</sup> the court dismissed the charges.<sup>166</sup> This conclusion, however, clearly reflects a lack of understanding of how social media works. A private account, or “protected tweets,” means that a user must approve any requests for followers.<sup>167</sup> Someone who searches for such a user on Twitter<sup>168</sup> will not be able to view the user’s tweets without first being approved.

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<sup>159</sup> *Id.* at 246. The court also discussed that there was no indication that “distribute,” as used within the statute, was to have any meaning other than its commonly known and used one: “to give or deliver (something) to people.” *Id.* at 244 (citing *Distribute*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/distribute> [<https://perma.cc/MC8F-Z85A>] (last visited Apr. 7, 2017)).

<sup>160</sup> Brown, *supra* note 153.

<sup>161</sup> In discussing the definition of distribute, the court noted that the post on Facebook constituted a distribution of the image because posting it on the public page made it available to the public. *Iniguez*, 202 Cal. Rptr. 3d at 246.

<sup>162</sup> No. 2013NY059761, 2014 N.Y. Misc. LEXIS 638, at \*1 (N.Y. Crim. Ct. Feb. 18, 2014).

<sup>163</sup> *Id.* at \*2.

<sup>164</sup> *Id.* at \*17.

<sup>165</sup> *Id.*

<sup>166</sup> *Id.* at \*20.

<sup>167</sup> *About Public and Protected Tweets*, TWITTER SUPPORT, <https://support.twitter.com/articles/14016> [<https://perma.cc/XQ6N-8L9S>] (last visited Mar. 14, 2017).

<sup>168</sup> A user (or non-user) can search for a specific Twitter user by performing a search for the user’s Twitter handle, which is akin to a screen name. *Finding People on Twitter*, TWITTER SUPPORT, <https://support.twitter.com/articles/14022> [<https://perma.cc/C5BF-U9F3>] (last visited Apr. 19, 2017).

However, an image can still be viewed by approved followers, downloaded, and then later uploaded to a public account or shared elsewhere.

Noting the existence of “private” versus “public” accounts creates a false dichotomy. A user’s lack of control over the dissemination of personal information means that all posted material is essentially public. In 2009, the Minnesota Court of Appeals reached a similar conclusion, holding that information posted on a MySpace page was public information, reasoning that once Internet communication occurs, that communication is publicly available.<sup>169</sup> Once an image is published online, the original poster of the image loses control of its digital reach.<sup>170</sup> Thus, uploading a private image without consent on any social media application or the Internet should qualify as making an image “public.”

Further, the ability for an actor other than the initial poster to distribute an image emphasizes why the distinction between public and private social media accounts is immaterial. With a private account, once the image is uploaded, the actor does not maintain control over its path through the Internet because those with access to the account can download or otherwise save the image and subsequently distribute it.<sup>171</sup> The Internet’s function as a “technological megaphone”<sup>172</sup> does not discriminate between public and private social media accounts and neither should the law.

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<sup>169</sup> *Yath v. Fairview Clinics, N.P.*, 767 N.W.2d 34, 44 (Minn. Ct. App. 2009).

<sup>170</sup> *See Kopf, supra* note 22, at 26 (“[O]nce the images are available to the public, anonymous website visitors are able to view them, copy them, and anonymously repost them on myriad other Internet sites. This chain reaction continues and allows the victim’s exposure to increase exponentially, particularly as the anonymous viewers ‘Like’ the images, comment on them, and promulgate the violation continuing to share them across the web.”).

<sup>171</sup> *See Chused, supra* note 24, at 158–59 (“There no longer can be a cultural belief that our personal lives are invisible or unavailable to others . . . . Granting only ‘friends’ access to pictures and videos on Facebook hardly guarantees that they will remain visible just to that group. One right-click of a mouse allows any ‘friend’ to save such an image and then to send it to others. The lack of privacy expectations, however, does not mean that everything about us that is visible to some machine or person—whether online or not—should be available for appropriation or use in all circumstances.”).

<sup>172</sup> *Walters, supra* note 120, at 427–28.

## 2. Society Values Privacy in Other Contexts

The intersection of technology and privacy is not conceptually new to American jurisprudence. Samuel Warren and Louis Brandeis wrote their famous article *The Right to Privacy* in 1890 in response to new technologies that carried the potential to intrude in private lives.<sup>173</sup> Similarly, modern technology and advances both allow for the nonconsensual distribution of sexually explicit images and render the old rules inapplicable.<sup>174</sup> However, the core concept of protecting a right to privacy, and the right be let alone,<sup>175</sup> remains the same. In other words, the mediums have changed but the intrusion persists. Nonconsensual pornography is a digital invasion of privacy.<sup>176</sup>

At its core, nonconsensual pornography is a digital invasion of privacy but it is not recognized like other privacy-related crimes. As is evident from a recent series of incidents involving nursing home residents, nonconsensual pornography's central concern is privacy. Recently, aides in a nursing home used Snapchat to capture images of their elderly patients without their consent, which they then disseminated for entertainment via the application.<sup>177</sup> As illustrated here, nonconsensual pornography need not involve ex-paramours, but it regularly involves an invasion of privacy.<sup>178</sup> Understanding the conduct as a digital invasion of privacy through cases like this one could help shift the societal mind-set that stands in the way of an effective, comprehensive fight against nonconsensual pornography.<sup>179</sup>

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<sup>173</sup> See Chused, *supra* note 24, at 108–09.

<sup>174</sup> See *id.* at 160.

<sup>175</sup> See *id.* at 114 (quoting Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 195–96 (1890)).

<sup>176</sup> See Kitchen, *supra* note 123, at 248; Franks, *supra* note 44.

<sup>177</sup> Charles Ornstein, *Nursing Home Workers Share Explicit Photos of Residents on Snapchat*, PRO PUBLICA (Dec. 21, 2015, 8:00 AM), <https://www.propublica.org/article/nursing-home-workers-share-explicit-photos-of-residents-on-snapchat> [<https://perma.cc/S228-RPKT>].

<sup>178</sup> Importantly, the perpetrators in the nursing home incidents would fall under the purview of this Note's model statute. See *infra* Part III.

<sup>179</sup> Moreover, “the Seventh Circuit suggested in dicta that revenge porn would constitute a privacy invasion: ‘[i]magine if nude pictures of a woman, uploaded to the Internet without her consent though without identifying her by name, were downloaded in a foreign country by people who will never meet her. She would still feel that her

Society both honors and protects privacy interests in a variety of other contexts, such as in financial and medical situations. For example, society does not “blame someone for trusting a financial advisor not to share sensitive information with strangers on the street,”<sup>180</sup> and understands that “[w]hen a person entrusts a doctor with sensitive health information, he is not authorizing that doctor to share that information with the public.”<sup>181</sup> Arguably, this is also because of an understanding that consent, as it relates to private information, is highly context dependent.<sup>182</sup>

Additionally, voyeurism is a crime in every state and criminalized by the federal government because Americans value their choice to privacy, and have “the basic right to choose who is allowed to see them naked and under what circumstances.”<sup>183</sup> Disclosing sexually explicit images without consent is a type of sexual exploitation and non-contact sexual abuse, like sexual harassment or voyeurism;<sup>184</sup> society already denotes these as unlawful because it at least views them as invasions of privacy that will not be tolerated.

### C. First Amendment Concerns

Some critics object to revenge porn statutes on the basis of First Amendment concerns, typically attacking statutes that are said to have been drafted too broadly.<sup>185</sup> Recently, the American Civil Liberties Union (“ACLU”) successfully challenged laws in

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privacy had been invaded.” Kitchen, *supra* note 123, at 290 (alteration in original) (quoting *Nw. Mem’l Hosp. v. Ashcroft*, 362 F.3d 923, 929 (7th Cir. 2004)).

<sup>180</sup> Citron & Franks, *supra* note 4, at 348.

<sup>181</sup> *Id.* at 355.

<sup>182</sup> *See id.*

<sup>183</sup> Franks, *supra* note 44.

<sup>184</sup> *See* Kopf, *supra* note 22, at 27 (“Revenge porn is analogous to existing punishable crimes in that it is a type of abuse, sexual exploitation, and non-contact sexual abuse. Revenge porn is a type of abuse, which is generally defined as ‘a departure from legal or reasonable use.’” (citing *Abuse*, BLACK’S LAW DICTIONARY (9th ed. 2009))).

<sup>185</sup> *See* Danielle Citron, *Debunking the First Amendment Myths Surrounding Revenge Porn Laws*, FORBES (Apr. 18, 2014, 11:19 AM), <http://www.forbes.com/sites/daniellecitron/2014/04/18/debunking-the-first-amendment-myths-surrounding-revenge-porn-laws/#744617424b89> [perma.cc/KFL5-C6F6] (explaining that it is principally the American Civil Liberties Union that objects to revenge porn statutes because of the chilling effect that the statutes may have on free speech).

Arizona and Rhode Island.<sup>186</sup> In Arizona, a federal judge struck down the law as unconstitutional.<sup>187</sup> In Rhode Island, the Governor vetoed a proposed revenge porn law in part due to arguments the ACLU had urged. Section II.C.1 addresses why the Arizona law was declared unconstitutional; Section II.C.2 explains why the Rhode Island statute failed to pass; and Section II.C.3 discusses the proposed federal statute, the IPPA.<sup>188</sup>

### 1. Arizona

In its 2014 challenge to Arizona's existing revenge porn law, the ACLU persuasively demonstrated its claim that the statute was overbroad by providing examples of who could be charged under the statute.<sup>189</sup> The ACLU argued that the law violated the First Amendment because its broad reach resulted in criminalizing protected speech.<sup>190</sup> For example, the law criminalized a bookseller that published the Pulitzer Prize-winning "Napalm Girl" photograph in a history book, in which an unclothed Vietnamese girl is seen, running in horror from her village; a vendor selling newspapers containing graphic images of naked, abused prisoners at Abu Ghraib; and a library lending a photo book on breastfeeding to a new mother.<sup>191</sup> In March 2016, the Arizona legislature responded by passing an amended version of the statute that included an "in-

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<sup>186</sup> The ACLU's opinion and opposition has proven to be influential in challenging nonconsensual pornography laws.

<sup>187</sup> Clark Mindock, *Arizona Revenge-Porn Law Halted Permanently After ACLU Lawsuit Challenged Constitutionality Under First Amendment*, INT'L BUS. TIMES (July 10, 2015, 5:17 PM), <http://www.ibtimes.com/arizona-revenge-porn-law-halted-permanently-after-aclu-lawsuit-challenged-2004009> [<https://perma.cc/ATA7-AYRR>].

<sup>188</sup> The IPPA is included in this Section because it was drafted with the help of First Amendment experts and scholars who firmly believe that there are no First Amendment concerns with the text, which, importantly, does not require an actor to disclose images with an intent to harm or harass. *See infra* Section II.C.3.

<sup>189</sup> *See* Sarah Jeong, *Is Arizona's Revenge Porn Law Overbroad?*, FORBES (Sept. 23, 2014, 3:58 PM), <http://www.forbes.com/sites/sarahjeong/2014/09/23/is-arizonas-revenge-porn-law-overbroad/#6fc4525b3154> [<https://perma.cc/PA4B-7CP3>].

<sup>190</sup> Press Release, Am. Civil Liberties Union, *First Amendment Lawsuit Challenges Arizona Criminal Law Banning Nude Images* (Sept. 23, 2014), <https://www.aclu.org/news/first-amendment-lawsuit-challenges-arizona-criminal-law-banning-nude-images> [<https://perma.cc/B5MB-3NCG>].

<sup>191</sup> *See id.*



tent to harm” clause.<sup>192</sup> The ACLU has yet to challenge the amended statute for being unconstitutional.<sup>193</sup>

## 2. Rhode Island

Rhode Island Governor Gina Raimondo recently vetoed a proposed bill intended to outlaw the “unauthorized dissemination of indecent material” because its language was “overly broad” and “potentially harmful to the practice of journalism.”<sup>194</sup> The bill passed in the Senate unanimously and in the House by a vote of sixty-eight to one.<sup>195</sup> The Rhode Island ACLU and others previously expressed the same concerns, arguing that without an “intent to harass” provision, the bill “made criminals out of thousands of people,” including an “average viewer of an illegally disseminated photo.”<sup>196</sup> Despite Governor Raimondo’s recent veto, Rhode Island Attorney General Peter F. Kilmartin plans to refile legislation this year.<sup>197</sup>

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<sup>192</sup> Yoder, *supra* note 17.

<sup>193</sup> See Mary Anne Franks, *The ACLU’s Frat House Take on ‘Revenge Porn,’* HUFFINGTON POST: BLOG (Apr. 1, 2015, 1:23 PM) [http://www.huffingtonpost.com/mary-anne-franks/the-aclus-frat-house-take\\_b\\_6980146.html](http://www.huffingtonpost.com/mary-anne-franks/the-aclus-frat-house-take_b_6980146.html) [<https://perma.cc/87V9-KQ7H>]; Yoder, *supra* note 17.

<sup>194</sup> S.B. 2540, 2016 Gen. Assemb., Jan. Sess. (R.I. 2016); Luke O’Neil, *Why Did This New Revenge Porn Law Fail? Or Did It?*, ESQUIRE (June 23, 2016), <http://www.esquire.com/lifestyle/sex/news/a46053/revenge-porn-law-vetoed/> [<https://perma.cc/YA3U-2DDR>].

<sup>195</sup> See Yoder, *supra* note 17.

<sup>196</sup> O’Neil, *supra* note 194. The ACLU used the dissemination of Jennifer Lawrence’s photos to illustrate their concerns. Stephen Brown, Executive Director of the Rhode Island ACLU, said: “Under this bill, if a 15-year-old went to one of the websites where [Jennifer Lawrence’s] pictures are and sent it to a friend, he’d be guilty of a crime.” *Id.* In its critique, the ACLU recommended requiring “clear intent to harm” and “proof that harm did in fact occur” in the bill. *Id.*

<sup>197</sup> Jason Vallee, *R.I. Attorney General to Re-File Vetoed ‘Sextortion’ and Revenge Porn Bill*, WESTERLY SUN (Dec. 29, 2016, 9:14 PM), <http://www.thewesterlysun.com/news/state/9745474-154/ri-attorney-general-to-re-file-vetoed-sextortion-and-revenge-porn.html> [<https://perma.cc/7ZJ8-2G2G>]. Notably, “[t]his will be the seventh year that Kilmartin has filed such legislation,” which will apply to an actor who “intentionally distribute[s] . . . images that were created under circumstances intended to remain private and that were distributed for no legitimate purpose.” *Id.*

### 3. IPPA (Federal)

At the federal level, proposed legislation has also attracted opposition from the ACLU, which recently criticized a bill entitled the Intimate Privacy Protection Act, or IPPA.<sup>198</sup> Not only does the ACLU oppose any bill that does not include language requiring some form of “malicious intent,” but it also insists that legislation include a motive requirement.<sup>199</sup> It is only willing to prohibit non-consensual pornography in cases where the offender intends to harass the victim.<sup>200</sup> As Mary Anne Franks pointed out, however, nonconsensual pornography “is no less harmful or less deserving of punishment when it is motivated by a desire for money, to gain reputational status, or to provide ‘entertainment.’”<sup>201</sup> She also noted that there is no “intent to harm” language in other privacy laws supported by the ACLU because “privacy laws recognize that the act of knowingly invading the privacy of another is itself malicious.”<sup>202</sup> For example, the ACLU supports the Genetic Information Nondiscrimination Act, which protects personal, sensitive information.<sup>203</sup> Additionally, the ACLU of New Jersey (“ACLU-NJ”) recently commended New Jersey Transit’s decision to stop audio surveillance of its passengers on certain transit lines.<sup>204</sup> In a

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<sup>198</sup> The bill was introduced on July 14, 2016. Mary Anne Franks, *It’s Time for Congress to Protect Intimate Privacy*, HUFFINGTON POST: BLOG (July 18, 2016, 1:32 PM), [http://www.huffingtonpost.com/mary-anne-franks/revenge-porn-intimate-privacy-protection-act\\_b\\_11034998.html](http://www.huffingtonpost.com/mary-anne-franks/revenge-porn-intimate-privacy-protection-act_b_11034998.html) [<https://perma.cc/LY6J-G7PK>].

<sup>199</sup> See *id.* Lee Rowland, an ACLU staff attorney, criticized the proposed bill for three reasons, including its lack of intent to harm provision: “[P]rosecutors should have to prove that a perpetrator actually intended to harm the victim . . . that the accused knew the victim [did not] consent to the image being shared . . . [and] that the victim expected the image to stay private.” Yoder, *supra* note 17.

<sup>200</sup> Franks, *supra* note 198.

<sup>201</sup> *Id.*

<sup>202</sup> *Id.* As Franks pointed out in *A Guide for Legislators*, in the ACLU’s objection to provisions of the Violence Against Women Act, it considered “intent to cause substantial emotional distress” to be “unconstitutionally overbroad.” FRANKS, *supra* note 78.

<sup>203</sup> *ACLU Letter to the Senate Urging Support of S. 358, the “Genetic Information Nondiscrimination Act of 2007,”* AM. C.L. UNION, <https://www.aclu.org/letter/aclu-letter-senate-urging-support-s-358-genetic-information-nondiscrimination-act-2007> [<https://perma.cc/D956-VKUT>] (last visited Apr. 19, 2017); Franks, *supra* note 193.

<sup>204</sup> Press Release, Am. Civil Liberties Union, NJ Transit Decision to No Longer Record Audio of Passengers a Win for Privacy, ACLU-NJ Says (June 29, 2016), <https://www.aclu.org/news/nj-transit-decision-no-longer-record-audio-passengers-win-privacy-aclu-nj-says> [<https://perma.cc/NQ6Y-83NP>].

press release, the ACLU-NJ Deputy Legal Director described the practice as an “extreme invasion of privacy” that destroyed riders’ “ability to have a personal conversation with a loved one on the train.”<sup>205</sup> However, it is the public nature of a train that prevents riders from having a personal, private conversation. The ACLU-NJ also noted that “[s]tate agencies should think twice before dismissing New Jerseyans’ privacy rights so easily [and think carefully about their] privacy rights in all future decisions.”<sup>206</sup> Here, the ACLU was concerned with an invasion of privacy in a public space,<sup>207</sup> but with nonconsensual pornography—a situation in which there is often a reasonable expectation of privacy—the ACLU has dismissed the victim’s right to privacy.<sup>208</sup>

Additionally, Franks pointed out<sup>209</sup> the ACLU’s proclamation on its “Privacy & Technology” homepage: “The ACLU works to expand the right to privacy, increase the control individuals have over their personal information, and ensure civil liberties are enhanced rather than compromised by technological innovation.”<sup>210</sup> This too would suggest that the ACLU would support a revenge porn law that protects an individual’s right to privacy. However, an opposite result was reached. Finally, Franks also argued that the ACLU’s insistence on statutory language requiring an intent to cause harm itself leads to constitutional infirmities based on “viewpoint discrimination and under-inclusiveness.”<sup>211</sup>

The IPPA was drafted with input from a number of First Amendment experts and does not have an intent requirement.<sup>212</sup>

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<sup>205</sup> *Id.*

<sup>206</sup> *Id.*

<sup>207</sup> *See id.*

<sup>208</sup> *See* Franks, *supra* note 193.

<sup>209</sup> *Id.*

<sup>210</sup> *Privacy & Technology*, AM. C.L. UNION, <https://www.aclu.org/issues/privacy-technology?redirect=technology-and-liberty> [<https://perma.cc/4RQ2-2QR8>] (last visited Mar. 14, 2017).

<sup>211</sup> Franks, *supra* note 193.

<sup>212</sup> The bill received support from “[twelve] leading constitutional scholars.” Sarah Jeong, *New Revenge Porn Bill Shows Silicon Valley’s Influence in Politics*, VICE: MOTHERBOARD (July 15, 2016, 4:28 PM), <http://motherboard.vice.com/read/new-revenge-porn-bill-shows-silicon-valleys-influence-in-politics> [<https://perma.cc/GE9V-PEGR>]; *see* Intimate Privacy Protection Act of 2016, H.R. 5896, 114th Cong. (2016).

Renowned constitutional scholar Erwin Chemerinsky<sup>213</sup> said: “There is no First Amendment problem with this bill. The First Amendment does not protect a right to invade a person’s privacy by publicizing, without consent, nude photographs or videos of sexual activity.”<sup>214</sup> Similarly, Professor Eugene Volokh<sup>215</sup> said that the IPPA is “quite narrow, and pretty clearly defined”<sup>216</sup> and Professor Neil Richards<sup>217</sup> called the IPPA “a very well-drafted law.”<sup>218</sup> These three professors are experts in First Amendment law and having their input and approval should be influential in assessing the constitutionality of the IPPA. Moreover, they emphasize that nonconsensual pornography is about an invasion of privacy that is not protected by the First Amendment.

A federal law like the IPPA is important because it would create clarity and consistency in the law on nonconsensual pornography,

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<sup>213</sup> Professor Chemerinsky is the Dean of University of California, Irvine School of Law, and an influential legal scholar. See *Erwin Chemerinsky*, U.C., IRVINE SCH. L., <http://www.law.uci.edu/faculty/full-time/chemerinsky/> [<https://perma.cc/99RC-NXLM>] (last visited Apr. 7, 2017).

<sup>214</sup> Press Release, Jackie Speier, Congresswoman Speier, Fellow Members of Congress Take on Nonconsensual Pornography, AKA Revenge Porn (July 14, 2016), <https://speier.house.gov/media-center/press-releases/congresswoman-speier-fellow-members-congress-take-nonconsensual> [<https://perma.cc/3TLL-LYJ4>].

<sup>215</sup> Professor Volokh is a professor at University of California, Los Angeles, School of Law, and a First Amendment expert who is well known for his skepticism of “most privacy-based speech restrictions.” Franks, *supra* note 198; see *Faculty Profiles: Eugene Volokh*, UCLA L., <https://law.ucla.edu/faculty/faculty-profiles/eugene-volokh/> [<https://perma.cc/7BEE-VMHK>] (last visited Apr. 7, 2017).

<sup>216</sup> Tracy Clark-Flory, *Bill that Would Make Revenge Porn Federal Crime to Be Introduced*, VOCATIV (July 14, 2016, 10:25 AM), <http://www.vocativ.com/339362/federal-revenge-porn-bill/> [<https://perma.cc/8KYH-Q5VA>]. Additionally, Professor Volokh said, in a general statement, that “a suitably clear and narrow statute” that banned disclosure “where there’s good reason to think that the subject did not consent to the publication . . . would likely be upheld by the courts . . . [as] courts can rightly conclude that as a categorical matter such nude pictures indeed lack First Amendment value.” Eugene Volokh, *Florida “Revenge Porn” Bill*, VOLOKH CONSPIRACY (Apr. 10, 2013, 7:51 PM), <http://volokh.com/2013/04/10/florida-revenge-porn-bill/> [<https://perma.cc/FCX6-RSQ2>]; see also Kopf, *supra* note 22, at 28 (“[T]he evil of non-consented to pornography overwhelmingly outweighs any interest in free speech that may be at stake.”).

<sup>217</sup> Professor Richards is a professor at Washington University School of Law and a First Amendment and privacy scholar. See *Neil Richards*, WASH. U. L., <https://law.wustl.edu/faculty/pages.aspx?id=314> [<https://perma.cc/J68S-7DWH>].

<sup>218</sup> Clark-Flory, *supra* note 216.

and provide protections for victims in the states that have yet to pass legislation.<sup>219</sup> Moreover, without an intent requirement, the draft bill is focused on the harm to the victim.<sup>220</sup> However, more victim protections<sup>221</sup> written in the text will make the IPPA stronger and, arguably, more effective.

### III. PROPOSAL: MODEL STATUTE THAT FOCUSES ON THE INTERNET AND SOCIAL MEDIA

As the law stands today, there is no consistent approach to the fight against nonconsensual pornography. Given the nature of the crime, an effective statute must focus on the Internet and social media. An additional challenge requires shifting society's mind-set from trivializing the harms of nonconsensual pornography to legitimizing and mitigating them. A statute will only be effective when society recognizes the impact nonconsensual pornography has on its victims, and fights on their behalf. Section III.A outlines and proposes the crucial elements of an effective statute, which is a hybrid of existing state statutes<sup>222</sup> as well as some new ideas. Section III.B explains the advantages and benefits of the proposed statute and why it will be the most effective at protecting victims, deterring future criminals, and punishing perpetrators. Section III.C proposes additional solutions to be used in conjunction with the statute to facilitate the most effective application of the law, and discusses the benefits of such solutions.

#### A. *Crucial Elements of the Statute*

This Section does not outline every part of the statute, but instead focuses on crucial elements. Section III.A.1 explains the importance of including sections on findings, purposes, and liberal

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<sup>219</sup> Johanna Mayer, *Revenge Porn State Laws Spread; A Federal One Remains Elusive*, PACER MONITOR (Dec. 19, 2016, 12:40 PM), <http://www.pacermonitor.com/articles/2016/12/19/revenge-porn-state-laws-spread-a-federal-one-remains-elusive/#sthash.RRdUwK8h.dpbs> [<https://perma.cc/6RZ3-SLHB>].

<sup>220</sup> *Id.*

<sup>221</sup> For example, the IPPA should include sections similar to "Findings," "Purposes," "Liberal Construction," and "Remedies" of this Note's proposed statute. *See infra* Appendix A, Sections 1-3, 9.

<sup>222</sup> The state statutes addressed below and used as part of this Note's model statute in Appendix A were chosen for their clear and specific language.

construction; Section III.A.2 provides specific definitions and parts of the prohibited conduct; Section III.A.3 highlights the importance of jurisdiction; and Section III.A.4 proposes classifying the disclosure as a misdemeanor (as a baseline) and elevating the charge to a felony when certain aggravating factors are present. The proposed statute, Nonconsensual Disclosure of Private Intimate Images Act, is attached in its entirety in Appendix A.

### 1. Findings, Purposes, and Liberal Construction

The preamble to the statute contains three sections. First, a section entitled “Findings”<sup>223</sup> summarizes the harms of and statistics on nonconsensual pornography as follows: (a) making private, intimate images publicly available on the Internet, without the victim’s consent, is increasingly common;<sup>224</sup> (b) disclosing such images causes undisputable and irreversible harm to the victim depicted in the image(s);<sup>225</sup> (c) the majority of such victims are women;<sup>226</sup> and (d) the harms are trivialized by society.<sup>227</sup> Second, the “Purposes”<sup>228</sup> section explains that the statute intends to: (a) prohibit disclosing an image on the Internet, on social media, or through non-electronic means, without the consent of the person depicted and to recognize the legitimate harms this practice causes;<sup>229</sup> (b) include acts committed in violation of this statute as domestic violence-related offenses;<sup>230</sup> (c) expand the definition of harassment to include a single incident of nonconsensual disclosure;<sup>231</sup> and (d) provide victims with adequate remedies. Third, the preamble includes an instruction on statutory construction<sup>232</sup> that states: This statute shall be construed and applied to protect

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<sup>223</sup> See *infra* Appendix A, Section 1.

<sup>224</sup> FLA. STAT. § 784.049(1)(b) (2016).

<sup>225</sup> See *id.*

<sup>226</sup> CYBER CIVIL RIGHTS INITIATIVE, CCRI’S 2013 NONCONSENSUAL PORNOGRAPHY (NCP) RESEARCH RESULTS (2013), <https://www.cybercivilrights.org/ncpstats/> [<https://perma.cc/L5FT-ALC9>].

<sup>227</sup> See *supra* note 33 and accompanying text.

<sup>228</sup> See *infra* Appendix A, Section 2.

<sup>229</sup> See *infra* notes 342–45 and accompanying text.

<sup>230</sup> See S.F. 2713, 2016 Leg., 89th Sess. (Minn. 2016).

<sup>231</sup> See MINN. STAT. § 617.261(7)(c) (2016).

<sup>232</sup> See *infra* Appendix A, Section 3.

against the harms of nonconsensual pornography and provide victims with adequate remedies.<sup>233</sup>

For multiple reasons, particularly the relative recentness of nonconsensual pornography statutes and a lack of understanding of the crime,<sup>234</sup> it is crucial to include sections on findings, purposes, and liberal construction in the statute. The overall effect of these three sections read together will be beneficial for victims. First, the findings emphasize that nonconsensual pornography causes legitimate harm to its victims. Second, the stated purposes sends the message that victims deserve appropriate protection from the law, and that the behavior will not be tolerated or ignored by society. Last, to avoid any confusion or misunderstanding, the preamble both outlines its purpose and instructs judges (as well as the public) to liberally construe the statute in accordance with its specified purposes.

## 2. Definitions and Prohibited Conduct

For the purposes of this statute, “[d]isclose”<sup>235</sup> means to make publicly available<sup>236</sup> or to cause another to do so, because an effective statute must be able to capture both the initial poster and those further down the line. Under the proposed statute, “[p]rivate”<sup>237</sup> means that the person depicted is entitled to a reasonable expectation of privacy<sup>238</sup> either because a reasonable person would know or understand that the image was to remain private<sup>239</sup> or the depicted

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<sup>233</sup> See S.B. 1135, 84th Leg., Reg. Sess. (Tex. 2015).

<sup>234</sup> See Citron & Franks *supra*, note 4 at 347. (“The fact that nonconsensual pornography so often involves the Internet and social media, the public, law enforcement, and the judiciary sometimes struggle to understand the mechanics of the conduct and the devastation it can cause.”).

<sup>235</sup> See *infra* Appendix, Section 4(a).

<sup>236</sup> CITRON, *supra* note 55, at 152. Initially, the private image is disclosed when it is uploaded to the Internet or social media or otherwise made available to the public. An image can be transmitted on social media by uploading the image to Facebook, Instagram, Twitter, Snapchat, or other similar applications. Furthermore, an actor can screenshot the image from a video chat, such as during a Facetime or Skype, or from Snapchat and then upload the image, which also qualifies as a way to disclose an image. See *supra* Sections I.A., I.B.1.

<sup>237</sup> See *infra* Appendix, Section 4(b).

<sup>238</sup> See FRANKS, *supra* note 78, at 10. This term must be specifically defined to avoid ambiguity. See *infra* note 311 and accompanying text.

<sup>239</sup> See, e.g., WASH. REV. CODE § 9A.86.010(1)(a) (2016).

person consented to or sent<sup>240</sup> the image within the context of a private or confidential relationship<sup>241</sup> under a reasonable belief that the image would remain within that context.<sup>242</sup> The definition of “[h]arm”<sup>243</sup> shall be interpreted in accordance with the stated purpose of the statute to include, but not be limited to emotional, psychological, physical, professional, reputational, social, and personal harm. Last, “[p]ersonally identifiable information”<sup>244</sup> includes, but is not limited to, the victim’s name, any part of their home, school or work address, e-mail address, telephone number, geolocation data,<sup>245</sup> links to or any information about their social media profile (for example, Facebook, LinkedIn, Twitter, Instagram, and Snapchat).

There are two main reasons to define the usage of certain terms in the statute. First, because laws that are overbroad can be challenged,<sup>246</sup> it is critical to explicitly and specifically define what is prohibited without inadvertently leaving victims unprotected. Among current laws that criminalize nonconsensual pornography, there are definitions of terms and prohibited conduct that vary from state to state, which can lead to inconsistent outcomes.<sup>247</sup> Second, the proposed statute’s definitions are specific and focus on the perpetrator’s behavior while simultaneously providing victims with multiple ways to obtain relief under the statute. For example,

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<sup>240</sup> A person does not automatically forfeit their reasonable expectation of privacy when he or she sends the image to another person. *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-1425(A)(2) (2016). Further, it shall not constitute a defense if the depicted person consented to the image or sent the image voluntarily. *See, e.g.*, TEX. PENAL CODE ANN. § 21.16(e) (West 2015).

<sup>241</sup> *See, e.g.*, DEL. CODE ANN. tit. 11, § 1335(a)(9)(b) (2016).

<sup>242</sup> *See, e.g.*, N.C. GEN. STAT. § 14-190.5A(a)(5) (2015).

<sup>243</sup> *See infra* Appendix, Section 4.

<sup>244</sup> *See infra* Appendix, Section 4.

<sup>245</sup> *See, e.g.*, § 1335(a)(9)(a)(2).

<sup>246</sup> *See supra* Section II.C.1.

<sup>247</sup> *Compare* 720 ILL. COMP. STAT. 5/11-23.5 (2016), *with* 18 PA. CONS. STAT. § 3131(a) (2016). For example, an Illinois victim discovered explicit photos of herself on social media and later learned her childhood friend had posted the images. *See* Allen, *supra* note 116. The victim’s friend was charged under Illinois’ revenge porn law. *See id.* However, had this occurred in Pennsylvania, the victim would face more barriers because, in the outlawed conduct, the statute defines nonconsensual pornography as a crime between “current or former sexual or intimate partner[s].” § 3131(a).



the definition of “[h]arm”<sup>248</sup> provides specific types of harms, but gives courts discretion to interpret harm in accordance with the statute’s purpose.

Given the Internet-based nature of the crime and the prevalence of the role of social media, the definitions in this Note’s proposed statute focus on both the Internet and social media. The definition of the prohibited activity further reflects that an image can be disclosed and made publicly available in a number of ways.<sup>249</sup> Initially, the private image is disclosed when it is uploaded to the Internet<sup>250</sup> or social media,<sup>251</sup> or otherwise made available to the public. It is undisputable that disclosing nonconsensual pornography via the Internet or social media makes the post accessible.<sup>252</sup> The proposed statute also provides examples of how images are transmitted on social media in order to eliminate any doubt on the issue: An image can be transmitted on social media by uploading the image to Facebook, Instagram, Twitter, Snapchat, or other similar applications. Furthermore, an actor can screenshot the image from Facetime,<sup>253</sup> Skype, or Snapchat, and then upload the image, which also qualifies as a way to disclose an image.<sup>254</sup>

An image that is posted on the Internet or social media can continue to circulate throughout the victim’s life for many years later.<sup>255</sup> Additionally, after the image is disclosed, actors other than the initial poster perpetuate the harm because they can continue to

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<sup>248</sup> See *infra* Appendix A, Section 4(e).

<sup>249</sup> See *infra* Appendix A, Section 4.

<sup>250</sup> “‘Internet’ means an electronically available platform by which sexual images can be disseminated to a wide audience, including social media, websites, and smartphone applications; provided, that the term ‘Internet’ does not include a text message.” D.C. CODE § 22-3051(3) (2016).

<sup>251</sup> “‘Social media’ means any electronic medium . . . that allows users to create, share, and view user-generated content.” MINN. STAT. § 617.261(7)(j) (2016).

<sup>252</sup> See Chused, *supra* note 24, at 187 (“[I]t is no longer possible for us to ignore the intrusive qualities of digital technology.”); see also FLA. STAT. § 784.049(1)(c) (2016) (“When such images are published on Internet websites, they are able to be viewed indefinitely by persons worldwide and are able to be easily reproduced and shared.”).

<sup>253</sup> Facetime is an application for Apple devices that allows users to video chat with one another. See *FaceTime for Mac: Make and Receive Video and Audio Calls*, APPLE (Sept. 22, 2016), [https://support.apple.com/kb/PH21389?viewlocale=en\\_US&locale=en\\_US](https://support.apple.com/kb/PH21389?viewlocale=en_US&locale=en_US) [<https://perma.cc/GUC7-A8XS>].

<sup>254</sup> See *infra* Appendix A, Section 4 n.385.

<sup>255</sup> See *infra* notes 324–25 and accompanying text; see also Calvert, *supra* note 104.

view and recirculate the image by sharing it directly with friends, posting it on other social media platforms, or making it accessible in other forms.<sup>256</sup> Therefore, the term “[d]isclose” used in this Note’s proposed statute includes causing another to make the image publicly available, which likely happens if it is recirculated on the Internet or a social media platform by that platform’s respective means.<sup>257</sup>

As discussed earlier,<sup>258</sup> the harms suffered by victims of non-consensual pornography are unique to each victim and vary based on the circumstances. In this Note’s proposed statute, prohibited conduct includes that the actor knew, or should have known, that the disclosure causes or could cause harm.<sup>259</sup> Harm shall be interpreted in accordance with the stated purpose of the statute to include emotional, psychological, physical, professional, reputational, social, and personal harm.<sup>260</sup> This definition is effective because it will not prevent a victim from taking action based on the type of harm experienced, and if an actor should have known that harm could occur, that will satisfy the standard.<sup>261</sup>

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<sup>256</sup> See *supra* note 45; see also *supra* note 120 and accompanying text.

<sup>257</sup> For example, if the image is “shared” on Facebook, “reposted” on Instagram, or “retweeted” or shared with a hashtag on Twitter, the image would be recirculated. If the image is emailed and the email is forwarded, that action would constitute recirculating the image. If the image appears on a website and a perpetrator downloads the image and then re-uploads or otherwise shares the image, that would also constitute recirculation. Recirculating can also be accomplished when someone, who is not the initial poster, takes a screenshot of an image in various applications and then distributes the image. See *supra* notes 169–72 and accompanying text.

<sup>258</sup> See *supra* Section I.B.4.

<sup>259</sup> See, e.g., TEX. PENAL CODE ANN. § 21.16(b)(3) (West 2015).

<sup>260</sup> See *infra* Appendix A, Section 4(e).

<sup>261</sup> Compare *infra* Appendix A, Section 4(e), with GA. CODE ANN. § 16-11-90 (2016). The text of the Georgia statute prohibits electronic transmission “when the transmission or post is harassment or causes financial loss to the depicted person and serves no legitimate purpose to the depicted person.” § 16-11-90(b)(1). This statute, however, does not reflect that victims experience harm in different forms, such as a harm that does not cause financial loss. For example, harm can manifest itself physically. While harassment might appear to broaden the scope of harm, the definition, arguably, narrows it instead. Harassment is defined as “engaging in conduct directed at a depicted person that is intended to cause substantial emotional harm to the depicted person.” § 16-11-90(a)(1). As defined, there is likely a high standard of proof of the actor’s intent to cause substantial emotional harm that a victim must surpass to receive this statute’s protections. First, there must be proof of the actor’s intent; second, the victim’s emotional harm must qualify as substantial. This Note’s proposed statute is therefore

This Note's proposed statute also prohibits a threat to disclose a private, intimate image<sup>262</sup> when the actor knew, or should have known, that the depicted person did not consent to such disclosure and the actor uses the threat as leverage.<sup>263</sup> An actor may threaten to expose an image to exert their power and control over another to effectively guarantee that they get what they want. Therefore, to deter future disclosures and protect victims, the threat to disclose an image, whether followed through or not, must also be considered unlawful conduct under this statute. Threats of exposure are common: One in ten women are threatened, and threats are carried out sixty-percent of the time.<sup>264</sup> Therefore, a statute that prohibits the threat ensures protection to more victims.

### 3. Jurisdiction

When an image is uploaded to a website or social media application, the poster loses control over it and cannot guarantee the path the image will take. The harms that affect victims do not differ depending on where the image is seen or accessed from—all that matters is that the image is out there, floating in the cloud. The crime is truly borderless and thus, this proposed statute expands the jurisdiction so that perpetrators cannot avoid liability for jurisdictional reasons.<sup>265</sup> For example, charges were dropped in an Illinois case because the poster, despite being an Illinois resident, was in Michigan at the time of the alleged crime.<sup>266</sup> Therefore, this proposed statute gives a court jurisdiction<sup>267</sup> when: (a) the depicted person or the actor is a resident of that court's state or was in the

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favorable because its definition of harm reflects a reality that the term cannot be defined with specificity such that it excludes victims from its scope.

<sup>262</sup> See *infra* Appendix A, Section 5.

<sup>263</sup> It will be within the court's discretion to decide, case by case, if an actor uses a threat as leverage. For example, an actor uses a threat as leverage when the threat is used to procure a benefit in return for not disclosing the image. See, e.g., TEX. PENAL CODE ANN. § 21.16(c).

<sup>264</sup> Kopf, *supra* note 22, at 22.

<sup>265</sup> See Franks, *supra* note 44.

<sup>266</sup> Satchel Price & Mary Clarke, *Blackhawks Prospect Will Not Be Prosecuted Under Illinois Revenge Porn Law*, SB NATION (Mar. 29, 2016, 3:28 PM), <http://www.sbnation.com/nhl/2016/3/29/11326046/garret-ross-prosecution-ended-illinois> [<https://perma.cc/NQW8-KXRM>].

<sup>267</sup> See *infra* Appendix, Section 6.

state when the image was disclosed;<sup>268</sup> or (b) the disclosed image is accessible in the state of the court proceeding.<sup>269</sup> This sends a message that the harms and reality of nonconsensual pornography are not contained to a certain jurisdiction. Further, it prevents perpetrators from taking advantage, for example, by driving across state lines to disclose an image.

#### 4. Classification

In this Note's proposed statute, the nonconsensual disclosure of a private, intimate image shall be a misdemeanor and elevated to a felony<sup>270</sup> if any number of certain factors are present.<sup>271</sup> The aggravating factors<sup>272</sup> are as follows: (a) if the image is disclosed with the intent to harass the depicted person or if a reasonable person would know or understand that would be the result;<sup>273</sup> (b) if the image is disclosed for profit<sup>274</sup> or other financial gain; (c) if, in addition to disclosing an image in violation of this statute, the actor maintains a website that specifically collects and/or solicits these images;<sup>275</sup> (d) if the image is disclosed with personally identifiable information;<sup>276</sup> (e) if the image serves as an advertisement for the depicted person's sexual services; (f) if this is a subsequent violation of this statute or another domestic violence-related offense;<sup>277</sup> or (g) if there is proof that the disclosure directly caused others to

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<sup>268</sup> See, e.g., D.C. CODE § 22-3057 (2016).

<sup>269</sup> See, e.g., S.B. 1135, 84th Leg., Reg. Sess. (Tex. 2015). Even if the Texas statute is only applied to civil matters in Texas, this Note's proposed statute expands the application to criminal matters as well.

<sup>270</sup> See *infra* Appendix, Section 7.

<sup>271</sup> Of the thirty-six laws that currently exist, nonconsensual pornography is a misdemeanor in twenty-five states, a felony in nine jurisdictions, and a miscellaneous-level crime in three states that do not classify offenses as misdemeanors or felonies. In seven states, the offense is elevated from a misdemeanor to a felony when certain factors are present. See *supra* notes 138–40, 145; see also, e.g., DEL. CODE ANN. tit. 11, § 1335 (2016) (elevating the offense from a misdemeanor to a felony if certain factors are present).

<sup>272</sup> See *infra* Appendix, Section 8.

<sup>273</sup> See, e.g., OKLA. STAT. ANN. tit. 21, § 1040.13b(B)(2) (West 2016); see also Kitchen, *supra* note 123, at 282.

<sup>274</sup> See, e.g., DEL. CODE ANN. tit. 11, § 1335(a)(9)(c)(2).

<sup>275</sup> See § 1335(a)(9)(c)(3).

<sup>276</sup> See § 1335(a)(9)(c)(5).

<sup>277</sup> See, e.g., N.C. GEN. STAT. § 14-190.5A(c)(3) (2015).

distribute the image. Even though classifying the offense as a misdemeanor does not send as strong a message as a felony does, it could make it easier for the proposal to pass.<sup>278</sup> Elevating the misdemeanor charge to a felony under certain circumstances can strike the right balance between sending a message, acting as an effective deterrent, and allowing passage. Moreover, each of the aggravating factors of this Note's proposed statute represents a situation where the actor has committed a more serious offense by exacerbating the potential harm.<sup>279</sup>

A number of ex-paramours arguably disclose private, intimate images to cause harm to the victim.<sup>280</sup> Although, as discussed, it can be challenging to prove the actor's intent to harass his victims by disclosing the image, the inability to do so should not act as a barrier to recourse.<sup>281</sup> Accordingly, if it can be proven that the actor disclosed the image with the intent to harass, the disclosure should constitute a felony. Also, if this is a subsequent charge for the actor, under either the nonconsensual pornography statute or another domestic-violence related offense, he should be charged with a felony.<sup>282</sup>

The aggravating factors cover situations where an actor takes full advantage of the Internet and its ability to exponentially expand an image's reach and harm. When an actor discloses the image for profit<sup>283</sup> or other financial gain, he is benefitting at the victim's expense, likely without victim's knowledge. An actor who maintains a website that specifically collects or solicits these images<sup>284</sup> directly contributes to the problem of nonconsensual pornography. Further, an actor who causes others to distribute the image is taking direct advantage of the viral nature of the Internet and exacerbating

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<sup>278</sup> CITRON, *supra* note 55, at 152.

<sup>279</sup> See *infra* Appendix A, Section 8.

<sup>280</sup> See Franks, *supra* note 44. However, it is critical to understand that this is not the exclusive motivation and in the cases of the many victims who do not even know the person who posted or circulated their image, their perpetrator is motivated by something other than a desire to cause harm.

<sup>281</sup> This is among the reasons why the actor need not intend harm to violate this Note's model statute. See Franks, *supra* note 44.

<sup>282</sup> See, e.g., § 14-190.5A(c)(3).

<sup>283</sup> See, e.g., DEL. CODE ANN. tit. 11, § 1335(a)(9)(c)(2) (2016).

<sup>284</sup> See, e.g., § 1335(a)(9)(c)(3).

the harm to the victim by causing the recirculation of the image and making it more difficult to remove it.

If the image is paired with “personally identifiable information,”<sup>285</sup> an actor is essentially inviting others to cause further harm to the victim offline. An image contains personally identifiable information if it includes the victim’s name, any part of their home, school or work address, e-mail address, telephone number, geolocation data,<sup>286</sup> links to or any information about their social media profiles (including, but not limited to, Facebook, LinkedIn, Twitter, Instagram, and Snapchat).<sup>287</sup> Last, if an image serves as an advertisement for the depicted person’s sexual services, or if there are explicit captions accompanying the image such as “dirty whore” or “lying cheating slut,”<sup>288</sup> the offense should be one of a more serious nature.

The last category of factors relates to social media and how communication in a technological age. If the actor creates a fake account pretending to be the depicted person, signs into the depicted person’s account, intentionally tries to stay anonymous, or tries to disguise<sup>289</sup> the image on a social media account, he should be charged with a felony. In any of these situations, the actor is taking additional advantage of, and hiding behind, the veil of anonymity that Internet communication provides.<sup>290</sup>

### *B. Benefits and Advantages of the Proposed Statute*

This Note’s proposed statute contains several benefits and advantages. Section III.B.1 explains why an intent provision is not included; Section III.B.2 explains the advantages to the way a rea-

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<sup>285</sup> § 1335(a)(9)(a)(2).

<sup>286</sup> *Id.*

<sup>287</sup> *See infra* Appendix A, Section 4(f).

<sup>288</sup> Poole, *supra* note 38, at 186.

<sup>289</sup> For example, on November 14, 2016, a search for “#nudity” on Instagram listed 53,650 public posts. The author scrolled through some images but did not get very far before seeing a message from Instagram: “Recent posts from #nudity are currently hidden because the community has reported some content that may not meet Instagram community guidelines.” The search also revealed that “#nüdity” and “#nûdity” are popular hashtags. These are likely ways to disguise the image and avoid getting “caught” by Instagram or the community. This example also exemplifies how using a hashtag is a form of sharing an image that leads to greater exposure and views.

<sup>290</sup> *See generally* CITRON, *supra* note 55.

sonable expectation of privacy is defined; Section III.B.3 details how the proposed statute's remedies provide effective protections for victims; and Section III.B.4 describes how the focus on social media makes for an effective statute.

### 1. Intent/Motive Provision

A requirement that an actor disclose the image with intent to harm, harass, intimidate, coerce, or otherwise antagonize the depicted person is effectively guaranteed to leave victims unprotected, and thus is not included in this Note's proposed statute. As previously discussed,<sup>291</sup> the ACLU opposes statutes that do not include intent to harm provisions because of potential for being too broad and violating the First Amendment. Notably, however, roughly one-third of the current laws outlawing nonconsensual pornography do not include an intent provision of this type.<sup>292</sup> For example, New Jersey's "Invasion of Privacy" statute, which is considered the country's first revenge porn law, does not require intent to harm, and its constitutionality has yet to be questioned.<sup>293</sup> A statute that requires intent to harm or harassment of the depicted person unnecessarily makes it much more difficult to establish guilt.<sup>294</sup> Mary Anne Franks argued that this arbitrary distinction "ignore[s] the reality that many perpetrators are [not motivated] by an intent to distress."<sup>295</sup> Other laws that protect privacy, such as the Health Insurance Portability and Accountability Act<sup>296</sup>

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<sup>291</sup> See *supra* Section II.B.

<sup>292</sup> See O'Neil, *supra* note 194; see also CITRON, *supra* note 55, at 207–08 (explaining that her model statute, which does not include an intent to harm provision, should be constitutional because "[d]isclosures of private communications involving nude images do not enjoy rigorous First Amendment protection").

<sup>293</sup> See O'Neil, *supra* note 194.

<sup>294</sup> Further, because the posting of an image can be motivated by more than one factor, "many prosecutors believe [it is] almost impossible to prove intent." Yoder, *supra* note 17.

<sup>295</sup> FRANKS, *supra* note 78, at 8. A requirement of intent to harm would exclude from a statute's reach many different perpetrators, including operators of revenge porn websites who are motivated by profit and perpetrators motivated by publicity or other status. Yoder, *supra* note 17.

<sup>296</sup> Pub. L. No. 104–191, 10 Stat. 1936 (codified in scattered sections of 29 and 42 U.S.C.).

and financial privacy laws, do not require any specific intent to do harm as an element of liability or guilt.<sup>297</sup>

With its intent requirement, the Pennsylvania statute exemplifies how certain elements of a statute, such as intent, serve as additional barriers to victims and thus render a statute ineffective.<sup>298</sup> For example, in 2015, fraternity brothers from Pennsylvania State University were accused of posting photographs of naked, unconscious women to private Facebook group pages titled “Covert Business Transactions” and “2.0.”<sup>299</sup> According to a fraternity member, the Facebook group “[was no] malicious whatsoever,” nor was it “intended to hurt anyone.”<sup>300</sup> Pennsylvania’s law against “Unlawful [D]issemination of [I]ntimate [I]mage” requires that the perpetrator act with “intent to harass, annoy or alarm a current or former sexual or intimate partner.”<sup>301</sup> As a result, the victims were left unprotected because the fraternity brothers did not act with the requisite intent.<sup>302</sup>

There will arguably be instances where it is possible to prove the actor disclosed the image with intent to harm the depicted person. Therefore, this proposed statute includes intent to harass<sup>303</sup> as an aggravating factor to increase the offense from a misdemeanor to a felony. If intent were necessary to charge the perpetrator with a crime, then the statute would inevitably be underinclusive because posters could merely claim other reasons for disclosing the image as a defense. However, statutes without an intent provision

<sup>297</sup> See O’Neil, *supra* note 194.

<sup>298</sup> See 18 PA. CONS. STAT. § 3131(a) (2016).

<sup>299</sup> See Franks, *supra* note 193.

<sup>300</sup> Franks, *supra* note 193 (citing Holly Otterbein, *Member of Penn State’s Kappa Delta Rho Defends Fraternity*, PHILA. MAG. (Mar. 18, 2015, 4:36 PM), <http://www.phillymag.com/news/2015/03/18/member-of-penn-states-kappa-delta-rho-defends-fraternity/> [<https://perma.cc/6B7V-6WVW>]). He added: “It [was not] intended to demean anyone. It was an entirely satirical group and it was funny to some extent.” *Id.*

<sup>301</sup> § 3131(a).

<sup>302</sup> See *id.* Moreover, the Pennsylvania statute is ineffective because it requires the perpetrator and the victim to be current or formal sexual or intimate partners. As is evident from this case, however, the ravages of nonconsensual pornography are not exclusive to partners in relationships. Therefore, this Note’s proposed statute does not have a similar relationship requirement.

<sup>303</sup> See *infra* Appendix A, Section 8; see also OKLA. STAT. tit. 21, § 1040.13b(B)(2) (2016); Kitchen, *supra* note 123, at 282. See generally CITRON, *supra* note 55.



can present a barrier for passage or constitutionality as they receive criticism for being overbroad, overreaching, and unconstitutional.<sup>304</sup> Therefore, this Note’s proposed statute strikes the right balance: It does not allow perpetrators to escape liability because of a lack of intent or motive, but it is also not overbroad. This Note’s statute will not criminalize more people than necessary—as the Arizona statute was criticized for<sup>305</sup>—because of the findings, purposes, and liberal construction sections. For example, reading the findings included in the statute in conjunction with the purposes of the statute clearly indicate that the statute is not intended to capture the examples listed in the Arizona statute.<sup>306</sup> Nevertheless, it will still not allow perpetrators to escape liability by claiming they lack the requisite intent, because there is no requisite intent required.

## 2. Reasonable Expectation of Privacy

This Note’s proposed statute defines a private<sup>307</sup> image as one in which the depicted person is entitled to a reasonable expectation of privacy,<sup>308</sup> or when a reasonable person would know or understand that the image was to remain private.<sup>309</sup> Additionally, the statute specifically defines when a person is entitled to a reasonable expectation of privacy in an effective way.<sup>310</sup> In her guide for legislators, Mary Anne Franks emphasized the importance of defining what is meant by “a reasonable expectation of privacy” because, without a definition, the term would be ambiguous.<sup>311</sup> An ideal definition consists of multiple parts, describing both when there is a reasonable expectation of privacy and clarifying situations where that right is not forfeited.<sup>312</sup> As with the rest of the statute, it should

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<sup>304</sup> See *supra* Section II.C.1.

<sup>305</sup> See *supra* Section II.C.1.

<sup>306</sup> See *supra* Section II.C.1.

<sup>307</sup> See *infra* Appendix A, Section 4(b).

<sup>308</sup> See, e.g., DEL. CODE ANN. tit. 11, § 1335(a)(9) (2016).

<sup>309</sup> See, e.g., WASH. REV. CODE § 9A.86.010(1)(a) (2016).

<sup>310</sup> See *infra* Appendix A, Section 4(b).

<sup>311</sup> FRANKS, *supra* note 78, at 10.

<sup>312</sup> See *infra* notes 313–21 and accompanying text.

be interpreted in a manner that protects victims, rather than in a way that acts as an additional barrier to relief.<sup>313</sup>

This Note's model statute proposes that a person is entitled to a reasonable expectation of privacy<sup>314</sup> when a reasonable person would know or understand that the image was to remain private,<sup>315</sup> or the depicted person consented to or sent<sup>316</sup> the image within the context of a private or confidential relationship<sup>317</sup> under a reasonable belief that the image would remain within that context.<sup>318</sup> Regardless of when the image is disclosed, if an ex-paramour discloses it, this definition covers victims who either sent or consented to the image in the context of the relationship. Furthermore, by including that the victim reasonably believes the disclosure will remain private, the victim will not have to face high standards of proof.

In this Note's proposed statute, the definition of reasonable expectation of privacy is advantageous for victims who want to use the statute against their perpetrators because it includes an instruction that a person does not automatically forfeit his or her expectation when they send the image to another person.<sup>319</sup> This provision is an essential part of any effective revenge porn statute because of a recent suggestion that a reasonable expectation of privacy may no longer exist within this context.<sup>320</sup> Furthermore, because of "[t]he current wave of news media attention . . . [a]rguably, only an *unreasonable* person would take the risk."<sup>321</sup> Statutes should not allow

<sup>313</sup> Kopf, *supra* note 22, at 22 ("In a world where the line between public and private is hazy at best, it is difficult to get adequate relief when someone publicizes your private life on the Internet.").

<sup>314</sup> See *infra* Appendix A, Section 4.

<sup>315</sup> See, e.g., WASH. REV. CODE § 9A.86.010(1)(a) (2016).

<sup>316</sup> See *supra* note 240 and accompanying text.

<sup>317</sup> See, e.g., DEL. CODE ANN. tit. 11, § 1335(a)(9)(b) (2016).

<sup>318</sup> See, e.g., N.C. GEN. STAT. § 14-190.5A(a)(5) (2015). Victims are often told the image they send will remain private and so they consent to sending the image under that premise. See Citron & Franks, *supra* note 4, at 354.

<sup>319</sup> See, e.g., ARIZ. REV. STAT. ANN. § 13-1425(A)(2) (2016).

<sup>320</sup> See Calvert, *supra* note 104, at 697-98 ("[T]oday there may *not* be a reasonable expectation of privacy that a sexual image taken consensually will not be disseminated later to others . . . only a naïve person—not a reasonable person—would believe that the photos will remain private."); see also Pitcher, *supra* note 123, at 1443 (arguing that there is doubt that anyone who voluntarily sends pictures can expect privacy, regardless of the increased media coverage).

<sup>321</sup> Calvert, *supra* note 104, at 699.

the increasing attention surrounding revenge porn to be used by a perpetrator to dispute the reasonable expectation of privacy that the victim is entitled to. Therefore, this proposed statute is advantageous because it protects victims by affirmatively disputing a notion that they can automatically lose their reasonable expectation of privacy.

### 3. Remedies

In accordance with the purpose of the statute, the remedies must focus on protecting the victims. The harms resulting from posting the images on the Internet are often permanent,<sup>322</sup> even if the images are removed.<sup>323</sup> Although social media platforms and Google are taking big steps in the right direction, there are limitations to how effectively these measures mitigate harm to the victims. For example, Facebook acknowledged that its process for removing images may not be fast enough because of how fast images

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<sup>322</sup> See, e.g., 42 PA. CONS. STAT. § 8316.1(c) (2016) (“In determining the extent of injury, the court shall consider that dissemination of an intimate image may cause long-term or permanent injury.”).

<sup>323</sup> In the United States, there is currently no way to guarantee that removing an image from the Internet will either remove it entirely or prevent further harm. Recently, a victim of revenge porn with a four-word unique name asked Google, Yahoo, and Bing to delete her name and the video her ex-boyfriend posted from their websites. Julia Marsh, *Revenge Porn Victim to Google: Make Me Disappear*, N.Y. POST (Jan. 3, 2017, 6:48 PM), <http://nypost.com/2017/01/03/revenge-porn-victim-wants-her-name-deleted-from-google/> [<https://perma.cc/U99Z-ESKW>]. Although the search engines removed the video, it had already gone viral by that time. *Id.* When they did not remove her name, she filed an unprecedented lawsuit seeking an injunction from a Manhattan court. *Id.* Legal experts have offered their opinion that her name will never be removed from the search engines. One expert said: “Her name is public. I [do not] think you have an exclusive right to your name—that sounds like B.S. to me.” The victim, however, cannot get an internship or job and her reputation has suffered. *Id.* She told the *New York Post*: “I feel violated every day. Each time I go on Google.” Julia Marsh, *Revenge Porn Victim Wants US to Adopt ‘Right to Be Forgotten’ Law*, N.Y. POST (Jan. 4, 2017, 7:34 PM), <http://nypost.com/2017/01/04/revenge-porn-victim-wants-us-to-adopt-right-to-be-forgotten-law/> [<https://perma.cc/T6VX-3E6L>]. Notably, residents of the European Union are entitled to the “right to be forgotten,” which permits removals on a case-by-case basis. *Id.*; see also *Woman Sues to Delete Name Online After Revenge Porn Incident*, CBS News (Jan. 4, 2017), <http://www.cbsnews.com/videos/woman-sues-to-delete-name-online-after-revenge-porn-incident/> [<https://perma.cc/M5VM-S8PQ>] (discussing the reality that people do not have a right of privacy in their own names because there may be other people out there who have the same name and their name should not be permanently removed from the Internet).

can go viral.<sup>324</sup> To illustrate, when requests to remove images for safety matters are filed, it can take Facebook up to forty-eight hours to take the image down.<sup>325</sup> Therefore, statutes must put in place victim protections that can try to minimize the rapidly spreading effects of nonconsensual pornography. The remedies suggested in this Note's proposed statute will provide protection to victims that will hopefully mitigate the harms and not allow the harms of nonconsensual pornography to dictate their lives.<sup>326</sup> Specifically, the statute can potentially mitigate harms and provide protection to victims whose employment or education opportunities are harmed by the publication of the images.<sup>327</sup> This remedy will help victims in situations where employers or universities discover the images and take action before giving a victim the chance to explain the image as nonconsensual pornography.<sup>328</sup>

Statutes must give courts the authority to provide temporary restraining orders as well as temporary or permanent injunctions in order to prevent further dissemination of the image. Because this proposed statute expands definitions of domestic violence-related offenses to include nonconsensual pornography, disseminating the image could be a term in a restraining order and considered a violation. Under circumstances where the victim is able to get a restraining order against a perpetrator who continues to upload the image to different platforms, each upload would be a violation and thus, hopefully deter future uploads. Recently, New York announced a change to their the state's policies on emergency temporary orders of protection ("TPOs"): The state will now allow victims to communicate with the court via Skype when seeking

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<sup>324</sup> Vindu Goel, *Facebook Clarifies Rules on What It Bans and Why*, N.Y. TIMES: BITS (Mar. 16, 2015, 12:01 AM), [http://bits.blogs.nytimes.com/2015/03/16/facebook-explains-what-it-bans-and-why/?\\_r=1](http://bits.blogs.nytimes.com/2015/03/16/facebook-explains-what-it-bans-and-why/?_r=1) [<https://perma.cc/4BNN-E95S>].

<sup>325</sup> *Id.*

<sup>326</sup> *See infra* Appendix A, Section 9.

<sup>327</sup> *See infra* Appendix A, Section 9; *see also* Jackie Borchardt, *Revenge Porn Would Be a Crime in Ohio Under New Bill*, CLEVELAND.COM (Sept. 9, 2016, 12:23 PM), [http://www.cleveland.com/open/index.ssf/2016/09/revenge\\_porn\\_would\\_be\\_crime\\_in.html](http://www.cleveland.com/open/index.ssf/2016/09/revenge_porn_would_be_crime_in.html) [<https://perma.cc/RKA9-K6M5>].

<sup>328</sup> One victim described being denied medical leave and said her employer claimed she perpetrated the incident. Chiarini, *supra* note 2.

TPOs.<sup>329</sup> The program that provides the Skype service, the Remote Access Project, will allow “the court to issue the order of protection on the same day.”<sup>330</sup> This program should also be available to revenge porn victims applying for temporary orders of protection or injunctions because they may not be able to physically appear in court for similar reasons.<sup>331</sup>

Last, to encourage victims to come forward, a court should allow victims to pursue civil litigation under a pseudonym and guarantee confidentiality throughout a civil process.<sup>332</sup> In her book, *Hate Crimes in Cyberspace*, Danielle Keats Citron recounted the story of a woman who “felt she had no choice but to dismiss the lawsuit” after a court denied her pseudonymous litigation.<sup>333</sup> Bringing a lawsuit can put the case in the public eye, which instills fear in victims of subsequent privacy violations and ultimately pushes the victims away from the court system.<sup>334</sup> Additionally, many states already provide this protection to victims of sexual offenses by allowing them to use an alias or an incomplete name in court documents.<sup>335</sup> Not only should nonconsensual pornography victims be treated like victims of other sexual offenses, but allowing pseudonymous litigation could also encourage victims report non-consensual pornography.<sup>336</sup>

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<sup>329</sup> Joel Stashenko, *State to Allow Skype, E-filing to Secure TPOs for Victims*, 256 N.Y.L.J., Nov. 4, 2016, at 1, 1.

<sup>330</sup> *Id.*

<sup>331</sup> *Id.* (“[S]ome domestic violence victims cannot get to court because of child care responsibilities or being in remote areas without transportation, and others because they consider it too dangerous to see their assailants in person.”).

<sup>332</sup> See, e.g., VT. STAT. ANN. tit. 13, § 2606(e)(2) (2016) (“The Court may grant injunctive relief maintaining the confidentiality of a plaintiff using a pseudonym.”).

<sup>333</sup> CITRON, *supra* note 55, at 162.

<sup>334</sup> *Id.* at 164.

<sup>335</sup> Bloom, *supra* note 84, at 287.

<sup>336</sup> *Id.* at 288. Nevada entitles victims of sexual offenses to this protection and so, too, should other states. NEV. REV. STAT. § 200.3772(1) (2015); see also CITRON, *supra* note 55, at 25 (“Pseudonymous litigation offers victims the opportunity to pursue their legal rights without further publicizing the abuse connected to their real identity. If we want to encourage victims to bring claims against their harassers, this form of privacy is essential.”).

#### 4. Social Media

An additional feature of an effective statute needs to explicitly encompass the disclosure and distribution of images via social media platforms. Thus, this Note's proposed statute is advantageous because it recognizes the challenges surrounding social media and specifically focuses on various platforms and the Internet.<sup>337</sup> An analysis of decided cases<sup>338</sup> highlights how critical it is for law enforcement and the judicial system to understand how social media platforms work, and particularly how each can be used to disseminate nonconsensual pornography. It also underscores the need for a broadly drafted statute (albeit not so broad so as to be susceptible to constitutional challenges). Thus, this Note's proposed statute includes express direction from the legislature that it should be interpreted and applied with the stated purposes in mind.<sup>339</sup>

Additionally, this Note's proposed statute accounts for how social media works and how perpetrators can take advantage of the anonymity it provides. Considering that eighty-three percent of victims forward selfies to another person, it is important that all laws going forward include the concept of selfies.<sup>340</sup> Conversely, the Georgia statute does not apply to "[a]ny person who transmits or posts a photograph or video depicting only himself or herself engaged in nudity or sexually explicit conduct."<sup>341</sup> This language leaves victims unprotected because it is possible for perpetrators to pose as the victim.

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<sup>337</sup> See *infra* Appendix A, Section 4(f).

<sup>338</sup> See *supra* Section II.B.1.

<sup>339</sup> Compare S.B. 1135, 84th Leg., Reg. Sess. (Tex. 2015) ("This chapter shall be liberally construed and applied to promote its underlying purpose to protect persons from, and provide adequate remedies to victims of, the disclosure or promotion of intimate visual material."), with *infra* Appendix A, Section 3.

<sup>340</sup> FRANKS, *supra* note 78, at 11. The first version of the California statute excluded selfies from coverage but has since been amended. It was a misdemeanor offense for "any person who photographs or records by any means the image of the intimate body part or parts of another identifiable person . . ." S.B. 1255, 2013 Leg., Reg. Sess. (Cal. 2014); see also *infra* Appendix A, Section 4 (providing a definition of intimate image that explicitly includes pictures that the depicted person takes of themselves).

<sup>341</sup> GA. CODE ANN. § 16-11-90(e)(3) (2016).

### C. *Additional Solutions and Benefits*

Society must learn from the history of domestic violence and workplace harassment as it begins to fight nonconsensual pornography, and recognize that, without a cultural shift, a statute outlawing nonconsensual pornography will serve a limited purpose.<sup>342</sup> When courts declared workplace harassment to be unequal treatment of women, it sent a message that “sexual abuse in the workplace violated women’s equality in a manner that would not be tolerated.”<sup>343</sup> Criminalizing behavior sends a message about what behavior society finds intolerable. As Danielle Keats Citron explained: “Law creates a public set of meanings and shared understandings between the state and the public,” and “[b]ecause law creates and shapes social mores, it has an important cultural impact . . . .”<sup>344</sup> This is the reason why the law has changed “society’s attitude toward domestic violence”<sup>345</sup> and why it will hopefully do the same for nonconsensual pornography.

Section III.C.1 highlights the importance of education; Section III.C.2 proposes ways to positively use social media as an additional solution; and Section III.C.3 emphasizes the importance of working within the framework of social media, ultimately proposing a combined effort as a solution.

#### 1. Education

Criminalizing nonconsensual pornography will send a message that the distribution of images is not acceptable and will not be tolerated.<sup>346</sup> To get to that point, however, society needs to be educated on the issue and the reality of the harms it causes.<sup>347</sup> The first

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<sup>342</sup> See Citron, *supra* note 5, at 409–10 (“Today, we see the same pattern of women’s subordination and exclusion in cyberspace.”).

<sup>343</sup> *Id.* at 408 (citing Catharine A. MacKinnon, *The Logic of Experience: Reflections on the Development of Sexual Harassment Law*, 90 GEO. L.J. 813, 818 (2002)) (discussing influential D.C. Circuit cases including *Vinson v. Taylor*, 753 F.2d 141 (D.C. Cir. 1985), *Bundy v. Jackson*, 641 F.2d 934 (D.C. Cir. 1981), *Barnes v. Costle*, 561 F.2d 983 (D.C. Cir. 1977), and *Williams v. Saxbe*, 413 F. Supp. 654 (D.D.C. 1976)).

<sup>344</sup> *Id.* at 407.

<sup>345</sup> See generally *id.* (“These legal developments helped alter the social meaning of domestic violence from a private family matter to criminal conduct.”).

<sup>346</sup> See Poole, *supra* note 38, at 197.

<sup>347</sup> The policy chief to Former California Attorney General Kamala Harris said: “The next big step . . . is educating law enforcement and the public to recognize that revenge

step is to educate law enforcement and the public on the legitimate harms of nonconsensual pornography in the hopes of preventing it from spreading further. Even though this model statute is not specifically directed at minors, it is important that teenagers and young adults understand the dangers of this crime. For example, in a 2008 survey about teenage sexting,<sup>348</sup> twenty percent of the responses indicated full nudity in text messages was acceptable and forty percent of respondents said being topless is acceptable.<sup>349</sup> Arguably, this phenomenon will increase among teenagers as the percentage of teenagers with cell phones, and specifically smart phones, increases.<sup>350</sup> One way to combat this is to implement education programs in schools as part of their sexual education programs, require training for school faculty, and include information in sexual assault training and employee handbooks.

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porn is a real crime. There's a cultural change that's needed, similar to how law enforcement has responded to domestic violence and public conceptions about sexual and gender-based violence have evolved over time." Brown, *supra* note 33; *see also* Citron & Franks, *supra* note 4, at 347 ("The fact that nonconsensual porn so often involves the Internet and social media, the public, law enforcement, and the judiciary sometimes struggle to understand the mechanics of the conduct and the devastation it can cause.").

<sup>348</sup> Although different from revenge porn, sexting involves sending "sexually suggestive text messages and images, including nude or semi-nude photographs, via cellular phones . . ." Nicole A. Poltash, Comment, *Snapchat and Sexting: A Snapshot of Baring Your Bare Essentials*, 19 RICH. J.L. & TECH. 1, 4 (2013).

<sup>349</sup> *Id.* at 5 (citing NATIONAL CAMPAIGN TO PREVENT UNWANTED PREGNANCY & COSMOGIRL.COM, SEX AND TECH: RESULTS FROM A SURVEY OF TEENS AND YOUNG ADULTS 1-2 (2008), <https://thenationalcampaign.org/resource/sex-and-tech> [<https://perma.cc/KQR2-J62Z>]).

<sup>350</sup> *See* Osterday, *supra* note 16, at 556. According to a 2013 Pew Research Center study, seventy-eight percent of children between the ages of twelve and seventeen own a cell phone, and almost half of that group own a smartphone. *Id.* (citing MARY MADDEN ET AL., PEW RESEARCH CTR., TEENS AND TECHNOLOGY 2013 at 2 (2013)). The study also found that ninety-three percent have access to either a computer or a tablet, and twenty-five percent use their cell phone as the primary way to access the Internet. *Id.* The author also cited a study that "[fifty-four percent] of college students admitted to having sent graphic or explicit texts before the age of eighteen." *Id.* (citing Randye Hoder, *Study Finds Most Teens Sext Before They're 18*, TIME (July 3, 2014), <http://time.com/2948467/chances-are-your-teen-is-sexting/> [<https://perma.cc/RLN5-YSVC>]). The author argued that teenagers value "popularity over privacy" and "intimate pictures drive up their 'likes' or 'favorites' on social networking sites." *Id.* at 563; *see also* Poltash, *supra* note 348, at 4 (explaining that the number of "sexts" sent has increased along with cell phone ownership).



Historically, police officers considered domestic violence a private matter and actively chose not to get involved.<sup>351</sup> Notwithstanding the criminalization of acts of domestic violence, a similar attitude exists among law enforcement today.<sup>352</sup> In her book *Hate Crimes in Cyberspace*, Citron detailed multiple incidents of police declining to help victims of revenge porn or cyber harassment.<sup>353</sup> Frequently, victims are required to educate the police officers on the laws because the only advice the victims are given is to stay offline.<sup>354</sup> For example, when a victim of online harassment went to the police, the officers did not take her fear seriously, said “[b]oys will be boys,” and told her to clean up her online reputation.<sup>355</sup> Law enforcement must be better equipped to address this crime seriously. Officers should be well educated on nonconsensual pornography and should not act as barriers to recourse for victims. Additionally, victims should be encouraged, not discouraged, to come forward and report incidents. Even if the conduct is not criminalized in the state, there should still be educational and training programs held until laws are in effect.

Officers can be educated through a mix of approaches. One way, and arguably the most effective, is for officers to speak with victims firsthand and read their stories.<sup>356</sup> Although it will be more difficult in smaller precincts, there should be dedicated cyber harassment units or at least officers who are familiar with the harms of revenge porn, the use of technology, and the status of the state’s laws. Since technology is changing, there should be frequent mandatory training for these officers. Every precinct should know about, and have materials available for, the local resources that are available to victims so that they can receive the proper support. In addition to referring victims to other organizations, law enforcement officials should attend workshops on how to provide support to victims of nonconsensual pornography. In her book, Citron suggested conditioning funds for police precincts on training officers

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<sup>351</sup> CITRON, *supra* note 55, at 81–83. Further, police training materials recommended this dismissive attitude. *See id.*

<sup>352</sup> *See* Chiarini, *supra* note 2.

<sup>353</sup> CITRON, *supra* note 55, at 84.

<sup>354</sup> *Id.* at 20–21, 84–85.

<sup>355</sup> *Id.* at 41.

<sup>356</sup> *See id.* at 144.

on the relevant laws and how to handle different forms of online abuse,<sup>357</sup> and recommended mandatory reporting of the number of complaints received and case outcomes.<sup>358</sup> In addition, police officers should be required to investigate all cyber harassment and non-consensual pornography complaints, regardless of their familiarity with the relevant technology and laws.

Educating police, students, the judiciary, and the general public about the true harms of revenge porn will play an important role in decreasing the number of victims. For example, when the harms of domestic violence were recognized as legitimate and no longer trivialized, domestic violence was understood as criminal conduct.<sup>359</sup> However, to make similar progress, law enforcement, the judiciary, and the public must understand technology and its relationship to revenge porn, as well as the consequences. When society's attitude shifts from victim blaming and dismissing complaints to understanding the problem and working toward a solution, victims will be more inclined to come forward and take action against their perpetrators.<sup>360</sup> Moreover, without the proper education, the law will not be effectively enforced.

## 2. Use and Work with Social Media

The Internet and social media can also be useful to educate the public. For example, when Leslie Jones was hacked, Twitter users shared posts with the hashtag “#istandwithleslie,” among others, to show support.<sup>361</sup> Even though celebrities distort the issue because it is easier for them to have images removed, the harm suffered is no different, as they are not immune from attack. Using

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<sup>357</sup> *Id.*

<sup>358</sup> *Id.* at 145.

<sup>359</sup> Citron, *supra* note 5, at 409.

<sup>360</sup> See Carrie Goldberg, *N.Y. Has Power to Stop Revenge Porn*, N.Y. DAILY NEWS (Jan. 1, 2017, 5:00 AM), <http://www.nydailynews.com/opinion/n-y-power-stop-revenge-porn-article-1.2929091> [<https://perma.cc/HQM2-22SR>] (“If our lawmakers care about sexual privacy, they will criminalize revenge porn.”). See generally Citron, *supra* note 5.

<sup>361</sup> Meghan Pryce, *This Week in Black Twitter: Standing Up for Leslie Jones, Feelings on Young Thug's Album Art*, BALTIMORE SUN (Aug. 26, 2016, 10:34 AM), <http://www.baltimoresun.com/features/baltimore-insider-blog/bal-this-week-in-black-twitter-leslie-jones-hack-20160825-story.html> [<https://perma.cc/6MMP-QAGP>].

opportunities like these to educate the public may bring the issue to the forefront.

Additionally, because nonconsensual pornography is typically disclosed on social media, fighting back on the same platform might draw more attention to the issue. Instead of using Instagram to publish images and use hashtags to harm victims, society can use Instagram to condemn revenge porn. In a recent example, the “NO MORE” campaign to end domestic violence posted images on Instagram and asked others to post images on various social media platforms with the hashtag “#NOMORE.”<sup>362</sup> The campaign is designed to bring awareness to domestic violence and show the many ways one can take action and support the project’s efforts.<sup>363</sup> Although the movement has started, it still needs to pick up more momentum.<sup>364</sup>

In addition to using social media to educate the public and fight against revenge porn, it is important to gain the support and approval of social media platforms. Notably, the IPPA was drafted in consultation with companies like Facebook and Twitter, who approve of the statute.<sup>365</sup> Recently, social media platforms have taken steps to discourage and prohibit this material on their platforms.<sup>366</sup> In March 2015, Facebook explicitly banned revenge porn, although the ban relies on “users to report violations of the standards.”<sup>367</sup>

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<sup>362</sup> The NO MORE campaign is sponsored by a collection of advocacy groups and others, dedicated to getting domestic violence, sexual assault, and abuse “out of the shadows.” *Our Story*, NO MORE, <https://nomore.org/about/our-story/> [<https://perma.cc/A8C9-C3T8>] (last visited Apr. 20, 2017). The organization runs a variety of campaigns throughout the year, including “NOMOREWEEK” in early March. *See No More Week 2017*, NO MORE, <https://nomore.org/campaigns/no-more-week-2017/> [<https://perma.cc/5QKD-6NLA>] (last visited Apr. 20, 2017).

<sup>363</sup> In addition to using social media, the NO MORE campaign uses print and television advertisements. Since the first campaign in 2013, NO MORE has generated more than 4 billion media impressions and reached all 210 media markets in the United States. *About*, NO MORE, <http://nomore.org/about/> [<http://nomore.org/about/>] (last visited Apr. 5, 2017).

<sup>364</sup> A search for “#endrevengeporn” on Instagram conducted on December 29, 2016 resulted in less than 500 results.

<sup>365</sup> Franks, *supra* note 198.

<sup>366</sup> *See, e.g.*, Goel, *supra* note 325.

<sup>367</sup> *Id.* In reference to Facebook’s support for IPPA, a Facebook spokesperson said: “Using intimate content to intentionally shame, embarrass or control someone is abhorrent.” Brown, *supra* note 1. In April 2017, Facebook announced that it is now using

Shortly after Facebook's announcement, Twitter also announced amendments to their policies to explicitly ban revenge porn.<sup>368</sup> To remove a Twitter post, the subject of the photo—or a legal representative—can request that Twitter review and remove the pictures.<sup>369</sup> If the photo is determined to violate Twitter's policy, the post will be hidden from public view and the poster's account will be locked.<sup>370</sup> According to a survey conducted by the National Network to End Domestic Violence<sup>371</sup> just prior to Twitter's announcement, “[fifty-five] percent of programs that provide support for domestic violence victims reported that revenge porn was used to perpetuate abuse against those in their programs” and “[twenty-seven] percent of the programs surveyed reported that abusers had used Twitter.”<sup>372</sup> Furthermore, “[ninety-nine] percent [of respondents] reported that Facebook, as the world's largest social network, had been used as a platform for abuse.”<sup>373</sup>

In 2015, Google announced that victims can request removal of nonconsensual images.<sup>374</sup> Google treats these photos like other privacy invasions, such as social security numbers, which it removes

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artificial intelligence to help keep the content of its website. See Niraj Chokshi, *Facebook Announces New Ways to Prevent 'Revenge Porn,'* N.Y. Times (Apr. 5, 2017), [https://www.nytimes.com/2017/04/05/us/facebook-revenge-porn.html?\\_r=0](https://www.nytimes.com/2017/04/05/us/facebook-revenge-porn.html?_r=0) [https://perma.cc/P8EM-44TC].

<sup>368</sup> Hayley Tsukayama, *Twitter Updates Its Rules to Specifically Ban 'Revenge Porn,'* WASH. POST (Mar. 11, 2015), [https://www.washingtonpost.com/news/the-switch/wp/2015/03/11/twitter-updates-its-rules-to-specifically-ban-revenge-porn/?utm\\_term=.d11b0410a7b1](https://www.washingtonpost.com/news/the-switch/wp/2015/03/11/twitter-updates-its-rules-to-specifically-ban-revenge-porn/?utm_term=.d11b0410a7b1) [https://perma.cc/B3RF-BTJ9]. Notably, Twitter is a company that prides itself on free speech. Brown, *supra* note 33. After announcing the ban, Twitter also tripled the size of its abuse response team and is now able to take images down much more quickly. Kashmir Hill, *Twitter Bans Nonconsensual Intimate Photos, A.K.A. 'Revenge Porn,'* FUSION (Mar. 11, 2015, 6:15 PM), <http://fusion.net/story/102264/twitter-bans-revenge-porn/> [https://perma.cc/YL5B-5SGT].

<sup>369</sup> Tsukayama, *supra* note 368.

<sup>370</sup> *Id.*

<sup>371</sup> The National Network to End Domestic Violence is an organization dedicated to ending abuse against women. See *About NNEDV*, NAT'L NETWORK TO END DOMESTIC VIOLENCE, <http://nnedv.org/about.html> [https://perma.cc/57V6-RMY Y] (last visited Apr. 20, 2017).

<sup>372</sup> Tsukayama, *supra* note 368; see also NAT'L NETWORK TO END DOMESTIC VIOLENCE, *A GLIMPSE FROM THE FIELD: HOW ABUSERS ARE MISUSING TECHNOLOGY* 2, 4 (2014).

<sup>373</sup> Tsukayama, *supra* note 368.

<sup>374</sup> See Brown, *supra* note 33.

from search results.<sup>375</sup> Although Google will remove the image if it determines that it is revenge porn, the image will still be accessible via direct link.<sup>376</sup> Google's approach is similar to the international right to be forgotten approach, although the European Union provides better options to victims.<sup>377</sup> Similar to Google, Twitter treats private sexual information like other forms of private information.<sup>378</sup>

If the social media platforms themselves are approaching revenge porn as a privacy issue, it is reasonable to wonder why society refuses to recognize it as such. When future legislation is developed, legislators should consult with social media companies and make sure to keep up with developments and changes in technology. There should be resources available for legislators who want (and need) to learn about nonconsensual pornography and social media platforms. Social media companies should also coordinate among themselves to develop the best policies for removing the images. Only by working together will a cultural shift be achieved.<sup>379</sup>

## CONCLUSION

The Internet is changing the way people communicate with one another and it is becoming the medium for the latest gender abuse against women. Women are finding their private images on the In-

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<sup>375</sup> See Kashmir Hill, *Google Will Let You Remove Nude Images of Yourself from Search*, FUSION (June 19, 2015, 2:16 PM), <http://fusion.net/story/153900/google-bans-revenge-porn-too/> [<https://perma.cc/4XBM-3WRG>] (“Our philosophy has always been that Search should reflect the whole web . . . [b]ut revenge porn images are intensely personal and emotionally damaging, and serve only to degrade the victims—predominantly women. So going forward, [we will] honor requests from people to remove nude or sexually explicit images shared without their consent from Google Search results.”).

<sup>376</sup> See Dino Grandoni, *Google to Remove ‘Revenge Porn’ Images from Search Results*, N.Y. TIMES: BITS (June 19, 2015, 4:26 PM), <https://bits.blogs.nytimes.com/2015/06/19/google-to-remove-revenge-porn-images-from-search-results/> [<https://perma.cc/8478-G4MT>].

<sup>377</sup> See Hill, *supra* note 368; see also Peter W. Cooper, Comment, *The Right to Be Virtually Clothed*, 91 WASH. L. REV. 817, 830–31 (2016).

<sup>378</sup> See Hill, *supra* note 368.

<sup>379</sup> Their support is crucial because getting social media companies to take down the images might offer a faster option than the law; although a law is still necessary. Brown, *supra* note 33.

ternet and social media, and becoming victims of nonconsensual pornography. An effective statute accounts for the Internet and social media, but a law will not be enough on its own. Society must learn from the movements to criminalize domestic violence and other gender offenses against women, and shift from an attitude that trivializes harms to women to one that recognizes them as legitimate. Once society recognizes cyber gender harassment and its unique harms to women, it will be ready to attack the problem.<sup>380</sup>

## APPENDIX A

### **Title:** Nonconsensual Disclosure of Private Intimate Images

#### **Section 1: Findings**

This legislative body finds that:

- (a) Making private, intimate images publicly available on the Internet, without the victim's consent, is increasingly common;<sup>381</sup>
- (b) Disclosing such images causes undisputable and irreversible harm to the victim depicted in the image(s);
- (c) The majority of such victims are women; and
- (d) The harms are trivialized by society.

#### **Section 2: Purposes**

The purposes of this statute are to:

- (a) Prohibit disclosing an image on the Internet, on social media, or through non-electronic means, without the consent of the person depicted and to recognize the legitimate harms this practice causes;
- (b) Include acts committed in violation of this statute as domestic violence-related offenses;<sup>382</sup>
- (c) Expand the definition of harassment to include a single incident of nonconsensual disclosure;<sup>383</sup> and

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<sup>380</sup> See Citron, *supra* note 5, at 378 (“Just as society ignored sexual harassment until scholars and courts recognized it as sex discrimination, a definition of cyber gender harassment is crucial to understanding and tackling its distinct harms to women.”).

<sup>381</sup> See *supra* notes 155, 224 and accompanying text.

<sup>382</sup> See *supra* note 230 and accompanying text.

<sup>383</sup> See *supra* note 231 and accompanying text.

(d) Provide victims with adequate remedies.

### Section 3: Liberal Construction

This statute shall be construed and applied to protect against the harms of nonconsensual pornography and provide victims with adequate remedies.<sup>384</sup>

### Section 4: Definitions

For the purposes of this statute:

(a) **“Disclose”** means to make publicly available<sup>385</sup> or to cause another to do so;

(b) **“Private”** means that the person depicted is entitled to a reasonable expectation of privacy<sup>386</sup> either because a reasonable person would know or understand that the image was to remain private<sup>387</sup> or the depicted person consented to or sent<sup>388</sup> the image within the context of a private or confidential relationship<sup>389</sup> under a reasonable belief that the image would remain within that context.<sup>390</sup>

(c) **“Intimate image”** means any visual depiction, actual or computer-generated that exposes human private bodily parts or sexually explicit conduct,<sup>391</sup> taken or created by the depicted person or by another.

(d) **“Sexually explicit conduct”** includes actual or simulated sexual intercourse, masturbation, and depictions of nudity or partial nudity.<sup>392</sup>

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<sup>384</sup> See *supra* notes 233, 339 and accompanying text.

<sup>385</sup> CITRON, *supra* note 55, at 152. Initially, the private image is disclosed when it is uploaded to the Internet or social media or otherwise made available to the public. An image can be transmitted on social media by uploading the image to Facebook, Instagram, Twitter, Snapchat, or other similar applications. Furthermore, an actor can take a screenshot of the image from a video chat, such as during a Facetime or Skype, or from Snapchat and then upload the image, which also qualifies as a way to disclose an image.

<sup>386</sup> See *supra* note 311 and accompanying text. This term must be specifically defined so as to not create more ambiguity.

<sup>387</sup> See *supra* notes 239, 309, 315 and accompanying text.

<sup>388</sup> See *supra* note 240 and accompanying text.

<sup>389</sup> See *supra* notes 241, 317 and accompanying text.

<sup>390</sup> See *supra* notes 242, 318 and accompanying text.

<sup>391</sup> UTAH CODE ANN. § 76-5b-203(1)(b) (2016).

<sup>392</sup> See *id.* § 76-5b-203(1)(c) for a complete list of sexually explicit conduct.

(d) **“Harm”** shall be interpreted in accordance with the stated purpose of the statute to include, but not be limited to: emotional, psychological, physical, professional, reputational, social, and personal harm.

(e) **“Personally identifiable information”** includes, but is not limited to, the victim’s name, any part of their home, school or work address, e-mail address, telephone number, geolocation data,<sup>393</sup> links to or any information about their social media profile (including, but not limited to, Facebook, LinkedIn, Twitter, Instagram, and Snapchat).

### **Section 5: Prohibited Conduct**

(a) It shall be a violation of this statute if an actor knowingly discloses a private, intimate image of a recognizable<sup>394</sup> person and the actor knew, or should have known:

(i) The depicted person did not consent to such disclosure;<sup>395</sup> and

(ii) The disclosure causes, or could cause, harm.<sup>396</sup>

(b) It shall also be a violation of this section if an actor knowingly threatens to disclose a private, intimate image when the actor knew, or should have known, the depicted person did not consent to such disclosure and the actor uses the threat as leverage.<sup>397</sup>

(c) It shall not alone constitute a defense if the image was posted as a joke.<sup>398</sup>

### **Section 6: Jurisdiction**

A court shall have jurisdiction when:

<sup>393</sup> See *supra* note 245 and accompanying text.

<sup>394</sup> A person is recognizable if his or her identity is clear to themselves or a third-party based on recognition from the image, information posted in conjunction with the image, or any attention the image receives.

<sup>395</sup> DEL. CODE ANN. tit. 11, § 1335(a)(6) (2016).

<sup>396</sup> See *supra* note 259 and accompanying text.

<sup>397</sup> It shall be within the court’s discretion to decide, case by case, if an actor uses a threat as leverage. For example, an actor uses a threat as leverage when it is used to procure a benefit in return for not disclosing the image. See TEX. PENAL CODE ANN. § 21.16(c) (West 2015).

<sup>398</sup> Kitchen, *supra* note 123, at 294.



(a) The depicted person or the actor is a resident of that court's state or was in the state when the image was disclosed;<sup>399</sup> or

(b) The disclosed image is accessible in the court's state.<sup>400</sup>

### **Section 7: Classification**

A violation of this section shall be a misdemeanor. However, if any of the aggravating factors in Section 8 are present, a violation shall be a felony.

### **Section 8: Aggravating Factors**

The following shall be considered aggravating factors:

(a) If the image is disclosed with the intent to harass the depicted person or if a reasonable person would know or understand that would be the result;<sup>401</sup>

(b) If the image is disclosed for profit<sup>402</sup> or other financial gain;

(c) If, in addition to disclosing an image in violation of this statute, the actor maintains a website that specifically collects and/or solicits these images;<sup>403</sup>

(d) If the image is disclosed with personally identifiable information;<sup>404</sup>

(e) If the image serves as an advertisement for the depicted person's sexual services;

(f) If the actor creates a fake account pretending to be the depicted person, signs into the depicted person's account, intentionally tries to stay anonymous or tries to disguise the image on social media;

(g) If this is a subsequent violation of this statute or another domestic violence-related offense;<sup>405</sup> or

(h) If there is proof that the disclosure directly caused others to distribute the image.

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<sup>399</sup> See *supra* note 268 and accompanying text.

<sup>400</sup> See *supra* note 269 and accompanying text.

<sup>401</sup> See *supra* notes 273, 303 and accompanying text.

<sup>402</sup> See *supra* notes 274, 283 and accompanying text.

<sup>403</sup> See *supra* notes 275, 284 and accompanying text.

<sup>404</sup> See *supra* notes 285–86 and accompanying text.

<sup>405</sup> See *supra* notes 277, 282 and accompanying text.

**Section 9: Remedies**<sup>406</sup>

Remedies shall be in the court's discretion and promote this statute's purposes outlined in Section 2. Potential remedies include, but are not limited to, the following:

- (a) Injunctive relief;<sup>407</sup>
- (b) If awarding damages, the court shall consider the potential for long-term or permanent injury and may award more than actual damages sustained;<sup>408</sup>
- (c) Reasonable attorney fees and costs;<sup>409</sup>
- (d) Issue an order to destroy the image;<sup>410</sup>
- (e) Compel the actor to remove the image;
- (f) Maintain the confidentiality of a plaintiff by allowing them to use a pseudonym;<sup>411</sup>
- (g) Issue a restraining order;<sup>412</sup>
- (h) Employers shall be required to make accommodations for victims, as long as it does not impose an undue hardship on the business and prohibited from firing, discriminating, or taking an adverse employment action towards a victim; an institution of higher education shall also be prohibited from revoking any form of financial aid, including grants, scholarships, and fellowships, from student victims;<sup>413</sup> and
- (i) Any additional relief the court deems necessary and proper.<sup>414</sup>

**Section 10: Civil Action**


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<sup>406</sup> These remedies shall be available to the court in both civil and criminal actions.

<sup>407</sup> FLA. STAT. § 784.049(5)(a) (2016).

<sup>408</sup> 42 PA. CONS. STAT. § 8316.1(c) (2016).

<sup>409</sup> *Id.* § 8316.1(c)(2).

<sup>410</sup> N.C. GEN. STAT. § 14-190.5A(e) (2015).

<sup>411</sup> VT. STAT. ANN. tit. 13, § 2606(e)(2) (2016).

<sup>412</sup> When a victim applies for their own restraining order or order of protection, he or she will be permitted to use Skype when communicating with the court so that a court may issue an order the same day. *See supra* notes 329-31 and accompanying text.

<sup>413</sup> *See supra* notes 327-28 and accompanying text.

<sup>414</sup> 42 PA. CONS. STAT. § 8316.1(c)(3) (2016).

This statute shall give a person the right to initiate a civil action and obtain relief, such as the options outlined in Section 9.<sup>415</sup> Additionally, the statute of limitations is tolled until the plaintiff learns their private, intimate image has been disclosed.<sup>416</sup>

### Section 11: Exceptions

This statute shall not apply to:

- (a) Voluntary exposure in public; or
- (b) Disclosures made in the public interest.<sup>417</sup>

### Section 12: Liability

This statute shall not impose liability on the following entities solely because of content or information provided by another person in violation of this statute:

- (a) “An interactive computer service, as defined in 47 U.S.C. 230(f)(2);
- (b) [A] provider of public mobile services or private radio services, as defined in Section 13-214 of the Public Utilities Act; or
- (c) [A] telecommunications network or broadband provider.”<sup>418</sup>

### Section 13: Severability

If any provision in this statute is held invalid, it shall be severable and not affect the application of other provisions that remain enforceable.<sup>419</sup>

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<sup>415</sup> § 8316.1(a).

<sup>416</sup> S.F. 2713, 2016 Leg., 89th Sess. (Minn. 2016). This is important because it might take time for a victim to discover that their images are on the Internet.

<sup>417</sup> FRANKS, *supra* note 78, at 11. Public interest disclosures include, but are not limited to: reports made to law enforcement, disclosures made in legal proceedings, or disclosures made pursuant to medical treatment.

<sup>418</sup> 720 ILL. COMP. STAT. 5/11-23.5(d)(1)–(3) (2016).

<sup>419</sup> FRANKS, *supra* note 78, at 11.