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A Post for Change: Social Media and the Unethical Dissemination of Nonconsensual Pornography

By CECILIA GRIMALDI*

Introduction

In today's world, where instant gratification is king and the majority craves being shocked and awed, stories that exploit the personal endeavors and escapades of our peers and superiors reign supreme. Of particular interest are those relating to sex; whether it's the kinks of a congressman, the intimacies of an idol, or the extramarital affair of a neighbor, people love the nitty-gritty and no one is safe from the dissemination of these exceedingly private details. This includes the distribution of intimate photos and videos taken with or without the consent of the individual depicted.

Not all states have laws specifically targeting the distribution of these depictions known as nonconsensual pornography, or colloquially as "revenge porn."¹ At this time, forty-six states and the District of Columbia have laws targeting perpetrators or revenge porn, with laws in South Carolina, Massachusetts, and Wyoming currently pending.² All states but Mississippi have some sort of revenge porn law, criminal or otherwise, for those affected.³ However, many of these laws are flawed, leaving victims with an illusion of protection when in fact they are vulnerable and exposed.⁴ With changes in the political climate and a push towards true protection of those victimized, the United States should, as a whole, criminalize revenge porn at the federal level.

* Cecilia Grimaldi is a J.D. student at University of California, Hastings College of the Law who will be graduating in May 2021. She would like to thank Professor Mark D'Argenio for his guidance and feedback on this article.

1. Deborah C. England, *Revenge Porn Laws in New Jersey*, CRIMINAL DEFENSE LAWYER, <https://www.criminaldefenselawyer.com/resources/revenge-porn-laws-new-jersey.htm> (last visited Mar. 1, 2020).

2. Oscar Michelen, Attorney, Cuomo LLC, Representing a Revenge Porn Victim Webinar (Dec. 26, 2019); CYBER CIVIL RIGHTS INITIATIVE, <https://www.cybercivilrights.org/revenge-porn-laws/> (last visited Mar. 7, 2020).

3. *Id.*

4. Michelen, *supra* note 2.

Revenge Porn in Everyday Life, Pop Culture, and Politics

The Cyber Civil Rights Initiative is a nonprofit organization that serves thousands of victims of nonconsensual pornography.⁵ It defines revenge porn as “the distribution of sexually graphic images of individuals without their consent.”⁶ This includes images either consensually obtained within the context of an intimate or trusted relationship, or originally obtained without the consent of the depicted individual through things like hidden cameras, phone hacking, or the recording of a sexual assault.⁷ This breach of trust and violent invasion of privacy, often by vengeful ex-partners or opportunistic hackers, “transforms unwilling individuals into sexual entertainment for strangers” by allowing the world to view the victim in the most intimate and personal lights imaginable.⁸

Terrifyingly, these images and videos can almost immediately “dominate the first several pages of ‘hits’ on the victim’s name in a search engine, as well as [be] emailed or otherwise exhibited to the victim’s family, employers, co-workers, and peers.”⁹ This cyber sexual assault can cause “public degradation, social isolation, and professional humiliation for the victims,” creating a “lasting digital stain . . . that is nearly impossible to fully erase.”¹⁰ These effects can be devastating, especially because many people engage in victim blaming and question why someone would put themselves in such a compromising position in the first place.¹¹ Needless to say, revenge porn can destroy relationships, ruin careers, and irreparably damage the psyche of the victim.

The modern world’s salacious interest in sexuality and the ever-present camera glued to the palm of every hand has made revenge porn increasingly common. This coupled with the accessibility of social media and other internet platforms has made the destruction of another’s life as easy as clicking a button. Every day there are new instances of revenge porn.¹² In Texas, a 19-year-old woman was blackmailed into having sex with three fifteen-year-olds after a former partner threatened to release an explicit video

5. CYBER CIVIL RIGHTS INITIATIVE, <https://www.cybercivilrights.org/welcome/> (last visited Feb. 7, 2020).

6. CYBER CIVIL RIGHTS INITIATIVE, <https://www.cybercivilrights.org/faqs/> (last visited Feb. 7, 2020).

7. *Id.*

8. *Id.*

9. *Id.*

10. *State v. VanBuren*, 214 A.3d 791, 795 (Vt. 2019) (citing Charlotte Alter, *‘It’s Like Having an Incurable Disease’: Inside the Fight Against Revenge Porn*, TIME, (June 13, 2017), <http://time.com/4811561/revenge-porn>).

11. Stephanie Thurrott, App Aims to End Revenge Porn, DOMESTIC SHELTERS, (Oct. 24, 2018), <https://www.domesticshelters.org/articles/technology/app-aims-to-end-revenge-porn>.

12. Charlotte Alter, *‘It’s Like Having an Incurable Disease’: Inside the Fight Against Revenge Porn*, TIME, (June 13, 2017), <http://time.com/4811561/revenge-porn>.

of them.¹³ In Pennsylvania, a young adult had “strange men” coming to her door after her ex-boyfriend posted images along with her address and an invitation to “come hook up.”¹⁴ In Illinois, a school superintendent in her 50s was fired after her ex-husband sent an explicit video of her to the school board.¹⁵ In Florida, a college employee, Holly Jacobs, found her likeness posted on nearly 200 porn sites, forcing her to change her name and leading to a diagnosis of depression and post-traumatic stress disorder.¹⁶ In the latter case, the victim “kept being rejected by police, the attorneys, [and] the FBI, because they kept saying there was nothing they could do.”¹⁷ This prompted her to start the Cyber Civil Rights Initiative and dedicate her time to helping others in similar situations.¹⁸

Pop culture is a notable hub for nonconsensual pornography. Not long ago, it changed the course of Paris Hilton’s career, and created Kim Kardashian’s. It made headlines when a hacker accessed the iCloud accounts of Jennifer Lawrence, Kate Upton, and other celebrities, spreading their nude photos throughout the world in what some call “Celebgate”¹⁹; it aggravated an intensely acrimonious split and custody battle between Rob Kardashian and Blac Chyna after he posted sexually charged images of her on his Instagram²⁰; and it forced Bella Thorne to release her own nude pictures before a hacker could first in an attempt to regain control of her life.²¹

Clearly, revenge porn has a large role in celebrity smear campaigns. However, pop culture celebrities are not the only public figures who have been affected by this devastating practice. In October 2019, photos of former United States Democratic Representative Katie Hill were leaked to two media outlets without her consent.²² Hill believes her estranged husband

13. KHOU Staff, *Katy teen charged with ‘revenge porn’*, KHOU 11 (Feb. 20, 2017), <https://www.khou.com/article/news/local/katy-teen-charged-with-revenge-porn/410219072>.

14. Alter, *supra* note 12.

15. Jake Russell, *Details emerge on superintendent’s firing*, MORRIS HERALD NEWS, (June 6, 2012), <https://www.morrisherald-news.com/2012/06/06/details-emerge-on-superintendents-firing/ams7p02/>.

16. Alter, *supra* note 12.

17. *Id.*

18. *Id.*

19. *Hacker Who Helped Leak Photos of Jennifer Lawrence and Kate Upton Pleads with Judge for Short Prison Sentence*, THE BLAST, (June 10, 2019), <https://theblast.com/c/jennifer-lawrence-kate-upton-hacker-sentencing>.

20. *Here Are Four Other Cases of Celebrity Revenge Porn*, BET (July 5, 2017), <https://www.bet.com/style/2017/07/05/blac-chyna-rob-kardashian-revenge-porn.html>.

21. Hollie Richardson, *Bella Thorne has shared nude photos “to take power back” from her revenge porn hacker*, STYLIST, <https://www.stylist.co.uk/life/bella-thorne-nude-photos-on-twitter-after-hacker/273535>, (last visited Mar. 15, 2020).

22. Aine Cain, *Former Rep. Katie Hill says the wave of harassment she faced after alleged revenge porn leak left her contemplating suicide*, BUSINESS INSIDER, (Dec. 7, 2019), <https://www.businessinsider.com/katie-hill-fallout-revenge-porn-leak-2019-12>.

actively leaked the photos, though he claims his computer was hacked.²³ Among other private things, these photos depicted the nude congresswoman engaging in intimate activities with a female subordinate,²⁴ a woman who reportedly was engaged in a “throuple” relationship with Hill and her husband.²⁵ Tabloids easily distributed the images through social media platforms like Facebook and Twitter by using “features intended to boost engagement and help publishers drive traffic to their websites.”²⁶

Hill was forced to resign following the leak.²⁷ During her resignation address, she described the essence of the destruction caused by revenge porn:

I’m leaving because of a misogynistic culture that gleefully consumed my naked pictures, capitalized on my sexuality and enabled my abusive ex to continue that abuse, this time with the entire country watching. . . Having private photos of personal moments weaponized against me has been an appalling invasion of my privacy.²⁸

Even months after the leak, DailyMail still has lightly censored versions of these pictures on its website.²⁹

Sexting: A Modern Trend

While the sending of explicit images may have once been considered taboo, there is a significant modern trend towards the acceptance of sharing intimate photos with intimate partners. In 2015, Pamela A. Gellar, a professor who runs the Women’s Health Psychology Lab at Drexel

23. Yelena Dzhanova, Dan Mangan, *Rep. Katie Hill’s husband claimed his computer was ‘hacked’ before her private photos appeared online*, report says, CNBC (Oct. 21, 2019), <https://www.cnbc.com/2019/10/31/rep-katies-hills-husband-claimed-his-computer-was-hacked.html>.

24. Josh Boswell, Martin Gould, Jennifer Van, *Shocking photos of Congresswoman Katie Hill are revealed showing off Nazi-era tattoo while smoking a bong, kissing her female staffer and posing nude on ‘wife sharing’ sites*, DAILY MAIL (Nov. 11, 2019), <https://www.dailymail.co.uk/news/article-7609835/Katie-Hill-seen-showing-Nazi-era-tattoo-smoking-BONG-NAKED.html>.

25. Jackie Salo, *Katie Hill admits her ‘throuple’ relationship was a bad idea*, N.Y. POST (Oct. 24, 2019), <https://nypost.com/2019/10/24/katie-hill-admits-her-throuple-relationship-was-a-bad-idea/>.

26. Caitlin Kelly, *Facebook’s Anti-Revenge Porn Tools Failed to Protect Katie Hill*, WIRED (Nov. 18, 2019), <https://www.wired.com/story/katie-hill-revenge-porn-facebook/>.

27. Dareh Gregorian, *Katie Hill Delivers fiery final speech on House floor*, NBC NEWS (Oct. 31, 2019), <https://www.nbcnews.com/politics/congress/rep-katie-hill-decries-dirtiest-gutter-politics-i-ve-seen-n1074841>.

28. *Id.*

29. Boswell, *supra* note 24.

University, conducted an online survey of 870 heterosexual adults.³⁰ These participants were recruited from the site Amazon Mechanical Turk and ranged from ages 18 to 82, with an average age of 35.³¹ The survey revealed that 88% of the participants had “sexted” at least once in their lives and 82% had done so in the past year.³² Further, 96% said they “endorsed the practice.”³³ Sexting is even more common in young adults, with nearly half of all people aged 18 to 26 having sent explicit photos of themselves and two-thirds having received them from someone else.³⁴

This trend is not just prevalent in adults.³⁵ In 2009, A Pew Research Center study found that 4% of teens aged 12 to 17 had sent a sexually explicit photo, while 15% had received one.³⁶ However, a 2018 *JAMA Pediatrics* study of 100,380 participants found these numbers had increased to 14.8% and 27.4%, respectively.³⁷ This study also found that the “prevalences of forwarding a sext without consent and having a sext forwarded without consent were 12.0% and 8.4%, respectively.”³⁸

With the increased acceptance of sexting comes an increased abuse of power regarding the sexually explicit depictions shared. A 2016 report from the Data & Society Research Institute and the Center for Innovative Public Health Research offers the first national statistics on the prevalence of nonconsensual pornography.³⁹ The study found that “4% of U.S. internet users—roughly 10.4 million Americans—have been threatened with or experienced the posting of explicit images without their consent.”⁴⁰

30. Sasha Harris-Lovett, *In survey, 88% of U.S. adults said they had sexed and 96% of them endorsed it*, L.A. TIMES (Aug. 8, 2015), <https://www.latimes.com/science/science-now/la-sci-sn-sexting-sexual-satisfaction-20150807-story.html>.

31. *Id.*

32. *Id.*

33. *Id.*

34. Asia A. Eaton, Dr. Holly Jacobs, Yanet Ruvalcaba, *2017 Nationwide Online Study of Nonconsensual Porn Victimization and Perpetration*, CYBER CIVIL RIGHTS INITIATIVE, (June 2017), <https://www.cybercivilrights.org/wp-content/uploads/2017/06/CCRI-2017-Research-Report.pdf>.

35. See Bruce Y. Lee, *Here Is How Much Sexting Among Teens Has Increased*, FORBES (Sept. 8, 2018), <https://www.forbes.com/sites/brucelee/2018/09/08/here-is-how-much-sexting-among-teens-has-increased/#3715b8b236f1>.

36. Amanda Lenhart, *Teens and Sexting*, PEW RESEARCH CENTER (Dec. 15, 2009), https://www.pewresearch.org/internet/wp-content/uploads/sites/9/2009/12/pip_teens_and_sexting.pdf.

37. Sheri Madigan et al., *Prevalence of Multiple Forms of Sexting Behavior Among Youth*, JAMA PEDIATRICS (Apr. 2018), <https://jamanetwork.com/journals/jamapediatrics/fullarticle/2673719>.

38. *Id.*

39. Amanda Lenhart, Michele Ybarra, Myeshia Price-Feeny, *Nonconsensual Image Sharing: One in 25 Americans Has Been A Victim of “Revenge Porn”*, DATA & SOCIETY RESEARCH INSTITUTE, (Dec. 13, 2016), <https://datasociety.net/blog/2016/12/13/nonconsensual-image-sharing/>.

40. *Id.*

Additionally, a 2017 study done by Cyber Civil Rights Initiative, Inc. and Florida International University, Department of Psychology was the first ever nation-wide study to profile the rates of nonconsensual pornography.⁴¹ The study found that 8% of 3,044 participants were victims of revenge porn, while 4.8% had been threatened with it.⁴² Nine-point-two percent of the women who participated were actual victims, compared to 6.6% of the men.⁴³ Further, 5.2% actually admitted having perpetrated revenge porn by sharing explicit images of someone without their consent.⁴⁴ Three-point-four percent of the women participants admitted to sharing revenge porn, while 7.2% of the men did.⁴⁵ This shows that no gender is safe from the devastation nonconsensual pornography can cause and no gender is immune from perpetuating it.

Social Media's Role in Perpetuating Revenge Porn

While some of these private depictions are shared by text and may remain off the internet, others “find their way to porn sites, where ‘revenge’ is its own genre.”⁴⁶ However, most often they are posted to social media, where all the victim’s friends and family can see them.⁴⁷ According to a leaked document obtained by *The Guardian*, Facebook had to assess nearly 54,000 reports of revenge porn and “sextortion” in January 2017 alone, with 33 of these cases involving children.⁴⁸ In that same month, Facebook had to disable more than 14,000 accounts related to the allegations.⁴⁹ However, because Facebook “relies on users to report most abusive content . . . the real scale of the problem could be much greater.”⁵⁰

While Facebook recently touted the power of its automated systems to combat the problem of nonconsensual pornography, in the wake of the Katie Hill scandal “both [Facebook and Twitter] seemed unaware of what was happening on their platforms, or failed to enforce their own policies.”⁵¹ In response to the Katie Hill leak, Twitter blocked posting of the original DailyMail.com link, “warning users that the link was ‘potentially harmful or

41. Eaton, *supra* note 34, at 4.

42. *Id.* at 11.

43. *Id.* at 13.

44. *Id.* at 15.

45. *Id.*

46. Alter, *supra* note 12.

47. *Id.*

48. Nick Hopkins, Olivia Solon, *Facebook flooded with ‘sextortion’ and ‘revenge porn’, files reveal*, THE GUARDIAN, (May 22, 2017), <https://www.theguardian.com/news/2017/may/22/facebook-flooded-with-sextortion-and-revenge-porn-files-reveal>.

49. *Id.*

50. *Id.*

51. Kelly, *supra* note 26.

associated with a violation of Twitter’s Terms of Service.”⁵² However, while that specific link might not be shareable on the social media platform, “DailyMail.com used a URL shortener for its tweet . . . [which] was able to [be] post[ed] just fine.”⁵³ Regardless of the preventative steps taken by social media platforms, the photos “will indelibly remain on the rest of the internet” especially because “they seeped across networks. . . , platforms and forums as people republished the images . . . , turned them into memes or used them as a backdrop on their YouTube show[s].”⁵⁴

Two days after Katie Hill’s resignation, Facebook published a post titled “Making Facebook a Safer, More Welcoming Place for Women.”⁵⁵ The post highlighted the platform’s use of “cutting edge technology” to detect nonconsensual pornography and to even block it from being posted in the first place.⁵⁶ The company also emphasizes its “zero tolerance” policy for nonconsensual pornography.⁵⁷ However, despite DailyMail’s clear violation of this policy, Facebook has taken no action against it.⁵⁸ This emphasizes the permanence of these privacy violations and the lack of an effective means to rectify these detrimental invasions of privacy.

Since 2017, Facebook has attempted to implement more aggressive tactics to battle nonconsensual pornography.⁵⁹ This action was sparked when investigations found that thousands of former and current servicemen were sharing intimate photos of women without their knowledge in a private Facebook group called Marines United.⁶⁰ Despite Facebook banning the group, new ones kept replacing it.⁶¹ In response, Facebook instituted photo-matching technology to prevent people from reuploading images after they have been reported and removed.⁶² That same year, Facebook “piloted a program in which anyone could securely share their nude photos with Facebook to preemptively hash and automatically block” them from being posted.⁶³ Facebook also said it would implement machine learning and artificial intelligence to proactively detect compromising images being shared without permission on both Facebook and Instagram, which could

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.*; see also FACEBOOK, <https://about.fb.com/news/2019/03/detecting-non-consensual-intimate-images/> (last visited Mar. 3, 2020).

help protect people who are unaware their photos had been leaked or are otherwise unable to report it.⁶⁴

However, given the platform's size, even with these safeguards almost half a million instances are not detected by the algorithms before they get reported and there is no way to gauge how much content does not get reported at all.⁶⁵ Furthermore, "according to NBC News, the company receives around half a million reports [of nonconsensual pornography] per month."⁶⁶ Even with all these policies and technology in place, there is no way to completely prevent these images from circulating the internet. This is the precise reason the United States needs a strong federal law prohibiting nonconsensual pornography, which would act as a deterrent from disseminating these compromising depictions in the first place.

A Guise of Protection: Means of Redress for Nonconsensual Pornography Victims

In 2004, New Jersey became the first state to take a stand against perpetrators of revenge porn.⁶⁷ California followed suit in 2013.⁶⁸ Other states then began taking steps towards drafting anti-revenge porn bills as well.⁶⁹ However, even after sixteen years of progress, not every state has adequate remedies for the destruction revenge porn can cause and there is a clear absence of support at the federal level.

In general, there are four means of redress for a victim of revenge porn, the first and most effective being a criminal complaint.⁷⁰ Currently, forty-six states and Washington DC have criminal laws with laws pending in Wyoming, Massachusetts, and South Carolina.⁷¹ A criminal complaint is the most certain way to prevent further harassment and put pressure on the offender to release the images.⁷² However, these complaints do not always result in an arrest.⁷³ Carrie Goldberg, an attorney who founded a New York based victim's rights law firm explained, "[h]aving the law on the books, though, is one piece of the puzzle. It's now on our law enforcers—cops,

64. FACEBOOK, <https://about.fb.com/news/2019/03/detecting-non-consensual-intimate-images/> (last visited Mar. 3, 2020).

65. Kelly, *supra* note 26.

66. *Id.*

67. Tal Kopan, *States criminalize 'revenge porn'*, POLITICO (Oct. 30, 2013), <https://www.politico.com/story/2013/10/states-criminalize-revenge-porn-099082>.

68. *Id.*

69. *Id.*

70. Michelen, *supra* note 2.

71. *Id.*

72. *Id.*

73. *Id.*

detectives, prosecutors—and judges to take complaints seriously. . . The law is meaningless if our public servants don’t use it.”⁷⁴

Further, there are many issues in bringing these types of claims to the authorities because the laws are so new.⁷⁵ Victim blaming is also an extremely pervasive problem and police officers have been known to be judgmental in these very sensitive situations, especially in more conservative jurisdictions.⁷⁶ Often times the police department will refer claims of this nature to detectives who deal with sexual assaults who may be more comforting than the regular garden variety police officer.⁷⁷ However, even then, “police are notorious for not investigating allegations of sexual abuse.”⁷⁸

In states without a precise ban on revenge porn, the victim may be able to file anti-stalking or anti-harassment claims.⁷⁹ Sharing the same images or videos multiple times will likely create a harassment claim.⁸⁰ Police officers are generally more comfortable with these statutes as they have been in place for many more years than revenge porn laws.⁸¹ However, harassment laws generally require multiple offenses before law enforcement can take action.⁸² Therefore, if the offender only posts the image one time, harassment laws may not apply and the victim will be left without recourse.⁸³ Additionally, harassment laws are often intent based.⁸⁴ In other words, if the disseminator can show he or she did not actually intend harm, he or she will likely evade conviction.⁸⁵

The second means of redress is a civil complaint or Digital Millennium Copyright Act (“DMCA”) take down letter.⁸⁶ A civil complaint general comes in the form of a copyright infringement action.⁸⁷ Copyright law is governed by a federal statute and therefore applies in all states.⁸⁸ Generally,

74. April Glaser, *New York’s New Revenge Porn Bill Is a Bittersweet Victory*, SLATE, (July 25, 2019, 3:52 PM), <https://slate.com/technology/2019/07/revenge-porn-law-new-york.html>.

75. Michelen, *supra* note 2.

76. *Id.*

77. *Id.*

78. Glaser, *supra* note 76.

79. Michelen, *supra* note 2.

80. *Id.*

81. *Id.*

82. See Cara Bayles, *With Online Revenge Porn the Law Is Still Catching Up*, LAW 360, (Mar. 1, 2020), https://www.law360.com/access-to-justice/articles/1247863/with-online-revenge-porn-the-law-is-still-catching-up?nl_pk=9df17e8b-3520-4222-a1de-ff8a24eda7b1&utm_source=newsletter&utm_medium=email&utm_campaign=access-to-justice.

83. *See id.*

84. *See* Glaser, *supra* note 76.

85. *See id.*

86. Michelen, *supra* note 2.

87. *Id.*

88. *Id.*

in revenge porn claims the victim is the person who took the explicit photo of him or herself.⁸⁹ In the context of copyright, the person who takes the image owns the rights to that image.⁹⁰ Therefore, if the victim took the video or picture, they own the copyright even if it was taken on or found on someone else's phone: whoever mechanically pushes the record button owns the content.⁹¹ If the victim did not take the image, it is possible to argue joint ownership of the content because they are the subject of it; though, that is not always successful.⁹² If a victim can make a successful copyright claim, he or she can obtain damages for sharing the copyrighted image.⁹³

However, in order to make a copyright claim the image must be registered with the Copyright Office⁹⁴ and even if there is infringement, the images may still remain on the internet or in the hands of others. Additionally, "copyright leaves little recourse for images that aren't selfies" and it also creates a different problem.⁹⁵ In the name of transparency, "Google posts copyright complaints to its Lumen website, an index of legal claims against the tech giant."⁹⁶ There, it sometimes names the owner of the image as well as the site where it appeared.⁹⁷ Therefore, while a search for a victim's name might not yield the image itself, it could very well uncover the report.⁹⁸ This can still have a substantial effect on the victim's life, especially in terms of public perception.

If the victim has copyright rights, he or she can submit a DMCA take down letter. President Bill Clinton enacted DMCA in 1998.⁹⁹ Its purpose is to "balance the interests of copyright owners and users and look into any sort of copyright infringement that surface in the digital world."¹⁰⁰ In doing so, it protects websites that allow third parties to post content on the site.¹⁰¹ In order for a website to enjoy this limited liability protection it must be DMCA compliant.¹⁰² This means that the website must have designated an agent who:

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

95. Bayles, *supra* note 82.

96. *Id.*

97. *Id.*

98. *Id.*

99. *The Ultimate Guide to Digital Millennium Copyright Act*, COPYRIGHTED (May 15, 2018), <https://www.copyrighted.com/blog/dmca-guide>.

100. *Id.*

101. Oscar Michelen, Attorney, Cuomo LLC, Representing a Revenge Porn Victim Webinar (Dec. 26, 2019).

102. *Id.*

receive[s] notifications of claimed infringement. . . , by making available through its service, including on its website in a location accessible to the public, and by providing to the Copyright Office, substantially the following information: (A) the name, address, phone number and electronic mail address of the agent [and] (B) other contact information which the Register of Copyrights may deem appropriate.¹⁰³

The infringement notices received by the registered agent are known as take down notices because the site is required to expeditiously “take down” or block access to the potential infringement upon receipt of proper notification.¹⁰⁴ Sites like “Tumblr and Instagram sometimes grant take down requests and Google considers requests to hide inappropriate pages from search results, but those can take weeks to process.”¹⁰⁵ Regardless, a DMCA compliant website is entitled to a takedown notice before a lawsuit can begin.¹⁰⁶ The site must then contact the poster and explain there is potential copyright infringement.¹⁰⁷ The poster will have a few days to respond and if they do not then the site will not repost the content.¹⁰⁸

Unfortunately, this does not mean that the poster cannot upload the content by other means, whether by using a different username or simply reposting it to the same or a different site. If a site is not DMCA compliant then the site itself can be listed as a defendant and the victim can collect damages from it through vicarious copyright infringement.¹⁰⁹ Additionally, if a website itself posts the images then there is no DMCA protection and the website can be listed as a defendant in a lawsuit.¹¹⁰ This is often the case with things like celebrity sex tapes when the website itself posts the tape in order to charge viewers.¹¹¹

However, even if the victim or victim’s attorney sends a takedown letter to a DMCA compliant website’s agent, there are no guarantees.¹¹² While most large sites, such as Pornhub and the like, will remove the image or video if it receives a notice of copyright infringement, many do not.¹¹³ Many sites use foreign DMCA agents in countries like Russia or China, who simply will

103. 17 U.S.C § 512(c)(2).

104. See Michelen, *supra* note 2; COPYRIGHT OFFICE, THE DIGITAL MILLENNIUM COPYRIGHT ACT OF 1998 U.S. COPYRIGHT OFFICE SUMMARY at 11 (1998), *also available at* <https://www.copyright.gov/legislation/dmca.pdf>.

105. Bayles, *supra* note 82.

106. Michelen, *supra* note 2.

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

not comply with the letters, leaving the content available for the masses.¹¹⁴ Moreover, while “you can encourage these companies to do the right thing and to have policies in place and resources dedicated to taking down [these] kind[s] of materials. . . the viral nature of especially salacious material [means] by the time you take it down. . . it’s too late.”¹¹⁵ This leaves an already vulnerable victim with little chances of content removal or image rehabilitation.

State rights to privacy and publicity are other available remedies if the victim depicted in the content is recognizable.¹¹⁶ The right to privacy is implicated if the victim did not consent to or know about images.¹¹⁷ It is invoked because the victim had an expectation of privacy or was in an intimate situation with a right to privacy, which was breached when images were taken without consent.¹¹⁸ In this situation, the victim can make a claim against the person and the site itself.¹¹⁹ It does not matter if the victim is a public figure or average individual; everyone is entitled to privacy protection.¹²⁰ However, there is no way to “legally compel a tech company to take down images that violate a plaintiff’s privacy rights.”¹²¹ Websites enjoy broad immunity under the Communications Decency Act, which created the legal framework of the internet.¹²² Under the 1996 federal law, even websites specializing in revenge porn are not liable for the posts of their users, unless there is copyright infringement.¹²³ If the offending video or image is a selfie, victims can assert their intellectual property rights over the work.¹²⁴ If it is not, making a claim is more challenging.

The right to publicity is the right of a person to protect their name or likeness from being exploited without consent or compensation.¹²⁵ It prevents the “unauthorized commercial use of an individual’s name, likeness, or other recognizable aspects of one’s persona” and “it gives an individual the exclusive right to license the use of their identity for commercial promotion.”¹²⁶ This can come into play if the content is posted on a site that has advertisements and, therefore, is the commercial

114. *Id.*

115. Kelly, *supra* note 26.

116. Michelen, *supra* note 2.

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

121. Bayles, *supra* note 82.

122. *Id.*

123. *Id.*

124. *Id.*

125. Michelen, *supra* note 2.

126. CORNELL LAW SCHOOL LEGAL INFORMATION INSTITUTE, <https://www.law.cornell.edu/wex/publicity> (last visited Mar. 3, 2020).

exploitation of the person's likeness.¹²⁷ Even if the victim's face is not shown an attorney can argue their likeness is depicted, especially if there are identifiable characteristics such as tattoos.¹²⁸

The final remedy is to contact the subject site directly, as the content likely violates its terms of service.¹²⁹ Most terms of service will prevent people from posting others' content¹³⁰ and some will prohibit nudity or other sexually graphic images. Sometimes a website will even say they will vet the images posted to the site.¹³¹ If a website affirmatively states it will review content before posting it, then there is no DMCA protection for the site and it can be listed as a defendant in a lawsuit.¹³² Further, generally there will be harassment terms or other terms regarding offensive material.¹³³ In these cases, the victim or victim's attorney should send a letter to the site with screen shots of the material and an explanation of how the terms are violated in an effort to get the content removed from the site,¹³⁴ although this unfortunately does not always result in removal of the images.

An Analysis of Revenge Porn Laws State-by-State

Some states have laws criminalizing revenge porn. In New Jersey, nonconsensual pornography is a crime, regardless of whether it's accomplished by an ex-partner or stranger.¹³⁵ New Jersey crimes have degrees from first to fourth, with fourth being the least serious, but still a felony offense.¹³⁶ Under New Jersey Statute 2C:14-9, an actor commits a revenge porn in the fourth degree if:

knowing that he is not licensed or privileged to do so, he photographs, films, videotapes, records, or otherwise reproduces in any manner, the image of the undergarment-clad intimate parts of another person, without that person's consent and under circumstances in which a reasonable person would not expect to have his undergarment-clad intimate parts observed.¹³⁷

127. Michelen, *supra* note 2.

128. *Id.*

129. *Id.*

130. E.g., FACEBOOK, <https://www.facebook.com/terms.php> (last visited Mar. 3, 2020); INSTAGRAM, <https://www.instagram.com/about/legal/terms/before-january-19-2013/> (last visited Mar. 3, 2020); TWITTER, <https://twitter.com/en/tos> (last visited Mar. 3, 2020).

131. Michelen, *supra* note 2.

132. *Id.*

133. *Id.*

134. *Id.*

135. England, *supra* note 1.

136. THE TORMEY LAW FIRM, LLC, <https://www.morristowncriminallaw.com/fourth-degree-crimes-in-new-jersey-penalties/> (last visited Feb. 20, 2020).

137. N.J. Stat. Ann. § 2C:14-9(b)(2).

Further, an actor commits nonconsensual pornography in the third degree if:

knowing that he is not licensed or privileged to do so, he photographs, films, videotapes, records, or otherwise reproduces in any manner, the image of another person whose intimate parts are exposed or who is engaged in an act of sexual penetration or sexual contact, without that person's consent and under circumstances in which a reasonable person would not expect to be observed¹³⁸

or if:

knowing that he is not licensed or privileged to do so, he discloses any photograph, film, videotape, recording or any other reproduction of the image. . . of: (1) another person who is engaged in an act of sexual penetration or sexual contact; (2) another person whose intimate parts are exposed; or (3) another person's undergarment-clad intimate parts, unless that person has consented to such disclosure.¹³⁹

Accordingly, even if the individual depicted consented to the recording, it is still a crime to post the recording without that person's additional consent to do so.¹⁴⁰ Revenge porn is considered a criminal invasion of privacy under New Jersey law.¹⁴¹ A person commits this crime by intentionally observing, recording, and/or disclosing the recording of another individual's intimate parts or sexual conduct without the individual's consent or doing so when the individual observed or recorded has a reasonable expectation of privacy.¹⁴²

Criminal invasion of privacy and distribution of nonconsensual pornography are both serious crimes under New Jersey law.¹⁴³ Those convicted may be subject to fines, prison time or both.¹⁴⁴ Anyone who photographs, videotapes or otherwise records the sexual conduct or intimates parts of another without their consent may be sentenced to a fixed prison term between three and five years.¹⁴⁵ They also may be ordered to pay a fine

138. N.J. Stat. Ann. § 2C:14-9(b)(1).

139. N.J. Stat. Ann. § 2C:14-9(c).

140. England, *supra* note 1.

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.*

up to \$15,000.¹⁴⁶ Similarly, a person who shares these recordings may also be subject to a prison term between three and five¹⁴⁷ years and ordered to pay a fine not to exceed \$15,000.¹⁴⁸ A victim may also be entitled to civil damages for invasion of privacy, in addition to the criminal penalties for the perpetrator.¹⁴⁹ Victims may seek actual damages of at least \$1,000 per violation, attorney fees, as well as punitive damages.¹⁵⁰

California has specifically outlawed revenge porn in its penal code as disorderly conduct, which is a misdemeanor.¹⁵¹ California Penal Code Section 647(j)(4)(A) explicitly states:

A person who intentionally distributes the image of the intimate body part or parts of another identifiable person, or an image of the person depicted engaged in an act of sexual intercourse, sodomy, oral copulation, sexual penetration, or an image of masturbation by the person depicted or in which the person depicted participates, under circumstances in which the persons agree or understand that the image shall remain private, the person distributing the image knows or should know that distribution of the image will cause serious emotional distress, and the person depicted suffers that distress.¹⁵²

Section 647(j)(4)(B) further explains that “a person intentionally distributes an image described in subparagraph (A) when that person personally distributes the image, or arranges, specifically requests, or intentionally causes another person to distribute that image.”¹⁵³ Accordingly, California prosecutors can charge an individual with a misdemeanor offense if they think they can prove, beyond a reasonable doubt, the defendant intentionally distributed an image of the intimate bodily parts of another identifiable person, or an image of another identifiable person engaged in a sexual act.¹⁵⁴ They must also prove beyond a reasonable doubt that the persons involved agreed or understood that the image was to remain private and that the individual distributing knew or should have known that

146. N.J. Stat. Ann. § 2C:43-3(b)(1).

147. England, *supra* note 1.

148. N.J. Stat. Ann. § 2C:43-3(b)(1).

149. England, *supra* note 1; N.J. Stat. Ann. § 2A:58D-1.

150. England, *supra* note 1.

151. Deborah C. England, *Revenge Porn Laws in California*, CRIMINAL DEFENSE LAWYER, <https://www.criminaldefenselawyer.com/resources/revenge-porn-laws-california.htm> (last visited Mar. 1, 2020); Cal. Penal Code § 647(j)(4)(A).

152. Cal. Penal Code § 647(j)(4)(A).

153. Cal. Penal Code § 647(j)(4)(B).

154. England, *supra* note 155.

distributing the image would cause serious emotional distress.¹⁵⁵ Further, there must be actual harm, generally shown by the person depicted suffering serious emotional distress.¹⁵⁶

Punishment for a misdemeanor offense in California is a prison term in a county jail not exceeding six months, or by a fine not to exceed \$1,000, or both.¹⁵⁷ A subsequent violation is punishable by a prison term in a county jail not exceeding one year, by a fine not exceeding \$2,000 or by both.¹⁵⁸ This is true whether or not the victim was a minor at the time of the offense.¹⁵⁹ The also code explicitly states “subdivision [(j)] does not preclude punishment under any section of law providing for greater punishment,”¹⁶⁰ therefore, punishments may be greater depending on the circumstances.

California harassment laws can also lead to criminal prosecutions. California Penal Code Section 653.2(a) states:

(a) Every person who, with intent to place another person in reasonable fear for his or her safety, or the safety of the other person’s immediate family, by means of an electronic communication device, and without consent of the other person, and for the purpose of imminently causing that other person unwanted physical contact, injury, or harassment, by a third party, electronically distributes, publishes, e-mails, hyperlinks, or makes available for downloading, personal identifying information, including, but not limited to, a digital image of another person, or an electronic message of a harassing nature about another person, which would be likely to incite or produce that unlawful action, is guilty of a misdemeanor. . .¹⁶¹

The code further defines harassment as “knowing and willful course of conduct directed at a specific person that a reasonable person would consider as seriously alarming, seriously annoying, seriously tormenting, or seriously terrorizing the person and that serves no legitimate purpose.”¹⁶²

In applying this law to nonconsensual pornography, anyone who uses an “electronic communication device,” such as a cell phone or computer, can be charged with a misdemeanor in California if they distribute, send, post, or otherwise disclose any personal identifying information, including a digital

155. *Id.*

156. *Id.*

157. Cal. Penal Code § 19.

158. Cal. Penal Code § 647(k)(1).

159. Cal. Penal Code § 647(k)(2).

160. Cal. Penal Code § 647(j)(5).

161. Cal. Penal Code § 653.2(a).

162. Cal. Penal Code § 653.2(c)(1).

image, of another person without consent; or to send a harassing message.¹⁶³ The law also applies when the distribution or sending would likely incite or produce harassment by a third party.¹⁶⁴ In order to convict under this law, the prosecution must prove the defendant intended to place another person in reasonable fear for his or her own safety, or that of an immediate family member.¹⁶⁵ This offense is punishable by up to one year in a county jail, by a fine of not more than \$1,000, or by both that fine and imprisonment.¹⁶⁶

Additionally, if the perpetrator gained access to the content through unauthorized access to the victim's computer, they can be charged with a felony under California Penal Code Section 502.¹⁶⁷ Anyone who knowingly and without permission accesses a computer, computer system, or computer network, or takes or copies any data, including images, from the computer, system, or network may be charged with a felony in California.¹⁶⁸ A conviction is punishable by imprisonment "for 16 months, or two or three years and a fine not exceeding ten thousand dollars (\$10,000)."¹⁶⁹

Moreover, the District of Columbia has explicitly outlawed revenge porn in the Criminalization of Non-Consensual Pornography Act of 2014.¹⁷⁰ Under this act, a person commits unlawful disclosure when they:

knowingly disclose one or more sexual images of another identified or identifiable person when: (1) The person depicted did not consent to the disclosure of the sexual image; (2) There was an agreement or understanding between the person depicted and the person disclosing that the sexual image would not be disclosed; and (3) The person disclosed the sexual image with the intent to harm the person depicted or to receive financial gain.¹⁷¹

A person who violates this law "shall be guilty of a misdemeanor and, upon conviction, shall be fined not more than [\$1,000] imprisoned for not more than 180 days, or both."¹⁷² A person commits first-degree unlawful publication if they publish the materials explained in unlawful disclosure.¹⁷³

163. England, *supra* note 155.

164. *Id.*

165. *Id.*

166. Cal. Penal Code § 653.2(a).

167. England, *supra* note 155; Cal. Penal Code § 502.

168. Cal. Penal Code § 502.

169. England, *supra* note 155; Cal. Penal Code § 502(d)(1).

170. Criminalization of Non-Consensual Pornography Act of 2014.

171. Criminalization of Non-Consensual Pornography Act of 2014 § 3(a).

172. Criminalization of Non-Consensual Pornography Act of 2014 § 3(b); *See also* D.C. 42 Official Code § 22-3571.01(b)(4).

173. Criminalization of Non-Consensual Pornography Act of 2014 § 4(a).

This results in a felony conviction and fine “not more than [\$12,500], imprison[ment] for not more than 3 years, or both.”¹⁷⁴

In New York there is both a state law and New York City specific law that protects revenge porn victims.¹⁷⁵ In New York City it is a criminal and civil offense to disclose or threaten to disclose an intimate image of another person with the intent to cause harm.¹⁷⁶ Violation of this law is punishable by “up to one year in jail and a fine of up to \$1,000 in criminal court and could result in financial compensation and a legal mandate that the perpetrator stop the abuse in civil court.”¹⁷⁷

New York Legislature passed the state bill in February 2019, which was signed by Governor Andrew Cuomo in July 2019.¹⁷⁸ Under the state penal law:

[a] person is guilty of unlawful dissemination or publication of an intimate image when: (a) with intent to cause harm to the emotional, financial or physical welfare of another person, he or she intentionally disseminates or publishes a still or video image of such other person, who is identifiable from the still or video image itself or from information displayed in connection with the still or video image, without such other person’s consent, which depicts: (i) an unclothed or exposed intimate part of such other person; or (ii) such other person engaging in sexual conduct. . . with another person; and b) such still or video image was taken under circumstances when the person depicted had a reasonable expectation that the image would remain private and the actor knew or reasonably should have known the person depicted intended for the still or video image to remain private, regardless of whether the actor was present when the still or video image was taken.¹⁷⁹

In New York it is both a criminal and civil offense to disclose an intimate image of another person with the intent to cause harm.¹⁸⁰ The law established revenge porn as a class A misdemeanor.¹⁸¹ Violation is

174. Criminalization of Non-Consensual Pornography Act of 2014 § 4(b); *See also* D.C. 42 Official Code § 22-3571.01(b)(6).

175. Michelen, *supra* note 2.

176. WOMEN’S JUSTICE NOW, <https://nownyc.org/womens-justice-now/issues/know-your-rights-revenge-porn/> (last visited Mar. 29, 2020).

177. *Id.*

178. Joseph Spector, *Revenge porn is now criminal in New York: Four changes you need to know*, DEMOCRAT & CHRONICLE, (July 23, 2019, 11:26 AM), <https://www.democratandchronicle.com/story/news/politics/albany/2019/07/23/revenge-porn-now-criminal-new-york-four-changes-you-need-know/1803210001/>.

179. NY Penal Law § 245.15

180. Women’s Justice Now, *supra* note 185.

181. NY Penal Law § 245.15.

punishable by up to one year in jail or three years' probation and a fine of up to \$1,000 in criminal court.¹⁸² In civil court, the victim may be awarded financial compensation and the perpetrator may be legally required to cease their actions.¹⁸³ New York law can apply if either the victim or the perpetrator is located in the state.¹⁸⁴ Victims have up to two years to pursue criminal charges and up to three years after an image was shared to bring a case in civil court, or one year from the date of discovery, whichever is later.¹⁸⁵

The New York state law has many more protections than other state statutes. New York state is the first and only state to enable victims to seek a court order to remove content from websites which host or transmit the challenged content.¹⁸⁶ Additionally, New York employers cannot discriminate against an employee who has been a victim of nonconsensual pornography.¹⁸⁷ Furthermore, "if law enforcement is moving too slowly, . . . a victim can get an order or protection from family court."¹⁸⁸ Thus in addition to fines and prison time, there are additional safeguards that actually help victims move on from revenge porn.

An Analysis of Revenge Porn Laws Case-by-Case

While there are many different laws alluding to nonconsensual pornography, there are very few published cases on the matter. In states with revenge porn laws often perpetrators raise First Amendment challenges to the law under which they are charged. In the Supreme Court of Vermont case *State v. VanBuren* the defendant was charged with violating a nonconsensual pornography statute and moved to dismiss the charge on First Amendment grounds.¹⁸⁹ There, the complainant contacted police after finding naked pictures of herself on a Facebook account.¹⁹⁰ When asked to remove the images, the defendant threatened to contact the victim's employer and "get revenge" for sending the images to whom she claimed was her significant other.¹⁹¹ While the court found that revenge porn did not fit into a First Amendment categorical exception like obscenity, it did find that the law survived strict scrutiny.¹⁹²

182. Women's Justice Now, *supra* note 185.

183. *Id.*

184. *Id.*

185. *Id.*

186. *Id.*; see also Glaser, *supra* note 76.

187. Glaser, *supra* note 76.

188. *Id.*

189. *VanBuren*, 214 A.3d at 791.

190. *Id.* at 796.

191. *Id.* at 796-77.

192. *Id.* at 800.

The court held there was a compelling government interest in preventing the significant intrusions on individual privacy caused by revenge porn because of the substantial injuries that revenge porn can cause.¹⁹³ Additionally, it held the law is narrowly tailored to that interest because it clearly and specifically outlines what constitutes a violation and is not otherwise overbroad.¹⁹⁴ Further, it “does not penalize more speech than necessary to accomplish its aim, and does not risk chilling protected speech on matters of public concern.”¹⁹⁵ Therefore, the law did not violate the First Amendment and was held to be constitutional.¹⁹⁶

In contrast, in *State v. Casillas*, the Court of Appeals of Minnesota held a state nonconsensual pornography statute did violate the First Amendment.¹⁹⁷ There, the defendant was charged with felony nonconsensual dissemination of private sexual images after the victim reported the defendant obtained and shared private images of her with another individual without her consent.¹⁹⁸ The court explained that because the law lacked an “intent-to-harm requirement” and instead used negligence as mens rea it was overbroad.¹⁹⁹ The law required that the perpetrator “knows or reasonably should know that the person depicted in the image does not consent to dissemination.”²⁰⁰ The court explained that this meant a person could be convicted even if he or she did not actually know that the person depicted in the image did not consent to dissemination.²⁰¹ Additionally, the law did not require proof the disseminator caused or intended a specific harm.²⁰² The court reasoned that the statute’s “harm-causing and intent-to-harm elements [did] not limit the expressive conduct proscribed by the statute; they merely determine[d] the level of criminality assigned to expressive conduct within the statute’s reach.”²⁰³ Thus, it held the law covered a wide range of expressive conduct and was, therefore, unconstitutional as overbroad.²⁰⁴ Accordingly, despite the defendant’s clear violation of the law, his conviction was overturned and he was released from prison.²⁰⁵

It’s likely the Minnesota law’s negligence mens rea was aimed at protecting individuals whose images were shared for entertainment purposes

193. *Id.* at 810, 811.

194. *See id.* at 812-13.

195. *Id.* at 814.

196. *Id.*

197. *State v. Casillas*, 938 N.W.2d 74, 77 (Minn. Ct. App. 2019).

198. *Id.*

199. *Id.*

200. *Id.* at 81.

201. *Id.* at 82.

202. *Id.*

203. *Id.*

204. *Id.*

205. *Id.* at 91.

rather than for revenge. This is a critical area in need of protection as the victim still suffers just as much as those who are maliciously targeted. They are still at risk for losing employment opportunities, facing social scrutiny, and dealing with the mental and economic hardships that come from revenge porn. Additionally, there should be no need to create a distinction between intent-to-cause harm and actual harm. If there is harm done to the victim, whether it's emotional, social or financial, there should be an adequate means of recovery. Courts should not turn a blind eye just because a disseminator of these private images uses them as badge of honor rather than a sword.

A Proposal for Greater Protection of Nonconsensual Pornography Victims

The United States needs a federal law to protect revenge porn victims. The majority of states have taken the initiative to generate laws with criminal implications and the prospect of fines. However, these punishments generally do not match the damage done. Many states impose fines up to a mere \$2,000 including Alaska, Maine, North Dakota and South Dakota.²⁰⁶ Others impose even less severe fines like California, Delaware, Florida, Michigan, New Mexico, and Oklahoma.²⁰⁷ In eleven states the offense can only be charged as a felony and in seventeen it can only be charged as a misdemeanor.²⁰⁸ Moreover, in states like New York, which treat nonconsensual pornography more like a harassment claim, the intent of the perpetrator is the defining element.²⁰⁹ This means that in order to bring a lawsuit, the victim must prove that the person who published or shared the image did so with the explicit purpose of harassing, alarming or annoying the victim.²¹⁰ Therefore, those who share the image with the purpose of entertainment go uncharged. Additionally, not every statute has a civil cause of action, leaving remedies in the hands of law enforcement.²¹¹ Furthermore, the Communications Decency Act can block victims from filing civil claims for emotional distress, invasion of privacy and defamation, which they would ordinarily be entitled to because it protects certain elements of free speech.²¹²

206. Mallory King, *Revenge Porn Laws by State*, TRAVERSE LEGAL, (July 25, 2017), <https://www.traverselegal.com/blog/revenge-porn-laws-by-state/>.

207. *Id.*

208. Bayles, *supra* note 82.

209. Glaser, *supra* note 76.

210. *Id.*

211. Bayles, *supra* note 82.

212. *Id.*

This is why many plaintiff attorneys want to see a federal law criminalizing nonconsensual pornography and offering plaintiffs a civil cause of action.²¹³ This would not only allow for standardization and uniformity, but “would ease the jurisdictional challenges that frequently occur when a victim and a perpetrator live in two different states.”²¹⁴ Katelyn Bowden, the founder of the revenge porn activist group BADASS, explained that legislation is long overdue, stating “there’s been a huge amount of progress at getting laws criminalizing on the state level, but jurisdictional issues and budget constraints for [l]aw enforcement have made them difficult to enforce.”²¹⁵ With the current political climate and a push towards victim protection, now more than ever, federal legislation is needed to combat this insidious, devastating practice and the ineffective hodgepodge of state laws that allow too many perpetrators to evade punishment.

On its website, the Cyber Civil Rights Initiative has both state and federal model laws for nonconsensual pornography. The model federal law states:

Whoever knowingly uses the mail, any interactive computer services, electronic communication service, electronic communication system of interstate commerce, or any other facility of interstate or foreign commerce 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 whose naked genitals or post-pubescent female nipple are exposed, with knowledge of or reckless disregard for the fact that the depicted person did not consent to the distribution, shall be fined under this title or imprisoned not more than ____, or both.

The model law also includes exceptions for voluntary exposure if it takes place in public or a lawful commercial setting and disclosures made in the public interest such as reporting unlawful conduct or medical treatment. Adopting a federal law like that developed by the Cyber Civil Rights Initiative would be a relatively simple way to create a standardized and protective means of combatting revenge porn.

Bills that would have made posting nonconsensual pornography a federal crime punishable with up to five years in prison were filed in 2016 by U.S. Representative Jackie Speier and in 2017 by U.S. Senator Kamala

213. *Id.*

214. *Id.*

215. Samantha Cole, *Bipartisan Legislators Hope to Pass Federal Anti-Revenge Porn Law*, VICE, (May 22, 2019), https://www.vice.com/en_us/article/qv7zd7/kamala-harris-bipartisan-legislators-hope-to-federal-anti-revenge-porn-law-shield-act.

Harris.²¹⁶ However, the 2016 bill never made it to a vote.²¹⁷ Speier re-filed similar legislation last year titled stopping Harmful Image Exploitation and Limiting Distribution Act, or SHIELD.²¹⁸ Speier stated:

[t]he damage caused by these attacks can crush careers, tear apart families, and, in the worst cases, has led to suicide. . . . Even in states that have laws on the books, the average person can't afford to take on these predators in civil courts. Worse yet are the numerous victims who have mustered the courage and strength to pursue criminal charges, only to learn there is no law that protects them. The SHIELD Act will fix this gaping hole in our legal system.²¹⁹

The SHIELD Act would “[e]nsure that the Department of Justice has an appropriate and effective tool to address these serious privacy violations.”²²⁰ It would also “[n]arrowly establish federal criminal liability for individuals who share private, sexually explicit or nude images without consent” and “[s]trike an effective balance between protecting the victims of these serious privacy violations and ensuring that vibrant online speech is not burdened.”²²¹ Prosecution under the SHIELD Act would “require proving that the defendant was aware of a substantial risk that the person depicted in an image expected the image would remain private and that the person did not consent to the image’s distribution.”²²² A prosecutor “would also have to prove that no reasonable person would consider the shared image to touch on a matter of public concern.”²²³ While it has not moved much this session, it does seem to have gained support; “her 2017 bill had 14 co-sponsors, but its current incarnation has 85.”²²⁴

Those opposing a federal nonconsensual pornography law generally cite First Amendment free speech concerns and over-criminalization as their reasons.²²⁵ Creating such a law “require[s] a ‘tricky balancing act’ weighing free speech against privacy rights.”²²⁶ Eric Goldman, a law professor at

216. Bayles, *supra* note 82.

217. *Id.*

218. *Id.*; Actor and Advocate Amber Heard Joins Rep Speier in Call for SHIELD Act to Protect Intimate Privacy, (May 20, 2019), <https://speier.house.gov/2019/5/actor-and-advocate-amber-heard-joins-rep-speier-call-bipartisan-bill>.

219. Reps. Speier and Katko Introduce Bipartisan Bill to Address Online Exploitation of Private Images (May 22, 2019), <https://speier.house.gov/2019/5/reps-speier-and-katko-introduce-bipartisan-bill-address-online>.

220. *Id.*

221. *Id.*

222. *Id.*

223. *Id.*

224. Bayles, *supra* note 82.

225. *Id.*

226. *Id.*

Santa Clara University and director of High Tech Law Institute, explained “you have to recognize the harms victims have suffered, but not curtail a lot of really powerful socially beneficial activity taking place on the internet.”²²⁷ He noted “we live in a heavily regulated society and possibly an over criminalized one” and “new speech restrictions actually shrink the internet of legitimate constitutionally protected conversations.”²²⁸ However, revenge porn is a sexual assault, not protected free speech. Anything to the contrary discounts the pain and suffering caused by such an action, whether it be a heartbreaking betrayal of trust, threats, or even physical abuse following an incident of revenge porn. Allowing offenders to hide behind a guise of free speech is akin to letting a rapist walk free.

The United States needs a standard approach to combatting the dissemination of sexually explicit images without consent. This would diminish jurisdictional issues created when the offense crosses state lines and it would allow law enforcement officers to better understand how to enforce laws to protect victims. It would also deter offenders, especially if there were lengthier prison sentences like those in the District of Columbia or higher fines like those in New Jersey. Additionally, making the crime a felony or requiring those convicted to be placed on a sex offender’s list would further facilitate deterrence.

The federal law must be consent, and not intent, based. In states that treat revenge porn like harassment perpetrators can escape punishment by simply showing they did not have malicious intent or explaining they meant the dissemination of sexually graphic images as a compliment or harmless joke. If the law is based on whether the victim consented to sharing his or her images rather than the perpetrator’s intent to harm the victim, there will be more protection because there will be a higher chance of recovery.

Moreover, there should be additional employment discrimination protection for victims. Like in New York, employers should be prevented from terminating an employee because he or she is a victim of revenge porn. This prohibition would remedy some of the destruction caused by revenge porn by protecting victims from losing jobs simply because they are a victim of a cyber sexual assault.

Conclusion

There is no question that states are pushing towards greater protection for victims of revenge porn and no question that organizations like the Cyber Civil Rights Initiative will continue to work tirelessly to facilitate change. Yet even though there is an increased recognition of the need for change in

227. *Id.*

228. *Id.*

individual states, there needs to be standardized statutory scheme protecting the people of the United States as a whole.

Now is a time to stand up for those hiding in shame and take a stand against those hiding behind screens. The United States needs federal protection for victims of nonconsensual pornography. The United States needs to answer this call—or better yet its post—for change.
