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Revenge Porn: The Name Doesn't Do Nonconsensual Pornography Justice and the Remedies Don't Offer the Victims Enough Justice

Introduction	198
I. Understanding the Epidemic of Nonconsensual Pornography	199
II. A Survey of the Consequences of Nonconsensual Pornography	202
III. The Damages Suffered by Revenge Porn Victims	206
IV. The Current Legal and Regulatory Environment and Its Limitations	208
A. Section 230 of the Communications Decency Act	209
B. Federal Copyright Law	211
C. The Digital Millennium Copyright Act	213
D. Common Law Tort Claims	214
1. Privacy	215
2. Intentional Infliction of Emotional Distress	216
E. Criminal Statutes	216

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F.	The Absence of a Unifying Federal Statute Addressing Nonconsensual Pornography	223
G.	Anti-Blackmail Statutes	224
H.	Anti-Hacking Statutes	224
V.	The Need for a Federal Statute Criminalizing Nonconsensual Pornography	225
	Conclusion	227

INTRODUCTION

This Article analyzes the efficacy of the legal environment relevant to the developing phenomenon of nonconsensual pornography. The overarching issue is that technology and changing mores have developed more quickly than the ability of the legal environment to address the harm caused by nonconsensual pornography.

Changes in technology, including the advent of social media and websites that feature user-generated content, in conjunction with the ease of taking and sharing digital photographs and video (particularly on smartphones, tablets, and mobile devices) has spawned the phenomenon of nonconsensual pornography.

Nonconsensual pornography causes serious and irreparable harm to its victims, in both their personal and professional lives. Victims have been known to suffer severe and sustained depression; a variety of employment issues, including humiliation in the workplace and difficulty securing and succeeding at employment; and even suicide.¹

Criminal, tort, and equitable regulatory schemes; copyright law; and laws regulating internet activities encompass the regulatory environment of nonconsensual pornography. These laws define the avenues of relief available to victims and prescribe who may be legally culpable for the harms caused. To date, forty-six states, the District of Columbia, and the Territory of Guam have enacted criminal statutes that proscribe nonconsensual pornography.² The Communications Decency Act (CDA) and the Digital Millennium Copyright Act (DMCA) are relevant to the responsibilities of internet search engines and hosting websites.³ The DMCA and copyright law affects who may successfully demand the takedown of such images.⁴

¹ See *infra* Part III.

² See *infra* Section IV.E.

³ See *infra* Sections IV.A–IV.C.

⁴ See *infra* Sections IV.B–IV.C.

The remedies available to victims of nonconsensual pornography are inadequate. The CDA essentially leaves internet service providers (ISPs) and host sites largely free to host nonconsensual pornography with impunity.⁵ Copyright law and the DMCA provide a takedown remedy only if the victim captured the image, commissioned the image, or otherwise obtained control of the copyright to the image. The inconsistent nature and the array of elements of many of the criminal statutes, which were enacted on an ad hoc, state-by-state basis, create significant obstacles to the prosecution of perpetrators of nonconsensual pornography.⁶

These shortcomings of the current nonconsensual pornography regulatory scheme leave many victims without adequate comprehensive remedies and allow many perpetrators of nonconsensual pornography to escape culpability. For example, the failure of the current regulatory regime to provide a remedy that results in the removal or takedown of the nonconsensual pornography from the internet subjects the victims to serious and irreparable harm in perpetuity.

This Article is composed of five parts. Part I reviews the definition of nonconsensual pornography and some of the relevant research. Part II provides context by reviewing incidents of nonconsensual pornography. Damages suffered by the victims of nonconsensual pornography are reviewed in Part III. Part IV analyzes and evaluates the current legal and regulatory environment and its shortcomings. The Article concludes with recommendations for change.

I

UNDERSTANDING THE EPIDEMIC OF NONCONSENSUAL PORNOGRAPHY

Nonconsensual pornography is a user-generated image of a person in a state of nudity or engaged in sexually explicit conduct in a state of nudity that is distributed to third parties without the consent of the person depicted in the photograph or video and without a legitimate purpose (such as a law enforcement investigation).⁷

⁵ See *infra* Section IV.A.

⁶ See *infra* Section IV.E.

⁷ See Sunny Freeman, *Porn 2.0, and Its Victims*, TYEE (July 6, 2007), <http://thetyee.ca/Mediacheck/2007/07/06/Porn2-0/> [<https://perma.cc/88C3-RRCG>] (discussing nonconsensual pornography).

Not all perpetrators of nonconsensual pornography are former romantic partners or even acquaintances of the victim.⁸ Some victims have had their computers hacked;⁹ others have received telephone calls from “spoof cards,” which allow hackers and stalkers to call victims using a fake telephone number;¹⁰ other victims received spoof emails from fake email accounts that allow hackers to invade the victim’s computer or mobile device and misappropriate private images;¹¹ and other victims had such images captured and posted to the internet while being victimized for other sex crimes.¹² Spyware software can be downloaded to a victim’s cellular telephone to allow a predator to hear a victim’s surroundings, monitor a victim’s telephone calls, reveal GPS locations, view photographs and video, and provide access to a victim’s internet search history and social media activity.¹³ Such software also allows hackers to invade the victim’s computer or mobile device and misappropriate private images and gain access to personal information that can be used to “tag” the person (i.e., identify the subject in a posted image).

Personal information about the victim, such as the victim’s name, home address, business address, social media sites, or other identifying information¹⁴ is often included in nonconsensual pornography, which amplifies the damages a victim may experience. When a victim’s

⁸ See, e.g., Sasha Goldstein, *Calif. Teen, Guilty in Miss Teen USA ‘Sextortion’ Plot, Sentenced to 18 Months in Prison*, N.Y. DAILY NEWS (Mar. 17, 2014), <http://www.nydailynews.com/news/crime/mastermind-teen-usa-sextortion-plot-18-months-prison-article-1.1724809> [<https://perma.cc/D9ZP-YW4H>].

⁹ See *id.*; see also Jennifer Valentino-DeVries, *Hundreds of Apps Can Empower Stalkers to Track Their Victims*, N.Y. TIMES (May 19, 2018), <https://www.nytimes.com/2018/05/19/technology/phone-apps-stalking.html> [<https://perma.cc/5LP4-8K29>].

¹⁰ Jennifer Gentile Long & John Wilkinson, *Stalking: Effective Strategies for Prosecutors*, 11 AEQUITAS 2 (Apr. 2012), https://www.stalkingawareness.org/wp-content/uploads/2018/08/Stalking_Effective_Strategies_for_Prosecutors.pdf [<https://perma.cc/ERE5-PUVB>].

¹¹ *Id.*

¹² E.g., Mike McPhate, *Teenager Is Accused of Live-Streaming a Friend’s Rape on Periscope*, N.Y. TIMES (Apr. 18, 2016), <https://www.nytimes.com/2016/04/19/us/periscope-rape-case-columbus-ohio-video-livestreaming.html> [<https://perma.cc/UX6Q-2VG7>]; *Woman Recorded Unconscious Friend Being Raped, Shared on Social Media, Prosecutors Say*, FOX NEWS (Sept. 19, 2017), <http://www.foxnews.com/us/2017/09/01/woman-recorded-unconscious-friend-being-raped-shared-on-social-media-prosecutors-say.html> [<https://perma.cc/SV22-7MJC>].

¹³ See Valentino-DeVries, *supra* note 9.

¹⁴ Carol Cadwalladr, *Charlotte Laws’ Fight with Hunter Moore, the Internet’s Revenge Porn King*, GUARDIAN, (Mar. 30, 2014), <https://www.theguardian.com/culture/2014/mar/30/charlotte-laws-fight-with-internet-revenge-porn-king> [<https://perma.cc/BH97-PMRH>].

information is depicted along with the offending images, the perpetrator's motive is to draw attention to the victim or enlist others to harass, humiliate, or cause damages to the victim.¹⁵

Statistical research provides important insights into the demographics and national impact of nonconsensual pornography. A study published in 2016 by the Data and Society Research Institute and the Center for Innovative Public Health Research provides statistics regarding the extent of the incidence of nonconsensual pornography. The study concluded that 4% of Americans have been victims of revenge porn.¹⁶ Six percent of women between the ages of fifteen and twenty-nine reported being victims of nonconsensual pornography.¹⁷ A similar study in Australia found that 23% of people between the ages of sixteen and forty-five self-reported as victims of nonconsensual pornography.¹⁸

Extrapolated to the U.S. population, these studies provide evidence that nonconsensual pornography is a national epidemic. In June 2019, the U.S. population was estimated at more than 329 million persons.¹⁹ Applying the statistics from the 2016 study of the U.S. population suggests that more than thirteen million Americans have been the victims of nonconsensual pornography.²⁰

In June 2017, the Cyber Civil Rights Initiative published a study of nonconsensual pornography that provides insight into the motivations of perpetrators and the nature of the victims.²¹ The research was based on survey data collected from 3044 participants over the age of

¹⁵ *Id.*

¹⁶ 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://perma.cc/YED8-UDYY>]. This research gathered data through a national telephone survey of 3002 U.S. internet users above the age of fifteen. *Id.* at 6.

¹⁷ *Id.*

¹⁸ Anastasia Powell et al., *The Picture of Who is Affected by 'Revenge Porn' Is More Complex Than We First Thought*, CONVERSATION (May 7, 2017), <https://theconversation.com/the-picture-of-who-is-affected-by-revcngc-porn-is-more-complex-than-we-first-thought-77155> [<https://perma.cc/RT4D-MYS6>].

¹⁹ *U.S. and World Population Clock*, U.S. CENSUS BUREAU, <https://www.census.gov/popclock/> [<https://perma.cc/2F9A-DY6K>] (last visited June 29, 2019) [hereinafter CENSUS BUREAU].

²⁰ The 4% victimization rate found by LENHART ET AL., *supra* note 16, multiplied by the estimated U.S. population of more than 329 million, CENSUS BUREAU, *supra* note 19, equals thirteen million.

²¹ ASIA A. EATON ET AL., CYBER CIVIL RIGHTS INITIATIVE, 2017 NATIONWIDE ONLINE STUDY OF NONCONSENSUAL PORN VICTIMIZATION AND PERPETRATION 6 (2017).

eighteen.²² Eight percent of respondents reported being victims of nonconsensual pornography.²³ Considered by gender, 9.2% of women and 6.6% of men were victimized.²⁴ According to the study, women were 1.5 times more likely to become victims of nonconsensual pornography.²⁵

As to perpetrators, 5.2% of respondents indicated that they had shared a sexually explicit image of another person without their consent.²⁶ Importantly, the study found that most incidents of nonconsensual pornography are committed without an intent to harm the victim.²⁷ Indeed, 79% of persons who self-identified as perpetrators indicated that they committed the acts of nonconsensual pornography simply to share the images “with friends.”²⁸ By contrast, only 12% of the responding perpetrators said they were motivated by a desire to harm the victim.²⁹

Regardless of the perpetrator’s motive, however, victims of nonconsensual pornography suffer the same serious and long-lasting damages. Images posted to the internet can be viewed by the general public, including the victim’s family, friends, romantic partners, and professional colleagues.

II

A SURVEY OF THE CONSEQUENCES OF NONCONSENSUAL PORNOGRAPHY

The internet, social media, and websites that accept user-created content have catalyzed the distribution of such nonconsensual pornography.³⁰ Accordingly, once a nude or sexually explicit depiction of a victim is in the possession of a perpetrator (whether created by the perpetrator, the victim, or a third party), a victim is essentially powerless to prevent members of the general public from distributing,

²² *Id.* at 9.

²³ *Id.* at 11.

²⁴ *Id.* at 13.

²⁵ *Id.*

²⁶ *Id.* at 15.

²⁷ *Id.* at 19.

²⁸ *Id.*

²⁹ *Id.*

³⁰ E.g., Ariel Ronneburger, *Sex, Privacy, and Webpages: Creating a Legal Remedy for Victims of Porn 2.0*, 21 SYRACUSE SCI. & TECH. L. REP., 1, 7–8 (2009). See generally Tim O’Reilly, *What Is Web 2.0*, O’REILLY MEDIA, INC. (Sept. 30, 2005), <https://www.oreilly.com/pub/a/web2/archive/what-is-web-20.html> [<https://perma.cc/DM3C-UBRE>] (defining Web 2.0 and explaining how the dot-com bubble changed the use of the web).

disseminating, sharing, or viewing the images without permission.³¹ The consequences of nonconsensual pornography are extreme and often irreversible, as exhibited by the following examples.

As previously noted, one category of nonconsensual pornography is “revenge porn,” where a previous romantic partner distributes the offending material.³² The Holly Jacobs incident is a well-publicized example.³³

The Jacobs matter involved a couple who were engaged in a romantic relationship over several years.³⁴ After Jacobs relocated from her hometown to attend graduate school, Jacobs provided nude photographs and videos to her partner as part of their continuing romantic relationship.³⁵ After several years, the relationship dissipated.³⁶ In 2009, Jacobs became a victim of revenge porn when private images of her were posted to the internet.³⁷ According to Jacobs, the ex-romantic partner was the only person who possessed such nude photographs and videos and, as such, was the only possible perpetrator of the crime.³⁸

Nonconsensual pornography is also perpetrated by individuals other than victims’ romantic partners, such as acquaintances or strangers.

In 2012, a fifteen-year-old California girl committed suicide after a revenge porn incident was perpetrated by her acquaintances.³⁹ The

³¹ *Id.*

³² See *supra* text accompanying notes 8–9.

³³ See, e.g., Beth Stebner, ‘I’m Tired of Hiding’: Revenge-Porn Victim Speaks Out Over Her Abuse After She Claims Ex Posted Explicit Videos of Her Online, N.Y. DAILY NEWS (May 3, 2013), <https://www.nydailynews.com/news/national/revenge-porn-victim-speaks-article-1.1334147> [<https://perma.cc/9TNZ-2BN2>]; Lauren Panariello, *The Women Who Want to Make Revenge Porn Illegal*, COSMOPOLITAN (Sept. 25, 2013), <https://www.cosmopolitan.com/scx-love/advice/a4825/revenge-porn-shutting-it-down/> [<https://perma.cc/SU2C-Y6RR>].

³⁴ See sources cited *supra* note 33.

³⁵ Michael E. Miller, *Revenge Porn Victim Holly Jacobs “Ruined My Life,” Ex Says*, MIAMI NEW TIMES (Oct. 17, 2013), <https://www.miaminewtimes.com/news/revenge-porn-victim-holly-jacobs-ruined-my-life-ex-says-6393654> [<https://perma.cc/B5Z9-VY97>] (reporting that the ex-romantic partner denied the accusations, the partner was charged with criminal cyberstalking in 2012, and the charges were eventually dismissed).

³⁶ *Id.*

³⁷ See sources cited *supra* note 33.

³⁸ See sources cited *supra* note 33.

³⁹ “Audrie & Daisy”: Mother of Audrie Pott, Teen Who Committed Suicide After Assault, Tells Her Story, DEMOCRACY NOW!, https://www.democracynow.org/2016/1/29/audrie_daisy_mother_of_audrie_pott [<https://perma.cc/Q9X3-KY54>] (Jan. 29, 2016) [hereinafter “Audrie & Daisy”].

victim attended a party at a friend's home.⁴⁰ After becoming intoxicated, several students took her to an upstairs bedroom.⁴¹ Several boys then sexually assaulted the girl, drew on her naked body with markers, and took photographs of the incident, which they then circulated through their high school.⁴² The victim later found out what had happened and learned about the offending images. Approximately a week later, the victim hanged herself at home.⁴³

Strangers are also perpetrators of nonconsensual pornography, as was the case in the peeping tom incident involving television personality Erin Andrews.⁴⁴ In 2008, a predator intentionally checked into an adjacent hotel room and used a peephole in a shared door to film Andrews changing clothes in her hotel room.⁴⁵ The images were posted to the internet and viewed by members of the general public.⁴⁶

The Marine Corps nonconsensual pornography scandal that was revealed in 2017 involved both acquaintances and strangers.⁴⁷ There, a group of active and veteran Marine Corps soldiers shared thousands of naked and private photographs of Marine Corps women.⁴⁸

Perpetrators have often conned victims into revealing information necessary to invade victims' computers and cloud storage repositories of private images. The 2014 incident involving the wrongful distribution through the internet of private photos of numerous celebrities, including Jennifer Lawrence and Kate Upton, is one such example.⁴⁹

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Stalker Tells All: How I Peeped on Erin Andrews*, PAGE SIX (Mar. 1, 2016), <https://pagesix.com/2016/03/01/stalker-tells-all-how-i-peeped-on-erin-andrews/> [<https://perma.cc/H5TG-6CA7>].

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ Dave Philipps, *Inquiry Opens Into How a Network of Marines Shared Illicit Images of Female Peers*, N.Y. TIMES (Mar. 6, 2017), <https://www.nytimes.com/2017/03/06/us/inquiry-opens-into-how-30000-marines-shared-illicit-images-of-female-peers.html> [<https://perma.cc/HUA8-MKBY>].

⁴⁸ *Id.*

⁴⁹ Joseph Scrna, *Man Convicted of Hacking Gmail and iCloud Accounts of at Least 30 Celebrities in L.A.*, L.A. TIMES (Sept. 28, 2016), <http://www.latimes.com/local/lanow/la-mc-ln-phishing-scam-conviction-20160928-snap-story.html> [<https://perma.cc/TC39-TM7A>]; Feliks Garcia, *iCloud Celebrity Nude Leak: Man Pleads Guilty to Hacking Emails of Stars Including Jennifer Lawrence and Kate Upton*, INDEPENDENT (Sept. 27, 2016), <http://www.independent.co.uk/news/people/icloud-celebrity-nude-leak-jennifer-lawrence-kate-upton-man-pleads-guilty-a7334031.html> [<https://perma.cc/7U29-UR9V>].

There, an Illinois man misappropriated more than five hundred pornographic images of celebrities from their email, social media, and cloud storage accounts.⁵⁰ The perpetrator employed phishing attacks that yielded the necessary login credentials.⁵¹ He then posted the images to various internet sites available to the general public.⁵²

Similarly, some perpetrators of nonconsensual pornography are hackers. Hackers break into a victim's computer, cellular telephone, tablet, or other device using spyware and other invasive means. This happened in 2011 and 2012 to at least twelve young women, including a former Miss Teen USA.⁵³ The hacker "gain[ed] access to the Facebook and other social media accounts of the women and remotely [captured] pictures of them by accessing their webcams."⁵⁴ The predator then threatened "to post the pictures on the women's social media pages unless they sent him more [explicit] photos or videos or spoke to him by video chat . . . and did what he demanded for five minutes."⁵⁵

Hackers may also be motivated by profit. Hunter Moore, the proprietor of the revenge porn website "IsAnyoneUp.com," claimed the site received thirty million page views and earned him \$13,000 a month before it was shut down.⁵⁶ Moore paid a hacker to break into the email accounts of victims to steal explicit images to post on the website.⁵⁷ Anon IB, another nonconsensual pornography website, reportedly receives 50,000 unique visitors and nearly 170,000 page views daily.⁵⁸ This generates approximately \$1500 in daily advertising

⁵⁰ Garcia, *supra* note 49.

⁵¹ Serna, *supra* note 49.

⁵² Garcia, *supra* note 49.

⁵³ Alex Dobuzinskis, *California Man Agrees to Plead Guilty to Extortion of Miss Teen USA*, REUTERS (Oct. 31, 2013, 4:56 PM), <https://www.reuters.com/article/us-usa-missteen-extortion/california-man-agrees-to-plead-guilty-to-extortion-of-miss-teen-usa-idUSBRE99U1G520131031> [<https://perma.cc/58H8-SKB5>].

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ Panariello, *supra* note 33. See generally Connor Simpson, *Revenge Porn King Hunter Moore Arrested for Hacking Email Accounts*, ATLANTIC (Jan. 23, 2014), <https://www.theatlantic.com/national/archive/2014/01/revenge-porn-king-hunter-moore-arrested-conspiracy-hack-email-accounts/357321/> [<https://perma.cc/J2MC-JNGT>] (reporting on the facts of Hunter Moore's criminal charges).

⁵⁷ Simpson, *supra* note 56.

⁵⁸ Gabrielle Fonrouge, *Inside the Twisted Revenge Porn Site That's Ruining Women's Lives*, N.Y. POST (Sept. 22, 2017), <https://nypost.com/2017/09/22/revenge-porn-site-leaves-trail-of-innocent-victims/> [<https://perma.cc/29JX-ZDEH>].

revenue, which supports an estimated site value of more than \$700,000.⁵⁹

III

THE DAMAGES SUFFERED BY REVENGE PORN VICTIMS

Suicide is the most serious consequence to victims of nonconsensual pornography.⁶⁰ As noted above, a California teen committed suicide after images of a sexual assault were captured and disseminated.⁶¹ Other common psychiatric diagnoses include anxiety disorders, depression, and post-traumatic stress disorder.⁶² For example, revenge porn victims fear the unknown, including whether they will be subject to stalking, physical injury, sexual assault, or death.⁶³ They also experience hypervigilance, traumatic recollections, and insomnia.⁶⁴ Victims also experience physical side effects, such as fatigue, nausea, and the exacerbation of current medical conditions.⁶⁵

⁵⁹ *Id.*

⁶⁰ See, e.g., “Audrie & Daisy,” *supra* note 39; Anthony Joseph, *Distraught Girlfriend Left Boyfriend Suicide Note*, DAILY MAIL (United Kingdom) (Mar. 16, 2018) <https://www.dailymail.co.uk/news/article-5509569/Distraught-lover-26-left-boyfriend-suicide-note-death.html> [<https://perma.cc/C2NX-TY6X>] (reporting that a 26-year-old woman committed suicide in London, UK, after her boyfriend threatened to send a sex video to her family).

⁶¹ “Audrie & Daisy,” *supra* note 39.

⁶² Cf. Michele Pathé, et al., *Management of Victims of Stalking*, 7 ADVANCES IN PSYCHIATRIC TREATMENT 399, 401 (2001) (finding these symptoms in victims of stalking) (“Victim studies and clinical experience have also shown that many stalking victims experience a deterioration in mental and/or physical well-being. The most common psychiatric diagnoses are posttraumatic stress disorder (PTSD), other anxiety disorders and depression.”).

⁶³ Cf. THE NAT’L CTR. FOR VICTIMS OF CRIME, THE MODEL STALKING CODE REVISITED 34–40 (2007), <https://www.victimsofcrime.org/docs/default-source/src/model-stalking-code.pdf?sfvrsn=12> [<https://perma.cc/5MLB-QVPJ>] (finding these symptoms in victims of stalking) (“In addition, because stalking behavior is as varied as the people who commit the crime, a stalking victim may not be able to predict what the stalker will do next. Fear of the unknown can be just as strong as the fear of death or serious physical harm. Fear of other consequences may also be equally traumatizing to a victim, depending on the circumstances surrounding the stalking. Many victims fear that they will be sexually assaulted by the individual who is stalking them.”) [hereinafter MODEL STALKING CODE REVISITED]; *Combating Stalking and Family Violence: Hearing on H.R. 103–206 Before the S. Comm. on the Judiciary*, 103d Cong. 2 (1993) (statement of Senator Joseph Biden, former Chairman, S. Comm. on Judiciary) (finding these symptoms in victims of stalking) (“Each year, a terrible toll is exacted by stalkers on their victims. Held hostage by fear, a victim never knows when or where or how the harassment or violence will resume. When the violence does return, serious injury or death often results.”).

⁶⁴ See sources cited *supra* notes 62–63. *Hypervigilance*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/medical/hypervigilance> [<https://perma.cc/3VRR-4238>] (last visited Aug. 28, 2015).

⁶⁵ See sources cited *supra* notes 62–63.

Other physical symptoms include short-term memory loss, constant exhaustion, and difficulty concentrating.⁶⁶

Damages to victims' professional careers are common.⁶⁷ Employers increasingly use internet resources to check the backgrounds of potential and current employees.⁶⁸ A recruiter survey found that 17% of employers excluded candidates based on "excessive personal information" on their social media profiles.⁶⁹ Another poll of three hundred recruiters found that 69% of employers had rejected a candidate based on information from their social networking profile, and 11% of them had rejected someone for inappropriate photos.⁷⁰

One victim of nonconsensual pornography was terminated from her job when a coworker circulated naked pictures of the victim.⁷¹ Another woman lost sales from her online handbag business when a predator allegedly posted pornographic images of her along with statements that she was "sexually lustful and promiscuous."⁷²

A significant issue is the disruption to victims' normal life routines caused by the fear that they will be recognized from the nonconsensual pornography images that remain on the internet indefinitely. For example, one victim of nonconsensual pornography explained, "When you have your pictures up like that, you don't know who's seen them

⁶⁶ Cf. Melvin Huang, *Keeping Stalkers at Bay in Texas*, 15 TEX. J. ON CIV. LIBERTIES & CIV. RTS. 53, 62 (2009) (finding these symptoms in victims of stalking).

⁶⁷ U.S. DEP'T OF JUSTICE, OFFICE ON VIOLENCE AGAINST WOMEN, 2014 REPORT TO CONGRESS: GRANT FUNDS USED TO ADDRESS STALKING (2017), <https://www.justice.gov/ovw/page/file/932736/download> [<https://perma.cc/8FQ4-GAVU>].

⁶⁸ See, e.g., Steve Johnson, *Those Party Photos Could Cost You a Job*, CHI. TRIB. (Jan. 17, 2012), <http://www.chicagotribune.com/features/tribu/ct-tribu-facebook-job-dangers-20120117,0,1257938.column> [<https://perma.cc/CU9K-ZNPR>] (noting surveys show between 18% and 63% of employers use internet social media checks, but only 7% of candidates realize employers do so). Jacquelyn Smith, *How Social Media Can Help (Or Hurt) You In Your Job Search*, FORBES (Apr. 16, 2013), <http://www.forbes.com/sites/jacquelynsmith/2013/04/16/how-social-media-can-help-or-hurt-your-job-search> [<https://perma.cc/7SQU-SELH>] (citing CareerBuilder study finding 37% of employers use social media sites to assess candidates, and that 34% of those employers had found content causing them not to hire certain candidates).

⁶⁹ Leslie Kwoh, *Beware: Potential Employers Are Watching You*, WALL ST. J. (Oct. 29, 2012), <https://www.wsj.com/articles/SB10000872396390443759504577631410093879278> [<https://perma.cc/84TM-WB73>].

⁷⁰ *How Employers Use Social Media to Screen Applicants*, UNDERCOVER RECRUITER, <http://theundercoverrecruiter.com/infographic-how-recruiters-use-social-media-screen-applicants> [<https://perma.cc/KQS2-6ZM9>] (last visited Aug. 28, 2015).

⁷¹ Second Amended Complaint at 2–5, *Lester v. Mineta*, 2006 WL 1042226 (N.D. Cal. Mar. 3, 2006). *Contrà id.* at 8.

⁷² *Leser v. Penido*, 879 N.Y.S.2d 107, 108 (App. Div. 2009).

and who hasn't Every time I walked into a classroom, I thought 'Has the professor seen them? Is he going to Google me?'"⁷³

This well-founded social anxiety causes victims of nonconsensual pornography to change significant aspects of their daily work, school, and family activities. Victims have changed their phone numbers and blocked unknown phone numbers.⁷⁴ Victims relocate, seek refuge with family members, and minimize their electronic footprints.⁷⁵ Some victims, such as Holly Jacobs, change their entire identity, including their names or social security numbers.⁷⁶

In summary, the widespread impact of nonconsensual pornography and the serious harms it causes demonstrate that enacting a comprehensive regulatory scheme is necessary to deter perpetrators of nonconsensual pornography.

IV

THE CURRENT LEGAL AND REGULATORY ENVIRONMENT AND ITS LIMITATIONS

Criminal, civil tort, civil statutory, and equitable statutory schemes have been proposed to help combat nonconsensual pornography and protect its victims.⁷⁷ Under the relatively new criminal laws enacted by forty-eight jurisdictions, penalties for perpetrators include prison, probation, fines, and forfeiture.⁷⁸ Victims may sue perpetrators for money damages using civil tort actions. Courts may use equitable remedies, such as restraining orders and orders of mandamus, to order the takedown and surrender of such offending images. Civil statutory schemes, such as the CDA and DMCA, regulate specific functions of

⁷³ Lorelei Laird, *Victims Are Taking on 'Revenge Porn' Websites for Posting Photos They Didn't Consent To*, A.B.A. J. (Nov. 1, 2013), http://www.abajournal.com/magazine/article/victims_websites_photos_consent [<https://perma.cc/JH4F-HZCU>].

⁷⁴ Cf. Brian H. Spitzberg & William R. Cupach, *The State of the Art of Stalking: Taking Stock of the Emerging Literature*, 12 AGGRESSION & VIOLENT BEHAVIOR 64, 73 (2007) (finding these behaviors in victims of stalking). See generally MODEL STALKING CODE REVISITED, *supra* note 63, at 15–16 (discussing the use of technology in stalking).

⁷⁵ Spitzberg & Cupach, *supra* note 74.

⁷⁶ See Stebner, *supra* note 33.

⁷⁷ CYBER CIV. RTS. INITIATIVE, 46 States + DC + One Territory Now Have Revenge Porn Laws, <https://www.cybercivilrights.org/revange-porn-laws/> [<https://perma.cc/U625-H7W5>] (last visited Sept. 16, 2019); see PETER FINN & MARIA O'BRIEN HYLTON, U.S. DEP'T OF JUSTICE, USING CIVIL REMEDIES FOR CRIMINAL BEHAVIOR, *passim* (1994), <https://www.ncjrs.gov/pdffiles1/Digitization/151757NCJRS.pdf> [<https://perma.cc/T3TA-ZEE9>].

⁷⁸ CYBER CIV. RTS INITIATIVE, *supra* note 77.

the internet including the potential liability of ISPs and online service providers.

The absence of a bona fide takedown remedy in the DMCA and the immunity provided to ISPs by the current iteration of Section 30 of the Communications Decency Act permit the offending images to remain online in perpetuity. This causes ongoing harm to the victims of nonconsensual pornography, as described above.⁷⁹ Many of the criminal statutes contain restrictive mens rea requirements and other elements that place even significant perpetrators of nonconsensual pornography (e.g., persons acting for pecuniary motive) beyond the reach of the law. The shortcomings of these laws are described in detail below.⁸⁰

A. Section 230 of the Communications Decency Act

The Communications Decency Act⁸¹ deprives victims of a bona fide remedy by providing a sort of immunity to ISPs for nonconsensual pornography posted through or on their internet services.⁸²

Section 230 of the CDA creates this de facto immunity. It provides that an ISP that simply serves as a digital bulletin board is not liable for content created, developed, or posted on or through the ISP's site, unless the ISP somehow curated the content.⁸³ Congress concluded that without such protections, websites, which receive millions of submissions and posts on a daily basis, would improperly restrict free speech.⁸⁴

Applied to nonconsensual pornography, this regulatory scheme places ISPs that host nonconsensual pornography (including social media sites and internet search engines) beyond the scope of liability for any damages or any equitable remedies. Thus, ISPs that host nonconsensual pornography generally operate with impunity under the CDA.

Developing case law, however, supports the assertion that ISPs should be liable under certain circumstances. In *Fair Housing Council of San Fernando Valley v. Roommates.com, LLC*, the court reasoned

⁷⁹ See *supra* Part III.

⁸⁰ See *infra* Section IV.E.

⁸¹ 47 U.S.C. § 230 (2012).

⁸² *Id.* § 230(c).

⁸³ *Id.*

⁸⁴ *Id.* § 230(a)(3).

that the Communications Decency Act was “not meant to create a lawless no-man’s-land on the [i]nternet.”⁸⁵ In *Roommates*, the defendant operated a roommate-matching website that required users to answer illegal questions about their age, race, sex, and marital status.⁸⁶ The Ninth Circuit held that the website operator did not enjoy CDA immunity.⁸⁷ The court reasoned that requiring users to answer illegal questions constituted the “creation or development of information” and transformed the ISP into an “information content provider” within the scope of 47 U.S.C. § 2309(c) and (f)(3).⁸⁸ The Ninth Circuit noted that the operator was “not being sued for removing some harmful messages while failing to remove others,” but rather for “the predictable consequences of creating a website designed to solicit and enforce housing preferences that are alleged to be illegal.”⁸⁹

Similarly, in *Federal Trade Commission v. Accusearch, Inc.*, a website sold “inherently unlawful” records to the public.⁹⁰ The website claimed immunity under Section 230, alleging that third parties provided the illegal records.⁹¹ The Tenth Circuit held that the website could be held liable because it had developed content by soliciting requests for confidential information and paying researchers to find the content.⁹²

Under the reasoning of *Roommate* and *Accusearch*, ISPs would be liable for creating or hosting destinations for illegal nonconsensual pornography. At this time, however, *Roommate* and *Accusearch* are outliers in the case law interpreting Section 230. Given the contrary interpretation in the remaining jurisdictions, the immunity provisions of Section 230 block any common law tort or equitable remedies that would otherwise be available to victims of nonconsensual pornography against the ISPs that provide access to the offending images in perpetuity.⁹³ Any bona fide remedy will have to address this limitation against the removal of the offending nonconsensual pornography images from the internet, or victims will suffer ongoing damages essentially for life.

⁸⁵ 521 F.3d 1157, 1164 (9th Cir. 2008).

⁸⁶ *Id.* at 1166.

⁸⁷ *Id.* at 1174.

⁸⁸ *Id.* at 1180 (McKown, J., concurring in part, dissenting in part).

⁸⁹ *Id.* at 1170.

⁹⁰ 570 F.3d 1187, 1199 (10th Cir. 2009).

⁹¹ *Id.* at 1195.

⁹² *Id.* at 1199.

⁹³ Communications Decency Act, 47 U.S.C. § 230 (2012).

B. Federal Copyright Law

Federal copyright law suffers from similar infirmities with respect to nonconsensual pornography remedies. Title 17 of the U.S. Code provides copyright protections to the creator of any original work of authorship that is “fixed in any tangible medium of expression.”⁹⁴ Copyright provides the original owner with the following six exclusive rights: (1) to copy the work, (2) to distribute the work, (3) to prepare derivative works, (4) to display the work publicly, (5) to publicly perform the work, and (6) to publicly perform the work by means of a digital audio transmission if the work is a sound recording.⁹⁵ Works created after January 1, 1978, enjoy copyright protection for the life of the author plus seventy years.⁹⁶ The author of an unpublished work generally reserves the right to decide whether to publish a work or allow the display of the work.⁹⁷

The remedies for copyright infringement, which are codified under 17 U.S.C. Chapter 5, provide extensive remedies.⁹⁸ For example, the act provides for injunctive relief “on such terms as it may deem reasonable to prevent or restrain infringement of a copyright.”⁹⁹ Authors are also entitled to actual damages and/or statutory damages.¹⁰⁰ But authors must register their works in order to enforce their rights and pursue these damages.¹⁰¹

On first examination, copyright law appears to provide a plausible remedy for nonconsensual pornography victims. But, a closer look reveals that there are substantial procedural, economic, and practical limitations.

At the outset, if a victim of nonconsensual pornography did not capture the offending image (e.g., a “selfie”¹⁰²), obtain the rights to the image, or commission the image, there is no copyright remedy.¹⁰³ As

⁹⁴ Digital Millennium Copyright Act, 17 U.S.C. § 102(a) (2012).

⁹⁵ *Id.* § 106.

⁹⁶ *Id.* § 302(a).

⁹⁷ *Id.* § 106.

⁹⁸ *Id.* at ch. 5.

⁹⁹ *Id.* § 502.

¹⁰⁰ *Id.* § 504.

¹⁰¹ *Id.* § 410.

¹⁰² See generally *Selfie*, *Macmillan Dictionary Buzzwords*, MACMILLAN DICTIONARY (July 2, 2013), <http://www.macmillandictionary.com/us/buzzword/entries/selfie.html> [<https://perma.cc/58K6-H4AK>] (defining selfie as “a photograph of you taken by yourself, usually for use in social media”).

¹⁰³ See 17 U.S.C. ch. 5.

a result, there is no copyright remedy for any nonconsensual pornography that was created surreptitiously, such as secret recordings, or by another party.

Even for selfies, the availability and efficacy of a copyright remedy is tentative. At the outset, an author must register the work within three months after first publication.¹⁰⁴ Few people are likely to register the intimate images at issue in nonconsensual pornography.¹⁰⁵ Even a victim who obtains a copyright must endure a lengthy court process to obtain injunctive relief under copyright law, and many victims of revenge pornography prefer not to expose themselves to such a public process.¹⁰⁶

Furthermore, the cost of engaging a lawyer is prohibitive for many victims of nonconsensual pornography. The cost of a copyright cease and desist letter averages \$2000.¹⁰⁷ Filing a complaint for injunctive and other relief is challenging for any pro se litigant. Accordingly, the significant expense and procedural hurdles of pursuing copyright-based remedies are often prohibitive. The statutory or actual damages are often uncollectable based on the fact that many noninstitutional defendants have limited assets and are very often judgment-proof. Additionally, the civil money damages that are available for copyright infringement do not address the issue of removing the offending material from continued internet viewing. Thus, the victim continues to suffer damages if injunctive relief is not a component of the remedy.

In summary, unless the images are selfies or the victim otherwise acquired the copyright, copyright law does not provide for eliminating the material from the internet; the expenses of enforcing a copyright claim are prohibitive to many victims; the projected nature of litigation to enforce such claims is a disincentive to many victims; and any money damages that may be awarded are often unenforceable.

¹⁰⁴ *Id.* § 412.

¹⁰⁵ See generally Christian J. Fisher, *Addition Through Subtraction: The Resolution of Copyright Registration Uncertainty Through the Repeal of §§ 411(a) and 412*, 14 TUL. J. OF TECH. & INTELL. PROP. 191, 228 (2011) (discussing the reasons why individuals are unlikely to register photographs).

¹⁰⁶ See, e.g., *supra* Part III.

¹⁰⁷ Holly Jacobs, *This Is What It Is Like to Be the Victim of Revenge Porn, and Why We Need to Criminalise It*, INDEPENDENT (Feb. 13, 2015), <http://www.independent.co.uk/voices/comment/this-is-what-it-is-like-to-be-the-victim-of-revenge-porn-and-why-we-need-to-criminalise-it-10045067.html> [<https://perma.cc/6RK7-EW5U>].

C. The Digital Millennium Copyright Act

The Digital Millennium Copyright Act (DMCA) also fails to provide victims with an adequate remedy.¹⁰⁸ The DMCA was enacted in 1998 for the purpose of “implement[ing] two 1996 World Intellectual Property Organization (WIPO) treaties: [t]he WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty.”¹⁰⁹ The DMCA governs the scope of, and procedure for, the takedown of copyright infringing materials posted to the internet through an ISP.¹¹⁰

The DMCA provides that only the holder of a copyright may demand an ISP to take down any images posted to the internet.¹¹¹ To make such a demand, copyright holders must follow the procedure prescribed by the DMCA, which includes filing a takedown notice with the ISP.¹¹²

A formal takedown notice must include the signature of a person authorized to act on behalf of the owner of an exclusive right that is allegedly infringed; identification of the copyrighted work or works claimed to have been infringed; identification of the material that is infringing and where that material is located; the claimant’s contact information; a statement that the claimant “has a good faith belief” that the material used is unauthorized by the copyright owner, its agent, or the law; and a statement under penalty of perjury that the information in the notification is accurate and that the actor is authorized to do so.¹¹³

ISPs that remove the copyright-offending material after receiving a formal takedown notice are not subject to liability.¹¹⁴ In this way, the DMCA creates a safe harbor that protects ISPs from liability for copyright infringement.

As noted in Section IV.B above, a victim of nonconsensual pornography will own the copyright to an offending image only if it is a selfie registered under the DMCA, it was professionally commissioned by the victim, or if the victim obtained the copyrights from the original copyright owner.¹¹⁵

¹⁰⁸ See 17 U.S.C. ch. 5.

¹⁰⁹ U.S. COPYRIGHT OFFICE, THE DIGITAL MILLENNIUM COPYRIGHT ACT OF 1998 1 (1998), <https://www.copyright.gov/legislation/dmca.pdf> [<https://perma.cc/8W4Z-3899>].

¹¹⁰ *Id.*

¹¹¹ See 17 U.S.C. § 512.

¹¹² *Id.* § 512(c)(3).

¹¹³ See *id.* § 512(c)(3)(A)(i)–(vi).

¹¹⁴ *Id.* § 512(g)(1).

¹¹⁵ See *supra* Section IV.B.

Accordingly, the DMCA's takedown remedy is unlikely to be available to victims of nonconsensual pornography, since they do not typically register the copyright of their "selfies" or professionally commission the images.

Another major limit to the efficacy of the DMCA's takedown procedure is that nonconsensual pornography tends to migrate from one internet site to another. As such, a single DMCA takedown request will generally not erase the offending images from the internet. Finally, the lack of any legal liability to ISPs, unless they fail to comply with a valid takedown request, provides no incentive for ISPs to preemptively seek out and remove nonconsensual pornography.

In summary, given the fact that many victims are not the copyright holder of the offending images, the intricacies of the takedown request procedure, and the extent that nonconsensual pornography images tend to migrate from site to site, the efficacy of the DMCA's remedies to victims of nonconsensual pornography is limited.

D. Common Law Tort Claims

Privacy and intentional infliction of emotional distress are causes of action that may permit victims to recover money damages from the perpetrators of nonconsensual pornography.

As with copyright claims, the cost of prosecuting a civil action may deter victims from seeking a remedy. The cost of attorney's fees in a civil lawsuit often exceeds the assets available to a victim of nonconsensual pornography.¹¹⁶ One investigative firm that represents clients who are victims of internet defamation, online stalking, and hacking estimated the cost of a civil suit to be anywhere from \$15,000 to \$100,000.¹¹⁷ Finally, victims are also reluctant to endure further suffering caused by the exposure of their intimate photos and videos and their identity in a public court proceeding.¹¹⁸

These tort claims, however, fail to provide stand-alone, satisfactory remedies to victims of nonconsensual pornography, because a takedown remedy is unavailable. Furthermore, the money damages

¹¹⁶ See Calc Guthrie Weissman, *Infographic: The Laws Are Imperfect, but Here's What Revenge Porn Victims Can Do*, PANDODAILY (Oct. 8, 2013), <http://pando.com/2013/10/08/infographic-the-laws-are-imperfect-but-heres-what-revenge-porn-victims-can-do/> [https://perma.cc/XFW7-WPQR].

¹¹⁷ Allison Pohle, *Why Doesn't Massachusetts Have a Revenge Porn Law?*, BOS. GLOBE (Mar. 23, 2015), <https://www.boston.com/news/untagged/2015/03/23/why-doesnt-massachusetts-have-a-revenge-porn-law> [https://perma.cc/8BD6-U5QM].

¹¹⁸ *Id.*

provided by tort remedies have little deterrent effect on judgment-proof predators.

A significant issue is the perverse consequences of tort remedies that provide only monetary damages. The victim truly needs the takedown of the offending images, but such a remedy is not available. Simple money damages, however, leave the offending images available to the general public in perpetuity. This has the bizarre consequence of simply transforming a victim from a forced amateur pornography subject into a forced paid pornography subject—when and if they succeed at winning judgment for money damages. It bears repeating that this is clearly not an effective remedy because the victims obviously wish to have the offending materials completely deleted from the internet.

Accordingly, these tort remedies are not the preferred remedy of victims of nonconsensual pornography.

1. Privacy

With the exceptions of North Dakota and Wyoming, every state recognizes some form of privacy or intrusion upon seclusion tort.¹¹⁹ Under these torts, a plaintiff must establish that a defendant intentionally intruded upon the victim's private affairs and that the intrusion would be highly offensive to a reasonable person.¹²⁰ Such a tort is easily applicable to a hacker who invaded a victim's computer or a perpetrator who surreptitiously captured images of a victim. But establishing such a cause of action is more challenging to a victim that provided a selfie to a current or former romantic partner. Courts have not yet considered whether, in the context of such a tort, a victim sending a nude image to a particular recipient makes the further sharing of the image by the recipient highly offensive to a reasonable person as a matter of law.

The action of a perpetrator of nonconsensual pornography may also constitute the distinct privacy tort of publicity given to private life.¹²¹ This public disclosure tort requires proof that a defendant publicized an element of a plaintiff's life that would be highly offensive to a reasonable person and is not a legitimate subject of public concern.¹²²

¹¹⁹ Tigran Palyan, Comment, *Common Law Privacy in a Not So Common World: Prospects for the Tort of Intrusion Upon Seclusion in Virtual Worlds*, 38 SW. L. REV. 167, 180 n.106 (2008).

¹²⁰ *Id.*

¹²¹ *E.g.*, RESTATEMENT (SECOND) OF TORTS § 652D (AM. LAW INST. 1977).

¹²² *Id.*

Although this tort may appear promising to victims of nonconsensual pornography, this tort is largely considered “dead” in the common law¹²³ due to its chilling effect on speech protected by First Amendment.¹²⁴

2. *Intentional Infliction of Emotional Distress*

Perpetrators of nonconsensual pornography may also be liable under the tort of intentional infliction of emotional distress.¹²⁵ To prevail under this cause of action, a plaintiff must establish that (1) the defendant’s conduct was extreme and outrageous, (2) the defendant acted intentionally or recklessly, and (3) the defendant’s conduct was the proximate cause of the plaintiff’s severe emotional distress.¹²⁶

E. Criminal Statutes

In response to changing technology and a slow but growing recognition of the serious and permanent harm caused by the nonconsensual sharing of intimate images,¹²⁷ a number of states have enacted criminal statutes proscribing nonconsensual pornography.

The proliferation of state laws that criminalize nonconsensual porn is consistent with current U.S. social values on the subject.¹²⁸ Consider the history of sexual harassment. Workplace sexual harassment was not uncommon until courts began to punish it in the late 1970s.¹²⁹ In that period, social acceptance of sexual harassment shifted—society no longer tolerated this behavior, and it became specifically proscribed.¹³⁰ This change is reflected in the reasoning of *Meritor Savings Bank, FSB*

¹²³ Jonathan B. Mintz, *The Remains of Privacy’s Disclosure Tort: An Exploration of the Private Domain*, 55 MD. L. REV. 425, 426 (1996) (“[O]ne third of the Supreme Court and most of privacy academia have pronounced dead the more than century-old tort of public disclosure of private facts.”). Compare *Florida Star v. B.J.F.*, 491 U.S. 524, 532 (1989) (holding that liability cannot result from the disclosure of private facts already in public records), with *id.* at 550 (White, J., dissenting) (stating that the majority had “obliterate[d] one of the most noteworthy legal inventions of the [twentieth] century . . .”).

¹²⁴ See 123 AM. JUR. *Trials* 433 § 7 (2012).

¹²⁵ See RESTATEMENT (SECOND) OF TORTS § 46 (AM. LAW. INST. 1965) (stating the elements for the tort of intentional infliction of emotional distress).

¹²⁶ *Id.*

¹²⁷ See *supra* Part II.

¹²⁸ Danielle Keats Citron, *Law’s Expressive Value in Combating Cyber Gender Harassment*, 108 MICH. L. REV. 373, 404 (2009).

¹²⁹ *Id.* at 393.

¹³⁰ *Id.*

v. *Vinson*, which is a seminal authority regarding hostile work environment sex discrimination.¹³¹

Nonconsensual pornography is comparable to sexual harassment because of the nature of the act, the harm to the victims, and society's attitude toward the act. Like sexual harassment, the nature of the wrongdoing turns on issues of privacy, consent, and violations of the body. In fact, technology (i.e., the internet) makes this form of predatory conduct especially harmful since it reaches an unlimited audience in perpetuity.

The harms that victims of nonconsensual pornography experience also resemble the harms that victims of sexual harassment experience.¹³² Like victims of sexual harassment, victims of revenge pornography feel dirty and humiliated by the indecent exposure,¹³³ and they experience significant psychological problems.¹³⁴

The fact that forty-eight jurisdictions (forty-six states, the District of Columbia, and Guam) have enacted nonconsensual pornography statutes demonstrates a strong consensus that victims suffer bona fide and serious harm and that such legislation is necessary.¹³⁵ New Jersey was the first state to enact such a criminal statute in 2004. It was approximately a decade before other states started to recognize the extreme harm caused by nonconsensual pornography and before certain state legislators took up the cause of criminalizing nonconsensual pornography.

All the statutes share a similar *actus reus*: causing the distribution, posting, or dissemination of private images of a victim in a state of nudity or engaged in some sexually explicit conduct without the consent of the victim.¹³⁶ The statutes differ widely, however, on the precise scienter requirements and other elements necessary for a conviction.

The categories of scienter and other important elements include: causation (intentionally or knowingly causing the distribution or dissemination of the private image), lack of consent (engaging in the

¹³¹ 477 U.S. 57, 66–68 (1986).

¹³² See ROBIN WEST, CARING FOR JUSTICE 103 (1997) (discussing street harassment).

¹³³ *Id.*

¹³⁴ See *supra* Part III.

¹³⁵ Jonathan S. Sales & Jessica A. Magaldi, *What Were They Thinking?: An Analysis of the Treatment of the Mens Rea Element in State Statutes that Criminalize Nonconsensual Pornography* (working title), 57 AM. CRIM. L. REV. (forthcoming 2020).

¹³⁶ *Id.*

distribution or dissemination without the consent or license of the victim), intent to harass (harboring an intent to harass or intimidate the victim), intent to harm (having the intent to cause harm to the victim), actual harm (causing actual harm to the victim), and a victim's expectation of privacy (establishing that the victim had a reasonable expectation of privacy when the images were captured and/or distributed).¹³⁷

Many of the statutes exempt certain conduct, so that otherwise innocent actors are not prosecuted. For example, individuals who distribute a matter of public concern or public interest may not be liable.¹³⁸

Ten of the forty-eight jurisdictions have nonconsensual pornography statutes with mens rea requirements regarding only the defendant's appraisal of permission, license, or consent to disseminate the image.¹³⁹ New Jersey and Illinois are examples.¹⁴⁰ The Illinois law's mens rea is whether the defendant knew or should have known the victim had not consented to the dissemination of the offending images.¹⁴¹ The New Jersey statute's mens rea requires proof that the defendant knew that he or she was not licensed or privileged to disclose the images.¹⁴² Statutes that include this kind of mens rea requirement do not allow perpetrators who harbor a profit, malicious, or simple enjoyment motive to escape prosecution (contrast this to the statutes described below that require a proof of intent to harass the victim).

The remaining thirty-eight jurisdictions have statutes with one or more elements that require proof that the defendant had an intent to harass, threaten, intimidate, humiliate, damage, and/or harm the victim.¹⁴³ Thirty-one states, the District of Columbia, and Guam require proof that the image was captured under circumstances in which the victim had a reasonable expectation of privacy.¹⁴⁴

Statutes that have additional scienter requirements beyond the intent to disseminate or distribute the images without consent, such as the

¹³⁷ *Id.*

¹³⁸ See, e.g., Disclosure of Sexually Explicit Images Without Consent, VT. STAT. ANN. tit. 13, § 2606(d) (2018).

¹³⁹ See Sales & Magaldi, *supra* note 135.

¹⁴⁰ 720 ILL. COMP. STAT. ANN. 5/11-23 (West 2011); N.J. STAT. ANN. § 2C:14-9(c) (West 2004).

¹⁴¹ 720 ILL. COMP. STAT. ANN. 5/11-23.

¹⁴² N.J. STAT. ANN. § 2C:14-9(c).

¹⁴³ See Sales & Magaldi, *supra* note 135 (discussing common elements of nonconsensual pornography statutes).

¹⁴⁴ See *id.*

intent to intimidate or cause harm, and/or the element of no reasonable expectation of privacy, exclude some of the most insidious conduct from prosecution.¹⁴⁵ For example, persons who post the nonconsensual pornography for purely pecuniary reasons (such as the Hunter Moore/AnyOneUp? revenge porn internet site) would not be liable under these statutes. Perpetrators who disseminate nonconsensual pornography not with the intent to intimidate or harm the victim but rather for their own amusement would also not be liable under these statutes.

This is particularly significant given research on nonconsensual pornography that found that a majority of nonconsensual pornography incidents are committed without the intent to cause harm to the victim.¹⁴⁶ Specifically, 79% of persons who self-identified as perpetrators cited their motivation as to simply share the material “with friends.”¹⁴⁷ In contrast, only 12% of perpetrators stated that they were motivated by some desire to impose harm on the victim.¹⁴⁸ Thus, the intent to harass or intimidate statutes fail to cover the majority of nonconsensual pornography incidents. Such a safe harbor for amusement and mercenary perpetrators significantly undermines the efficacy of such statutes, because the harm to victims is the same regardless of intent. In this way, the intent to harass or cause harm statutes largely fail to achieve their stated legislative intent.¹⁴⁹

These statutes raise the issue as to whether they implicitly provide redundant scienter requirements (i.e., knowledge of the lack of authorization to disseminate and the intent to harass).¹⁵⁰ This perspective is consistent with the common understanding that any nonconsensual dissemination of a person in a state of nudity or while engaged in some form of explicit sexual conduct necessarily results in damage to the victim.¹⁵¹ In this way, a person distributing such material is at least engaging in willful blindness as to the harm the victim suffers. Thus, the harassment or damage to the defendant is implicit in, and established by, the unauthorized distribution element of the statute.

¹⁴⁵ *See id.*

¹⁴⁶ EATON ET AL., *supra* note 21, at 19.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ Sales & Magaldi, *supra* note 135.

¹⁵⁰ *Id.*

¹⁵¹ *Id.*; *see discussion supra* Part II.

The multi-scienter statutes also appear to require jurors to make findings on a similar aspect of a defendant's state of mind twice.¹⁵² Additionally, the intent to harass element changes the focus of the misconduct from the predator-defendant's actions to whether the victim felt harassed. This may have a chilling effect upon a victim's willingness to report such crimes and on the prosecution's ability to secure fair verdicts.

A number of states have experienced First Amendments challenges to their nonconsensual pornography statutes, including Arizona, Illinois, Rhode Island, Texas, Vermont, and Wisconsin.¹⁵³

Arizona passed its original nonconsensual pornography statute in 2014 without an element requiring proof of an intent to harm, harass, or intimidate the victim. The law was challenged on the basis that it violated the First Amendment.¹⁵⁴ Arizona entered into a consent decree to not enforce the law.¹⁵⁵ In 2016, Arizona passed a new nonconsensual pornography law that added the requirement that the state prove that the perpetrator intentionally shared the image without the subject's permission and with the intent to harm, harass, or intimidate the victim.¹⁵⁶

Texas passed its original law addressing nonconsensual pornography in 2015. The law required proof that the images were disclosed without consent and that the disclosure caused harm. In April 2018, a Texas intermediate appellate court, the Twelfth Court of Appeals, ruled that the law was unconstitutional because of its broad-based content restrictions that were more likely to infringe on the free speech rights of third parties.¹⁵⁷ Prosecutors appealed the ruling to the Texas Court of Criminal Appeals.¹⁵⁸ While the appeal was pending in

¹⁵² Sales & Magaldi, *supra* note 135.

¹⁵³ For an in-depth analysis of these issues, see *id.*

¹⁵⁴ Final Decree at 1–2, *Antigone Books, L.L.C. v. Brnovich*, No. 2:14-CV-02100 (D. Ariz. July 10, 2015) (stipulated order granting permanent injunction).

¹⁵⁵ *Id.* at 2.

¹⁵⁶ ARIZ. REV. STAT. ANN. § 13-1425 (2016).

¹⁵⁷ *Ex parte Jones*, No. 12-17-00346-CR, 2018 WL 2228888, at *7 (Tex. Ct. App. May 18, 2018).

¹⁵⁸ State's Petition for Discretionary Review, *Ex parte Jones*, No. PD-0552-18 (Tex. Crim. App. June 1, 2018); see also Brief of Amicus Curiae the Office of the Attorney General in Support of the State, *Ex parte Jones*, No. PD-0552-18 (Tex. Crim. App. Mar. 26, 2019).

2019, the Texas law was amended to address these concerns by adding a number of elements, including the intent to harm the victim.¹⁵⁹

In 2016, the state of Rhode Island passed its original bill addressing nonconsensual pornography that would have criminalized the distribution of nonconsensual pornography without the consent of the victim.¹⁶⁰ The bill did not require proof of an intent to harass, intimidate, and/or harm the victim.¹⁶¹ The Governor of Rhode Island vetoed the bill, citing First Amendment concerns.¹⁶² In 2018, Rhode Island passed an amended nonconsensual pornography law that requires “knowledge or with reckless disregard” that the images will cause harm.¹⁶³

The Illinois law addressing nonconsensual pornography was also challenged on First Amendment grounds.¹⁶⁴ The Illinois nonconsensual pornography statute criminalizes the nonconsensual dissemination of private sexual images if the perpetrator knew or should have known that the image was to remain private.¹⁶⁵ The trial court held that the statute was unconstitutional.¹⁶⁶ The State of Illinois filed an interlocutory appeal. As of July 2019, the matter is pending before the Supreme Court of Illinois.¹⁶⁷

The Court of Appeals of Wisconsin¹⁶⁸ rejected a First Amendment-based challenge to that state’s nonconsensual pornography law and held that the law was constitutional.¹⁶⁹ The Wisconsin statute criminalizes posting, publishing, or causing the posting or publishing

¹⁵⁹ H.B. 98, 86th Leg., Reg. Sess. (Tex. 2019), <https://legiscan.com/TX/bill/HB98/2019> [<https://perma.cc/DAS2-FR43>].

¹⁶⁰ Matt O’Brien, *Raimondo Vetoes Revenge Porn Bill amid Free-Speech Worries*, WASH. TIMES (June 21, 2016), <https://www.washingtontimes.com/news/2016/jun/21/rhode-island-governor-vetoes-revenge-porn-bill/> [<https://perma.cc/32YY-7T9A>].

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ Tom Mooney, *Governor Signs ‘Revenge Pornography’ Bill amid Free-Speech Concerns*, PROVIDENCE J. (Rhode Island) (June 4, 2018), <https://www.providencejournal.com/news/20180604/governor-signs-revenge-pornography-bill-amid-free-specch-concerns> [<https://perma.cc/X2KM-E249>].

¹⁶⁴ See Brief and Appendix of Plaintiff-Appellant People of the State of Illinois at 6–7, *Illinois v. Austin*, (2019) (No. 123910) 2019 WL 1870854, at *1–2 [hereinafter Brief and Appendix of Plaintiff-Appellant].

¹⁶⁵ 720 ILL. COMP. STAT. 5/11-23.5(b) (2015).

¹⁶⁶ Brief and Appendix of Plaintiff-Appellant, *supra* note 164.

¹⁶⁷ *Id.*

¹⁶⁸ The Wisconsin Court of Appeals is an intermediate appellate court that provides the initial appellate review of circuit court decisions.

¹⁶⁹ *State v. Culver*, 918 N.W.2d 103, 114 (Wis. Ct. App. 2018).

of a depiction of a person that he or she knows is a private representation without the consent of the person depicted.¹⁷⁰

Vermont is the only jurisdiction that has had its nonconsensual pornography law reviewed by its highest appellate court.¹⁷¹ The Vermont Supreme Court found that the statute was constitutional because it was narrowly tailored due to the following factors: the narrow definitions of nude images and sexually explicit conduct provide “little gray area or risk of sweeping in constitutionally protected speech”;¹⁷² the requirement that the individual depicted in the image be identifiable;¹⁷³ proof that the perpetrator knowingly disclosed the images without the victim’s consent is required;¹⁷⁴ the inclusion of the specific intent to harm, harass, intimidate, threaten, or coerce the person depicted or to profit financially;¹⁷⁵ that the proscribed disclosures are limited to those that would cause a reasonable person (not an unreasonably fragile person) “physical injury, financial injury, or serious emotional distress”;¹⁷⁶ the exclusion of disclosures regarding matters of public concern or made in the public interest, such as those made for law enforcement, criminal reporting, corrections, legal proceedings, or medical treatment;¹⁷⁷ and the exclusion of “[i]mages involving voluntary nudity or sexual conduct in public or commercial settings or in a place where a person does not have a reasonable expectation of privacy.”¹⁷⁸

Another aspect of the Vermont Supreme Court’s decision bears noting. The court rejected the notion that civil penalties are less restrictive than criminal penalties in the context of strict scrutiny analysis. The Vermont Supreme Court reasoned that “[p]eople charged

¹⁷⁰ WIS. STAT. § 942.09(3m) (2017).

¹⁷¹ See *State v. VanBuren*, 214 A.3d 791, 794 (2019).

¹⁷² *Id.* at 812.

¹⁷³ *Id.* (citing VT. STAT. ANN. tit. 13, § 2606(b)(1) (2019)).

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* (citing § 2606(b)(1)–(2)). In footnote 10, the Vermont Supreme Court stated, “We express no opinion as to whether this narrowing element is essential to the constitutionality of the statute.” *Id.* at 812 n.10.

¹⁷⁶ *Id.* (quoting § 2606(a)(2), (b)(1)).

¹⁷⁷ *Id.* (citing § 2606(d)(2)).

¹⁷⁸ *Id.* at 813 (quoting § 2606(d)(1)). The Vermont Supreme Court further narrowed the statute by excluding from the scope of the nonconsensual pornography statute “images recorded in a private setting but distributed by the person depicted to public or commercial settings or in a manner that undermines any reasonable expectation of privacy.” *Id.* at 813. This was necessary to account for the fact that “there is no practical difference between a nude photo someone voluntarily poses for in the public park and one taken in private that the person then voluntarily posts in that same public park.” *Id.*

criminally enjoy greater procedural safeguards than those facing civil suit, and the prospect of steep civil damages can chill speech even more than that of criminal prosecution.”¹⁷⁹

Statutes that address nonconsensual pornography with additional elements beyond the requirement that the perpetrator caused the dissemination of the image with the knowledge or in reckless disregard for the fact that the victim did not consent to the disclosure (and was not captured during an episode of public nudity) leave significant pernicious activities unpunished. For example, the mens rea that the perpetrator intended to harass or intimidate the victim leaves those that act with pecuniary or prurient motivations outside the scope of the regulatory scheme. Thus, each additional element tends to limit the applicability and effectiveness of the statute. The infirmity of the majority of the nonconsensual pornography statutes (especially on such an important element as the intent to harass or cause harm) provides an uncertainty that has a chilling effect on victims’ willingness to report the crimes and risks nonuniform outcomes for the same conduct. These issues as a whole undermine the efficacy of the legislative schemes and the credibility of the legal system. It also supports the need for a uniform nonconsensual pornography statute that can be enacted across the states.

F. The Absence of a Unifying Federal Statute Addressing Nonconsensual Pornography

Although a federal statute has been proposed to address nonconsensual pornography, it has not been enacted.

The federal government and some states have criminalized cyberharassment.¹⁸⁰ It is a crime to use interstate commerce to transmit an obscene image with the intent to “abuse, threaten, or harass another person.”¹⁸¹ It is also a crime to use electronic communications to harass or intimidate another individual or to surveil another person in a manner that causes substantial emotional distress to a person.¹⁸²

Similar to state laws covering nonconsensual pornography, however, the efficacy of this federal statute is limited by an intent to

¹⁷⁹ *Id.* at 814 (citing *New York Times v. Sullivan*, 376 U.S. 254, 277 (1964)).

¹⁸⁰ 47 U.S.C. § 223 (2012).

¹⁸¹ *Id.*

¹⁸² 18 U.S.C. § 2261A (Supp. 2013).

harass requirement.¹⁸³ For example, defendants may claim that they had other motivations for posting the photos or videos of the victims, such as fame, money, or fulfilling sexual fantasies.

G. Anti-Blackmail Statutes

Anti-blackmail statutes also apply to some nonconsensual pornography incidents, such as when a hacker threatens to post such materials if the victim does not pay or follow the blackmailer's orders.¹⁸⁴ In one such case, an Oklahoma State University student videotaped himself and his then-girlfriend during sexual intercourse.¹⁸⁵ When the victim ended the relationship, the perpetrator threatened to post the video online unless she continued to have sex with him.¹⁸⁶ She went to the police, and he was charged with felony blackmail.¹⁸⁷

Although blackmail statutes might be effective in some instances, the majority of revenge porn incidents are beyond their scope.

H. Anti-Hacking Statutes

Anti-hacking statutes also target a subsection of nonconsensual pornography. A famous example is the case of the revenge porn entrepreneur, Hunter Moore.¹⁸⁸ Moore was indicted on conspiracy charges for allegedly paying a coconspirator to hack into private email accounts of victims to obtain nude images to post to his website, "IsAnyoneUp.com."¹⁸⁹ The shortcoming of these statutes is that they do not apply to perpetrators of nonconsensual pornography who originally captured the images or who obtained the images from another person. Additionally, hackers who engage in more limited acts

¹⁸³ Mary Anne Franks, Combating Non-Consensual Pornography: A Working Paper 7 (Sept. 7, 2014) (unpublished manuscript) (on file with the Social Science Research Network), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2336537&download=yes [<https://perma.cc/5Q95-JALP>].

¹⁸⁴ *People v. Cavazos*, No. A124274, 2010 Cal. App. LEXIS 3420, at *3 (Cal. Ct. App. May 11, 2010); *Serrano v. Butler*, No. C 06-04433 JW, 2010 U.S. Dist. LEXIS 137617, at *15 (N.D. Cal. Dec. 20, 2010).

¹⁸⁵ Mary Anne Franks, *Unwilling Avatars: Idealism and Discrimination in Cyberspace*, 20 COLUM. J. GENDER & L. 224, 239 (2011).

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ See generally Indictment, *United States v. Moore*, No. CR13-0917 (C.D. Cal. Dec. 20, 2013), http://www.wired.com/images_blogs/threatlevel/2014/01/revenge-porn-Moore-Evens-indictment.pdf [<https://perma.cc/A2VH-94JQ>].

¹⁸⁹ *Id.* at 1–2; see also 18 U.S.C. § 371 (2012) (discussing conspiracy to commit offense).

of disseminating nonconsensual pornography may escape prosecution due to the difficulty of tracking people on the internet.¹⁹⁰

V

THE NEED FOR A FEDERAL STATUTE CRIMINALIZING NONCONSENSUAL PORNOGRAPHY

The absence of nonconsensual pornography criminal statutes in four states and the variance of the conduct legally prescribed by the forty-six different state nonconsensual pornography criminal statutes leaves substantial nonconsensual pornography conduct unrestricted. As previously noted, statutes that require proof of some intent to harass the victim leave perpetrators with a pecuniary motive or those who share such material casually with friends outside the reach of the law. Additionally, the state criminal statutes cannot address the impediment to protecting victims from nonconsensual pornography that is created by the section 230 immunity to ISPs.¹⁹¹

Congress has the power to rectify these issues. Congress can enact a nonconsensual pornography statute that encompasses the actions of ISPs and removes the section 230 immunity—that is, if a statute contains a section 230 exception for nonconsensual pornography. Furthermore, virtually all nonconsensual pornography activity involves the transmission of such material through the internet across state and country jurisdictional boundaries, which means Congress has jurisdiction to regulate in this area.¹⁹²

California Congresswoman Jackie Speier sponsored and introduced a federal nonconsensual pornography bill in 2014.¹⁹³ The bill makes it a federal crime to distribute a

visual depiction of a person who is identifiable from the image itself or information displayed in connection with the image, and who is engaging in sexually explicit conduct, or of the naked genitals or post-pubescent female nipple of a person, with reckless disregard for the person's lack of consent to the distribution.¹⁹⁴

¹⁹⁰ See Bryan H. Choi, *The Anonymous Internet*, 72 MD. L. REV. 501, 530–31 (2013).

¹⁹¹ *Id.*

¹⁹² Steven Nelson, *Federal 'Revenge Porn' Bill Will Seek to Shriveled Booming Internet Fad*, U.S. NEWS (Mar. 26, 2014), <https://www.usnews.com/news/articles/2014/03/26/federal-revengc-porn-bill-will-seek-to-shriveled-booming-internet-fad> [https://perma.cc/E8XV-5KL8].

¹⁹³ H.R. 5896, 114th Cong. (2d Sess. 2016).

¹⁹⁴ *Id.*

The proposed legislation does not require an intent to harass. The press release regarding the federal bill provides that “the bill recognizes that the distribution of nonconsensual pornography is a privacy violation, as nonconsensual pornography is not always about revenge or harassment.”¹⁹⁵ The statute also is reported to require U.S. websites to take down such material.¹⁹⁶

The bill was introduced in Congress on July 14, 2016, referred to the House Committee on the Judiciary on the same date, and referred to the Subcommittee on Crime on August 10, 2016.¹⁹⁷ The bill was never enacted.

In November 2017, another federal nonconsensual pornography law was proposed contemporaneously in the Senate and the House.¹⁹⁸ This bill is known as the ENOUGH Act, an acronym for “Ending Nonconsensual Online User Graphic Harassment Act of 2017.”¹⁹⁹ The bill was referred to the Senate Committee on the Judiciary in November 2017 and the Subcommittee on Crime, Terrorism, Homeland Security, and Investigations in January 2018.²⁰⁰ It has not progressed to the floor.²⁰¹ The new bill makes it a federal crime to knowingly use any means or facility of interstate or foreign commerce to distribute an intimate visual depiction of an individual—

- (1) with knowledge of or reckless disregard for—
 - (A) the lack of consent of the individual to the distribution;
 - (B) the reasonable expectation of the individual that the depiction would remain private; and
 - (C) harm that the distribution could cause to the individual; and
- (2) without an objectively reasonable belief that such distribution touches upon a matter of public concern.²⁰²

¹⁹⁵ Press Release, Jackie Speier, Congresswoman, U.S. House of Representatives, 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/6V52-S8ZM>].

¹⁹⁶ *Id.*

¹⁹⁷ Intimate Privacy Protection Act of 2016, H.R. 5896, 114th Cong. (2016).

¹⁹⁸ See S. 2162, 115th Cong. (as introduced in the Senate, November 28, 2017) [hereinafter S. 2162].

¹⁹⁹ *Id.* § 1.

²⁰⁰ *Id.*

²⁰¹ See *id.*

²⁰² *Id.* § 2(b)(1)(A)–(C).

The penalty is five years in prison and/or a fine.²⁰³

Such a law is necessary to provide a bona fide remedy to victims of revenge porn. In this regard, it captures not only the actions of previous romantic partners but also the actions of those with pecuniary motive, hackers, and persons who simply share such materials casually. As a federal statute, it provides a significant deterrent effect. Finally, it also contains a takedown remedy. This may be the most important aspect of the proposed law since it provides for the removal of the offending materials from the internet, which prevents ongoing harm to the victim. Accordingly, it is essential that Congress enact this law to address this growing issue.

CONCLUSION

Nonconsensual pornography is a serious offense that causes significant, life-changing harm to victims. Victims may experience humiliation, mental anguish, even the destruction of their careers, and some have committed suicide. The victims cannot bring claims against ISPs because they are currently protected by the CDA. Additionally, current civil and criminal laws are ineffective. They do not result in the takedown of the offending material (which allows the harm to continue) and are insufficient deterrents.

As with most aspects of internet regulation, effective responses to nonconsensual porn will require a multifaceted regulatory framework. Current social norms regarding sex crimes appear to support more comprehensive remedies than provided by the current statutory schemes. To accomplish this, a federal nonconsensual pornography criminal statute must be enacted without a scienter of harassment element.

Furthermore, the scienter of harassment element must be eliminated from the relevant state statutes, and uniform standards must be adopted. This will provide the strongest deterrent from state criminal statutes and the greatest protections to victims. Finally, a nonconsensual pornography exemption to Section 230 must be fashioned.

These remedies are necessary to address the nonconsensual pornography epidemic and the serious harms that its victims, who are predominantly women, suffer. Anything less would perpetuate a system that disproportionately tolerates offensive conduct against women. The long-term negative effects on victims, including mental

²⁰³ *Id.* § 2(c).

health issues, relationship breakdowns, and financial losses from unemployment and medical expenses can lead to tragic consequences, which must be prevented through new, compassionate legislation.