

# The Internet Never Forgets: A Federal Solution to the Dissemination of Nonconsensual Pornography

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## ABSTRACT

As technology evolves, new outlets for interpersonal conflict and crime evolve with it. The law is notorious for its inability to keep pace with this evolution. This Comment focuses on one area that the law urgently needs to regulate—the dissemination of “revenge porn,” otherwise known as nonconsensual pornography. Currently, no federal law exists in the U.S. that criminalizes the dissemination of nonconsensual pornography. Most U.S. states have criminalized the offense, but with vastly different degrees of severity, resulting in legal inconsistencies and jurisdictional conflicts. This Comment proposes a federal solution to the dissemination of nonconsensual pornography that carefully balances the interests of victims with the variety of scenarios that may give rise to this crime.

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## INTRODUCTION

Four percent of Americans have been victimized by threats or posts of nude or nearly nude images without their permission.<sup>1</sup> Young women are particularly at risk of becoming victims—for women under the age of thirty, that number rises to ten percent.<sup>2</sup> These crimes wreak devastation on victims and continue to follow them years after the crime is committed. As such, a person who becomes a victim of this heinous crime may continue to be haunted by the images for years after the initial distribution.

For example, in 2005, Savannah, a sixteen-year-old girl, started dating a boy from a nearby high school.<sup>3</sup> One night while she was out of town, Savannah's boyfriend asked that she send him a nude photo. After strongly protesting the request, Savannah surrendered.<sup>4</sup> A year later, her boyfriend's requests for intimate photos became a regularity, and he even began taking intimate photos of Savannah himself.<sup>5</sup> Then, one day, Savannah received a cryptic email claiming there were photos of her on the internet—naked photos.<sup>6</sup> Savannah followed the link in the email, and to her horror, the images she had sent to her boyfriend and those he had taken of her clearly performing sexual acts covered the page. And, to make matters worse, Savannah's full name—first, middle, and last—were listed beside the photos.<sup>7</sup>

Savannah's boyfriend eventually confessed to campus police that he had posted the images, but his punishment only required that he submit a USB drive with "all the photos" to the campus police and sign a document promising that he had deleted all the copies of the photos.<sup>8</sup> This event happened in the mid-2000s. But, as most know today in the era of screenshots and website caches, once a photo has been published on the

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1. See AMANDA LENHART ET AL., NONCONSENSUAL IMAGE SHARING: ONE IN 25 AMERICANS HAS BEEN A VICTIM OF "REVENGE PORN" 4 (2016), [https://datasociety.net/pubs/oh/Nonconsensual\\_Image\\_Sharing\\_2016.pdf](https://datasociety.net/pubs/oh/Nonconsensual_Image_Sharing_2016.pdf) [<https://perma.cc/884U-QK7P>].

2. See *id.* at 5.

3. *Revenge of the Porn*, AM. PUB. MEDIA: TERRIBLE, THANKS FOR ASKING (Feb. 27, 2018), <https://www.apmpodcasts.org/tffa/2018/02/revenge-of-the-porn/> [<https://perma.cc/S4XD-B7GG>] [hereinafter *Revenge of the Porn*].

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

internet, it is impossible to ensure that a photo has been deleted from existence.<sup>9</sup> Savannah learned this fact the hard way.

Even though the website hosting the intimate images was taken down, the photos followed Savannah for years.<sup>10</sup> The images first resurfaced when she was in grad school, and a random, anonymous email address sent a message to her classmates with a link to the photos.<sup>11</sup> The next instance occurred when someone called Savannah while she was at work, threatening to send the images to her boss unless she detailed what kind of undergarments she was wearing.<sup>12</sup> Yet another time, a man sent a Facebook message to Savannah's new boyfriend, telling the boyfriend there were naked pictures of Savannah on the internet.<sup>13</sup>

Fortunately for Savannah, she had grad school classmates, work colleagues, and a new boyfriend who valued her worth and stood by her in support rather than blaming her for taking the photos in the first place.<sup>14</sup> Nearly a decade later, and continuing to grow in strength, Savannah continues to fear the pictures will show up, forcing her to explain to yet another person that she trusted the wrong guy when she was a teenager.<sup>15</sup>

Savannah's story represents the variety of issues that a victim faces when they become a victim of "revenge porn," or nonconsensual pornography, and images taken and shared in confidence are distributed on the internet without their consent. Due to the nature and structure of the internet and technology we use today, it is impossible to ensure that a photo that has been posted on the internet has been permanently deleted; therefore, we must address this life-altering crime from a different angle: deterrence.

Forty-six states, the District of Columbia, and Guam have passed some version of laws criminalizing the distribution of nonconsensual pornography or "revenge porn."<sup>16</sup> However, states are all over the map, figuratively, when it comes to categorizing nonconsensual pornography.<sup>17</sup> Among the states, nonconsensual pornography is categorized as a

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9. Tribune Wire Reports, *Experts: Deleted Online Information Never Actually Goes Away*, CHI. TRIB. (Aug. 21, 2015), <https://www.chicagotribune.com/bluesky/technology/chi-deleted-online-information-never-goes-away-20150821-story.html> [<https://perma.cc/2K3M-NRT6>].

10. *Revenge of the Porn*, *supra* note 3.

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. *46 States + DC + One Territory Now Have Revenge Porn Laws*, CYBER C.R. INITIATIVE, <https://www.cybercivilrights.org/revenge-porn-laws/> [<https://perma.cc/6DJD-JTDR>] [hereinafter *Revenge Porn Laws*].

17. *See id.*

misdemeanor, a felony, or not a crime at all;<sup>18</sup> therefore, offenders of this malicious act enjoy the possibility of getting away with ruining a victim's life forever in some states.

The distribution of nonconsensual pornography has had life-ending outcomes for some victims.<sup>19</sup> And, the remedy for those who survive the emotional, mental, and economic disruption that ensues after becoming a victim simply depends on the state in which the crime is determined to have occurred. The crime of nonconsensual pornography is a crime born out of the age of technology, and most often, the offense takes place over electronic messaging or the internet.<sup>20</sup> Due to these modes of transmission, it is absolutely imperative that the dissemination of nonconsensual pornography be prescribed as a crime under federal law, carrying with it sentencing that is proportionate to the gravity of the offense.

In Part I, I will define "revenge porn" and also explain why some advocates prefer the term "nonconsensual pornography" and the arenas that have enabled the spread of it. In Part II, I will present an overview of the laws currently in place to combat nonconsensual pornography and the jurisdictional issues that result from the wide variety of state laws. In Part III, I will discuss the constitutional arguments, in particular First Amendment arguments, that have been made against existing revenge porn laws. In Part IV, I will examine the international landscape of nonconsensual pornography laws. In Part V, I will provide an overview of previous attempts at a federal nonconsensual pornography law. Finally, in Part VI, based on these findings, I will lay out my proposal for a federal law prohibiting revenge porn. The law will have graduating levels of punishment severity, with the most egregious crimes charged as a felony and requiring the offender to register as a sex offender.

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18. *See id.*

19. Audrie Pott, a fifteen-year-old girl, was raped by three male classmates who took photos of the assault. The photos were then circulated to Pott's classmates. Humiliated, Pott committed suicide eight days after the assault. Julia Dahl, *Audrie Pott, Rehtaeh Parsons Suicides Show Sexual Cyber-Bullying Is "Pervasive" and "Getting Worse," Expert Says*, CBS NEWS (Apr. 12, 2013), <https://www.cbsnews.com/news/audrie-pott-rehtaeh-parsons-suicides-show-sexual-cyber-bullying-is-pervasive-and-getting-worse-expert-says/> [https://perma.cc/SZN5-AM8D]; *see also* Crimesider Staff, *Audrie Pott Suicide: Three Teens Arrested for Alleged Sexual Assault of Calif. Girl Who Committed Suicide*, CBS NEWS (Apr. 12, 2013), <https://www.cbsnews.com/news/audrie-pott-suicide-three-teens-arrested-for-alleged-sexual-assault-of-calif-girl-who-committed-suicide/> [https://perma.cc/8ABM-P8CR].

20. *See* Carrie Goldberg, *How Google Has Destroyed the Lives of Revenge Porn Victims*, N.Y. POST (Aug. 17, 2019), <https://nypost.com/2019/08/17/how-google-has-destroyed-the-lives-of-revenge-porn-victims/> [https://perma.cc/YKR3-9YD9].

## I. NONCONSENSUAL PORNOGRAPHY

Nonconsensual pornography (NCP), colloquially referred to as revenge porn, is any image or video of a sexual nature that is shared without the subject's consent.<sup>21</sup> Though the colloquial term insinuates the image is circulated by a former partner in response to a provocation by the victim, any dissemination of a sexually explicit image by a person for the purpose of humiliating or controlling the victim constitutes nonconsensual pornography.<sup>22</sup> The motivation to share the image is not dispositive of an image being considered NCP; therefore, for the remainder of this Comment, I will refer to what is popularly known as revenge porn as nonconsensual pornography or NCP.

The exchange of intimate images or sexual messages between lovers can be traced throughout history; however, the advent of the smartphone has increased the ease with which people can send these intimate photos and messages.<sup>23</sup> Now, users can take a photograph of themselves using their smartphone and send it to another within a few seconds. And this is typically how the photos are taken; an overwhelming majority of victims—around eighty percent—took the photographs that were later used by the assailants.<sup>24</sup> The exchange of intimate images is not uncommon, either. More than half of people aged eighteen to twenty-six have shared nude images of themselves and more than two-thirds have received sexually explicit images, according to an interview with Dr. Asia Eaton, the head of research for the Cyber Civil Rights Initiative, an organization dedicated to fighting online abuse.<sup>25</sup> In addition, it is estimated 1 in 12 adults have been a victim of revenge porn.<sup>26</sup> Oftentimes, intimate images shared in confidence become weaponized when relations sour. Offenders use these images to oppress, disarm, and embarrass victims, yet some states still have not passed laws that criminalize nonconsensual pornography.<sup>27</sup>

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21. *What Is "Revenge Porn"?*, CYBER C.R.: LEGAL PROJECT, <https://www.cyberrightsproject.com> [<https://perma.cc/3ZYH-WPPN>].

22. *See id.*

23. Aviva Majerczyk, *A Brief, Dirty History of Sexting*, LINK (Mar. 5, 2019), <https://thelinknewspaper.ca/article/a-brief-dirty-history-of-sexting> [<https://perma.cc/HBN7-AGMR>]. For example, as early as the seventeenth century, King Charles II of England commissioned erotic portraits of his mistress, Nell Gwyn. *See* Nell Gwyn, NAT'L PORTRAIT GALLERY, <https://www.npg.org.uk/collections/search/portrait/mw204602/Nell-Gwyn> [<https://perma.cc/Z9YE-SSUJ>].

24. *What Is "Revenge Porn"?*, *supra* note 21.

25. Alejandra Martinez, *Meet the FIU Psychologist Working to Stop 'Non-Consensual Porn' on Social Media*, WLRN (Sept. 25, 2018), <http://www.wlrn.org/post/meet-fiu-psychologist-working-stop-non-consensual-porn-social-media> [<https://perma.cc/HT8X-HEMR>].

26. *Id.*

27. As of April 2020, Massachusetts, Mississippi, South Carolina, and Wyoming do not have laws that specifically condemn nonconsensual pornography. *Revenge Porn Laws*, *supra* note 16.

NCP can take many forms, including photos or videos “taken during the course of an intimate relationship . . . [,] hidden recordings[, ] images stolen from electronic devices[, or a] recording of a sexual assault.”<sup>28</sup> NCP can also take other forms, including fake images generated by artificial intelligence.<sup>29</sup> And while nonconsensual pornography impacts individuals from all walks of life, women are targeted more than men.<sup>30</sup>

Regardless of sex, individuals should not feel threatened with an image of themselves that was captured during a moment of intimacy with another. Due to the breadth of factors that may motivate a perpetrator, the term nonconsensual pornography captures the variety of situations that may result in the dissemination of one’s intimate images.<sup>31</sup> Professor Mary Anne Franks of the University of Miami School of Law writes that, because of this spectrum of motivating factors, the term revenge porn is inaccurate.<sup>32</sup> The term “revenge” is imprecise because perpetrators “may be motivated by a desire for profit, notoriety or entertainment, or for no particular reason at all.”<sup>33</sup> Their only constant is that they act without the consent of the person depicted.<sup>34</sup> Franks goes on to write that the term “porn” is also inexact because visual depictions of nudity or sexual activity created within the privacy of an intimate relationship are not inherently “pornographic.”<sup>35</sup>

In some instances, a vindictive ex may share intimate images with the victim’s family, friends, and co-workers to embarrass and shame the

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28. *Know Your Rights: Nonconsensual Pornography (“Revenge Porn”)*, LEGAL VOICE (Apr. 2018), <http://www.legalvoice.org/nonconsensual-pornography> [<http://perma.cc/2NYR-LFFU>]; see *Definitions*, CYBER C.R. INITIATIVE, <https://www.cybercivilrights.org/definitions/> [<https://perma.cc/E4YC-HZMP>].

29. Matt Burgess, *The Law Is Nowhere Near Ready for the Rise of AI-Generated Fake Porn*, WIRED (Jan. 27, 2018), <https://www.wired.co.uk/article/deepfake-app-ai-porn-fake-reddit> [<https://perma.cc/UK8N-QYJ8>].

30. Ten percent of women under the age of thirty have had someone threaten to share their intimate photos with others, and six percent of women under thirty have been victims of NCP. Four percent of men under thirty have been victims of revenge porn. Press Release, Seth Young, Ctr. for Innovative Pub. Health Rsch., *New Report Shows that 4% of U.S. Internet Users Have Been a Victim of “Revenge Porn”* (Dec. 13, 2016), <https://innovativepublichealth.org/press-releases/revenge-porn-report-findings/> [<https://perma.cc/FQA6-L8YQ>].

31. See LENHART ET AL., *supra* note 1, at 3.

32. Mary Anne Franks, “Revenge Porn” Reform: *A View from the Front Lines*, 69 FLA. L. REV. 1251, 1257–58 (2017).

33. *Id.*

34. *Id.*

35. *Id.* In determining whether something is pornographic, the Supreme Court in *Miller v. California* developed the *Miller Test*, which lays out a three-part test to determine whether a work is considered “obscene.” *Miller v. California*, 413 U.S. 15, 24 (1973). The three parts include (1) whether the average person, applying contemporary community standards, would find that the work taken as a whole appeals to the prurient interest; (2) whether the work depicts or describes, in a patently offensive way, sexual conduct or excretory functions specifically defined by applicable state law; and (3) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value. *Id.*

victim. In others, a victim's phone or computer may be infiltrated by a hacker who may then watch and capture intimate images of the victim through a webcam or steal existing intimate photos, then blackmail the victim for money or more pornographic images in an act dubbed "sextortion."<sup>36</sup> Finally, Recorded Sexual Assault (RSA), which occurs when an image or video captures a sexual assault and is then used to further shame and discourage the victim from reporting the assault, falls under the umbrella of NCP.<sup>37</sup> Based on the variety of circumstances that may give rise to NCP, crafting a law that accurately captures bad actors has proven difficult for lawmakers.

A victim of NCP may not only fear that their intimate images may be sent to family, friends, or colleagues. Public websites have been created with the sole intention of either hosting NCP or dedicating a page to the spread of NCP. For example, MyEx.com was a platform that allowed users to post sexually explicit images of individuals, without the victim's consent, and often included the victim's full name, age, address, employer, phone number, social media account information, and email address.<sup>38</sup> Not only did the site serve as a platform for vengeful exes, the site itself extorted victims, requesting payment in exchange for removing postings.<sup>39</sup>

In January of 2018, the Federal Trade Commission (FTC) and the state of Nevada filed a complaint in the U.S. District Court of Nevada against the operators of MyEx.com.<sup>40</sup> The FTC investigation into the site revealed over 12,600 posts that included derogatory tags on postings with labels like "bad in bed," "slut," and "gold digger."<sup>41</sup> In addition, the complaint alleged that the website extorted "victims by requiring them to pay fees of hundreds of dollars to have their intimate pictures, videos, and information removed from the site."<sup>42</sup> In June of 2018, a federal court ordered MyEx.com to remove all postings and pay \$2 million in monetary

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36. "Sextortion" occurs when an individual threatens to expose nude, intimate, or sexually explicit photos of a victim and demands the victim pay money, provide additional intimate images, or perform sexual acts to maintain the privacy of the photos. *Definitions*, *supra* note 28; BENJAMIN WITTES ET AL., BROOKINGS INST., SEXTORTION: CYBERSECURITY, TEENAGERS, AND REMOTE SEXUAL ASSAULT 6–7 (2016), <https://www.brookings.edu/research/sextortion-cybersecurity-teen-agers-and-remote-sexual-assault/> [<https://perma.cc/WY5A-8YE7>].

37. *Definitions*, *supra* note 28.

38. Complaint for Permanent Injunction and Other Equitable Relief at 5, *FTC v. EMP Media, Inc.*, No. 2:18-cv-00035, 2018 WL 372707 (D. Nev. Jan. 9, 2018).

39. Order Granting Plaintiff's Motion for Alternative Service at 2, *FTC v. EMP Media, Inc.*, No. 2:18-cv-00035-APG-NJK, 2018 WL 664796 (D. Nev. Feb. 1, 2018); Heather Kuldell, *Feds Target Revenge Porn Website*, NEXTGOV (Jan. 9, 2018), <https://www.nextgov.com/policy/2018/01/feds-target-revenge-porn-website/145080/> [<https://perma.cc/N95S-FKYD>].

40. Kuldell, *supra* note 39.

41. *Id.*

42. Complaint for Permanent Injunction and Other Equitable Relief, *supra* note 38, at 5.

relief to the FTC; fortunately, the site has been permanently barred from operating and has ceased facilitating the distribution of NCP.<sup>43</sup>

Unfortunately, MyEx.com was not the only platform of its kind. What started as an amateur porn website, IsAnyoneUp.com became a place where NCP perpetrators could exact their malicious plans.<sup>44</sup> Hunter Moore, the website's creator and self-proclaimed nudist, told a *Forbes* reporter that in his ideal world, naked photos would be socially acceptable.<sup>45</sup> At the time of the interview in 2011, the now-defunct website attracted 60,000 visitors a month.<sup>46</sup> Moore admitted that he was able to hide behind the protection of § 230 of the Communications Decency Act because it protected site owners from legal liability for copyrighted material posted on his site by third-parties.<sup>47</sup>

Despite the fact that third-parties generated the website content, Moore allegedly made up to \$13,000 a week by hosting the website and allowing users to anonymously post nude photos of "the willing and unwilling," alongside screenshots of their Facebook pages.<sup>48</sup> Moore knew that users were uploading nude images of unknowing individuals, yet he continued to allow these posts on his site.<sup>49</sup> Though he had no problem posting images of unknowing subjects, Moore did take precautions to comply with child pornography laws by purchasing an outside server to screen photos for underage subjects.<sup>50</sup> After verifying a subject's age via social media, Moore would post a nude photo as long as the subject was at least eighteen years old, regardless of whether they knew the image was being posted on the website.<sup>51</sup> Moore serves as an example that, because there is little legal deterrence for facilitating or spreading NCP, those who may profit off of NCP have no incentive to stop unless they are sued or are compelled to stop by moral guilt.

As described above, although nonconsensual pornography is often motivated by revenge, revenge is not always the sole motivation behind this heinous crime. Sometimes the motivation is monetary or pure malice.

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43. Ricardo Torres-Cortez, *Operators of Revenge Porn Website Ordered to Pay \$2 Million*, LAS VEGAS SUN (June 23, 2018), <https://lasvegassun.com/news/2018/jun/23/operators-of-revenge-porn-website-ordered-to-pay-2/> [https://perma.cc/59N2-JYDN].

44. See Kashmir Hill, *Revenge Porn with a Facebook Twist*, FORBES (July 6, 2011), <https://www.forbes.com/sites/kashmirhill/2011/07/06/revenge-porn-with-a-facebook-twist/#64de4abc1d2e> [https://perma.cc/ZPK6-48VS].

45. *Id.*

46. *Id.*

47. *Id.* See Communications Decency Act § 230, 47 U.S.C. § 230.

48. Kashmir Hill, *IsAnyoneUp Is Now Permanently Down*, FORBES (Apr. 19, 2012), <https://www.forbes.com/sites/kashmirhill/2012/04/19/isanyoneup-is-now-permanently-down/#89be3e450a00> [https://perma.cc/RK3Y-S6ZB].

49. Hill, *supra* note 44.

50. *Id.*

51. *Id.*



## II. THE CURRENT NONCONSENSUAL PORNOGRAPHY LAWS IN THE UNITED STATES AND RESULTING JURISDICTIONAL ISSUES

### *A. The Current Landscape of Nonconsensual Pornography Laws in the United States*

Forty-six states, Washington D.C., and Guam have laws criminalizing nonconsensual pornography.<sup>52</sup> However, the sentencing patterns across these jurisdictions vary. To better illustrate the current landscape of nonconsensual pornography laws, I will provide examples of states that illustrate the sweeping variety of laws that lead to inequities when sentencing NCP offenders. Ten states punish first time offenses as felonies and thirty-three other states do not.<sup>53</sup>

In May 2018, Missouri passed two statutes—one outlawing NCP and the other outlawing the threat to disseminate NCP.<sup>54</sup> By far, Missouri has the most severe state law criminalizing NCP given that even a threat to disseminate NCP is a Class E felony, carrying a potential sentence of up to four years.<sup>55</sup> Because the law was passed fairly recently, few cases have been prosecuted under these new Missouri NCP laws. However, a case recently made headlines and provides an example of a story with aggravating factors that warrant the finding of a felony.

Katharine Galbraith was separated from her husband when she met Andrew Snyder.<sup>56</sup> The pair dated for a brief few months, then broke up

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52. *Revenge Porn Laws*, *supra* note 16.

53. Arizona, D.C., Hawaii, Idaho, Illinois, Kansas, Missouri, Nevada, New Hampshire, New Jersey, and North Carolina all charge a first time NCP offense as a felony. *See* ARIZ. REV. STAT. § 13-1425 (2016) (unlawful distribution of images depicting states of nudity or specific sexual activities is a Class 4 felony if disclosed by electronic means and a Class 1 misdemeanor if threatened but not actually disclosed); D.C. CODE § 22-3063 (2015) (under the Criminalization of Non-Consensual Pornography Act of 2014, a first time violation of the Act is a felony); HAW. REV. STAT. § 711-1110.9 (2018) (a violation of privacy in the first degree under this section constitutes a Class C felony); IDAHO CODE § 18-6609 (2018) (an act of video voyeurism under this section is a felony); 720 ILL. COMP. STAT. 5/11-23.5 (2012) (non-consensual dissemination of private sexual images is a Class 4 felony); KAN. STAT. ANN. § 21-6101(a)(8), 6101(b)(2)(B) (2016) (a breach of privacy by disseminating any videotape, photograph, film, or image under this section is a person felony, severity level 8, and the presumptive probation does not exceed eighteen months); MO. REV. STAT. § 573.110 (2019), 573.112 (2018); NEV. STAT. § 200.780 (2015); N.H. REV. STAT. ANN. § 644:9-a (2016) (nonconsensual dissemination of private sexual images is a Class B felony); N.J. REV. STAT. § 2C:14-9 (2013) (New Jersey charges a first time NCP offense as a third-degree offense, which is the same as a felony); N.C. GEN. STAT. § 14-190.5A (2015) (a disclosure of private images by a person eighteen years of age or older is a Class H felony and a Class 1 misdemeanor if the person is under eighteen years of age at the time of the offense).

54. MO. REV. STAT. § 573.110 (2019); MO. REV. STAT. § 573.112 (2018).

55. *See* MO. REV. STAT. § 573.112 (2018).

56. Shannon O'Brien, *Parkville Man Charged with Posting Revenge Porn of Ex in Her Neighborhood, Online*, FOX 4 (Dec. 27, 2018), <https://fox4kc.com/2018/12/27/parkville-man-charged-with-posting-revenge-porn-of-ex-in-her-neighborhood-online/> [https://perma.cc/5GWT-2PFT].

when Galbraith decided to reconcile with her husband.<sup>57</sup> In response to the breakup, Snyder created a website on which he posted naked photographs of Galbraith, posted the website name on banners outside Galbraith's neighborhood and her husband's place of work, and passed out flyers with Galbraith's photo with the phrase, "I'll do what your wife won't," and included Galbraith's phone number and home address.<sup>58</sup>

As a result of Snyder's actions, Galbraith alleged strangers came to her home in response to the flyers, and even months later, the harassment still continued.<sup>59</sup> Galbraith and her husband both lost their jobs and had to move to escape the response provoked by Snyder's actions.<sup>60</sup> Prior to the enactment of the Missouri NCP law, Galbraith's best bet for recourse would be a stalking<sup>61</sup> or harassment charge,<sup>62</sup> which even then, may have been difficult to prove given the situation and language of the respective statutes. Andrew Snyder's hearing took place in November 2019, and he faced up to seven years in prison, a fine of \$10,000, or both if convicted.<sup>63</sup> However, Snyder pleaded guilty to the charge, and the judge placed him on probation for five years and required him to have no contact with the victim or her address and to complete 100 hours of community service.<sup>64</sup>

To further demonstrate the stark contrast between the states, one may compare laws from the East Coast and West Coast of the United States. California, for example, classifies a nonconsensual pornography offense as disorderly conduct, a misdemeanor punishable by up to six months and fine up to \$1,000.<sup>65</sup> In New Jersey, NCP is a third-degree invasion of privacy, punishable by a state prison term of up to five years, a fine of \$30,000, or both.<sup>66</sup> Offenders of the same crime stand to face shockingly different sentences simply based on the state where they live.

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57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

61. A first-degree stalking charge, which a person commits if "he or she purposely, through his or her course of conduct, disturbs or follows with the intent of disturbing another person and . . . [m]akes a threat communicated with the intent to cause the person who is the target of the threat to reasonably fear for his or her safety, the safety of his or her family or household member," is a Class E felony, as well. MO. REV. STAT. § 565.225 2(1), (5) (2017). See MO. ANN. STAT. § 573.110 (2018) for Class D felonies.

62. A first-degree harassment which occurs if "a person . . . without good cause, engages in any act with the purpose to cause emotional distress to another person, and such act does cause such person to emotional distress" is a class E felony. MO. REV. STAT. § 565.090 (2017).

63. Guilty Plea, *State v. Snyder*, No. 18AE-CR03208-01 (6th Cir. Ct. Mo. Nov. 14, 2019).

64. *Id.*

65. See CAL. PENAL CODE § 647(j)(4) (2020).

66. See N.J. REV. STAT. § 2C:14-9 (2016).

The vast majority of states with NCP laws have created offenses that are charged as high-level misdemeanors<sup>67</sup> for a first-time offense. Although most states treat a first-time offense as a misdemeanor, the penalties for a misdemeanor across states may vastly differ. For example, when a person violates Florida's nonconsensual pornography offense, they are charged with a first-degree misdemeanor, which is punishable by up to one year in jail, a \$1,000 fine, or both.<sup>68</sup> When a person violates Iowa's NCP law, they are charged with an aggravated misdemeanor, which is punishable by up to two years in jail, a fine up to \$6,250, or both.<sup>69</sup> The margin between the consequences of a conviction in Florida and Iowa are much closer than that found between California and New Jersey. Justice for a victim should not depend on what state they live in. NCP is the same crime, no matter what state it happens in; therefore, it is essential to pass a federal law that punishes each degree of an NCP offense in the same way, regardless of the state where the crime occurred.

Because there are a multitude of scenarios that may give rise to an NCP offense, a federal law should have graduating degrees. A charge should raise to a felony if aggravating offenses are present. Beyond the felony-misdemeanor distinction, the consequences of charges are vastly different among the states that have NCP laws, leading to confusion and uncertainty about whether bad actors will receive due punishment when they have distributed nonconsensual pornography.

### *B. Jurisdictional Issues*

Given the ranging variety of state laws and lack of a federal NCP law, a web of jurisdictional and venue issues impedes the successful prosecution of NCP offenses. Nonconsensual pornography is most often transmitted via the internet or some form of electronic message—two modes of communication that present difficult jurisdictional issues for legislators and prosecutors. Though sites such as MyEx.com have been shut down, it is estimated that, in 2016, there were around 2,000 NCP websites worldwide.<sup>70</sup> It is possible that this number has grown, though there has not been a recent assessment. One NCP website may host user content from all over the world. For example, someone in Alaska could post an intimate image to a website hosted in California, and the subject

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67. States classify misdemeanors in a variety of ways that range from the term "gross misdemeanor" to "Class A" misdemeanor.

68. See FLA. STAT. § 784.049 (2019).

69. See IOWA CODE § 708.7 (2017).

70. JuJu Chang, Ashley Riegle, Jake Lefferman & Lauren Effron, *Chrissy Chambers of YouTube Sensation 'BriaAndChrissy' Opens Up About Her Revenge Porn Legal Battle*, ABC NEWS (Apr. 1, 2016), <https://abcnews.go.com/US/chrissy-chambers-youtube-sensation-briaandchrissy-opens-revenge-porn/story?id=38087941> [<https://perma.cc/X96L-XZKP>].

of the intimate image may live in South Carolina. Therefore, it is likely that an NCP offense will also include a jurisdictional issue, making it even more difficult to address the crime.

To mitigate jurisdictional issues, Georgia, Virginia, and Delaware have included language that subjects a perpetrator in any state to prosecution for the violation of the state statute.<sup>71</sup> Elisa D'Amico, an attorney with K&L Gates in Miami and co-founder of the Cyber Civil Rights Legal Project, describes the jurisdictional problem:

Law enforcement says I'll take your report here, but since the perpetrator doesn't live here, you need to report this to the other police department in the other state. And so, then the victim calls there and is told. 'Well, you don't live here, so we can't take your report.'<sup>72</sup>

D'Amico was interviewed because she is the cofounder of the Cyber Civil Rights Initiative and an expert on nonconsensual pornography, including international jurisdictional issues that arise from the offense.<sup>73</sup> Her statement captured not only the international jurisdictional issues when it comes to prosecuting NCP but the issues we face between U.S. jurisdictions, specifically between individual states.<sup>74</sup>

For example, Jeffery W. Ryland II lives in Illinois but previously lived in Iowa with his ex-girlfriend.<sup>75</sup> When the couple broke up, Ryland hacked into his ex-girlfriend's Amazon photo account and downloaded intimate images of her.<sup>76</sup> Ryland then threatened to send the photos to her friends and family if she did not agree to get back together with him, call him, or let him see the child they had together.<sup>77</sup> When the victim did not

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71. DEL. CODE ANN. §§ 11-1335(c)(1)(B), 932, 940 (2014); GA. CODE ANN. § 16-11-90(d)(1) (2014); VA. CODE ANN. § 18.2-386.2(D) (2014).

72. Brian Pia, *Alabama Woman a Victim of International Revenge Porn*, ABC NEWS 4 (Nov. 3, 2017), <https://abcnews4.com/news/nation-world/alabama-woman-victim-of-international-revenge-porn> [https://perma.cc/UHQ9-XEGU].

73. D'Amico was interviewed in connection with a case with a middle-aged woman who was targeted on social media by a "young" suitor from another country. *Id.* Though the two never met in person, they developed a relationship, and the man asked for her to send him nude photos. *Id.* Eventually, the relationship turned toxic and the man threatened to share the nude photos if she did not send more. *Id.* When she did not, the man posted the nude photos on fake social media accounts, posted them on porn websites, and directly sent the photos to the woman's friends, family, and her boss. *Id.* Because the man lived in another country, it has been nearly impossible to track him down and prosecute the offense. *Id.*

74. *See id.*

75. *Illinois Man Charged in "Revenge Porn" Case after Hacking Ex's Social Media Accounts, Posting Nudes*, ABC WQAD 8 (June 19, 2018), <https://wqad.com/2018/06/18/illinois-man-charged-in-revenge-porn-case-after-hacking-exs-social-media-accounts-posting-nudes/> [https://perma.cc/7LJV-BFYA].

76. *Id.*

77. *Id.*

comply, Ryland sent the photos to others, including her mother.<sup>78</sup> In addition, Ryland hacked into his ex-girlfriend's social media accounts and posted several of the sexually explicit photos on her public Twitter page.<sup>79</sup>

The issue with prosecution, however, rested in the fact that Ryland, the perpetrator, lived in Illinois and the victim lived in Iowa.<sup>80</sup> Depending on what state had proper jurisdiction, Ryland faced vastly different outcomes for his crime. In Illinois, those found guilty of disseminating nonconsensual porn face a felony charge, resulting in up to three years in prison and a \$25,000 fine.<sup>81</sup> In Iowa, a nonconsensual pornography offense, at most, results in an aggravated misdemeanor.<sup>82</sup> Ryland's case will be heard by a judge in Iowa, where he is also facing charges for extortion.<sup>83</sup> Ryland was released with supervision and, as of May 2020, is still awaiting trial.<sup>84</sup>

In the past, extortion has been used to charge instances of NCP before NCP laws existed, and in Iowa, extortion is a Class D felony.<sup>85</sup> In the best-case scenario for prosecuting nonconsensual porn, both the perpetrator and the victim live in the same state and the crime is committed there, too. While it may take years or even decades to create a means to prosecute NCP internationally, enacting a federal NCP law would solve the jurisdiction and venue issues that result from cross-state transmission of nonconsensual pornography in the U.S. A federal law would create one statute that would define what constitutes the illegal dissemination of nonconsensual pornography and convicted perpetrators would be charged in the same way across all states in the United States.

### III. CONSTITUTIONAL CHALLENGES

The laws of each state vary in statutory language; therefore, the standards for conviction between any two states may differ immensely. Because of the differences in language, some state laws have been criticized for being either overly broad or ambiguously vague,

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78. *Id.*

79. *Id.*

80. *Id.*

81. See 720 ILL. COMP. STAT. § 11-23.5 (2015).

82. Katherine Bauer, "Revenge Porn" Handled Differently in Illinois, Iowa, ABC WQAD 8 (June 21, 2018), <https://wqad.com/2018/06/20/revenge-porn-handled-differently-in-illinois-iowa/> [<https://perma.cc/3VQ6-Q9M3>]; see also Rod Boshart, *Iowa Senate Passes Bill Against 'Revenge Porn,'* THE GAZETTE (Apr. 11, 2017), <https://www.thegazette.com/subject/news/government/iowa-senate-passes-bill-against-revenge-porn-20170411> [<https://perma.cc/2BHU-ZY97>].

83. Bauer, *supra* note 82.

84. *Offender Information: Jeffery Wayne Ryland II*, IOWA DEP'T CORRECTIONS, <https://doc.iowa.gov/offender/view/6887923> [<https://perma.cc/4HQP-82JM>].

85. IOWA CODE § 711.4 (2020). A Class D felony is the lowest level felony in Iowa, punishable up to five years in prison and a fine between \$750 to \$7,500. IOWA CODE § 902.9 (2019).

while others are criticized for their specificity and the resulting narrowness of application.<sup>86</sup>

The American Civil Liberties Union (ACLU) has argued that a law with broad language will ensnare innocent parties who have received an unsolicited intimate image. In an interview with VICE, Lee Rowland, senior counsel for the ACLU, posited the following situation: “Consider a woman goes on a date, after which the date sends her a nude photo of himself . . . the woman feels harassed and forwards the picture to a friend to get advice.”<sup>87</sup> The ACLU argues that, if a woman were to do this, she would find herself an offender of nonconsensual porn under an overly broad NCP law. The ACLU, an organization whose primary goal is to preserve American constitutional rights, particularly free speech, must contemplate hypothetical scenarios such as the one described above to illustrate the unintended consequences of an overly broad law. While it is possible such a scenario may play out, it is unlikely and constructing an extremely narrow law that would account for this scenario could result in the dismissal of legitimate NCP cases.

Specifically, the ACLU argues, to be compliant with the First Amendment, an NCP statute must have three parts: prosecutors should have to prove that (1) the perpetrator intended to harm the victim, (2) the perpetrator knew the victim did not consent to the image being shared, and (3) the victim expected the image to stay private.<sup>88</sup>

While intent may be directly proven with screenshots of threatening emails or messages, the second two elements are redundant. The second element—the perpetrator did not consent to the image being shared—is implicit in the victim pressing charges. If the victim consented to sharing the photo, presumably they would not be pursuing a charge. In the event that the victim is pursuing a charge, it would be redundant to prove that they did not consent to nude photos of themselves shared with others. Finally, the third element—the victim expected the image to stay private—is very similar to the second. To prove this element, the victim would have to make an explicit statement such as, “I want this image to stay private.” This element does not consider a common situation in which intimate images are shared—in the context of an intimate, trusting relationship. Many times, intimate photos are shared when a relationship is going well, and then, they are disseminated after the relationship ends

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86. See *State Revenge Porn Policy*, EPIC: ELECTION PRIVACY INFO. CTR., <https://epic.org/state-policy/revenge-porn/> [<https://perma.cc/B6H6-HZEN>].

87. Steven Yoder, *Why Is It so Hard to Write a Decent Revenge Porn Law?*, VICE (Aug. 2, 2016), [www.vice.com/en\\_us/article/kwka43/why-is-it-so-hard-to-write-a-decent-revenge-porn-law](http://www.vice.com/en_us/article/kwka43/why-is-it-so-hard-to-write-a-decent-revenge-porn-law) [<https://perma.cc/GH84-SYUG>].

88. *Id.*

and animosity rises in the perpetrator. Someone who disseminates nonconsensual pornography to another should be held accountable, regardless of whether the victim said they wanted the image to remain private. This is not an issue of free speech.

The laws at issue are challenged as content-based speech restrictions that are applied over-broadly.<sup>89</sup> For example, in April 2018, a Texas state court of appeals found that the state's nonconsensual pornography law produced a broad-based content restriction on free speech, thus violating the First Amendment and rendering the law unconstitutional.<sup>90</sup> The law, which took effect in June 2015, "made posting private, intimate photos a misdemeanor, carrying a charge up to a year in jail as well as a \$4,000 fine."<sup>91</sup> The Appeals Court, in reaching its decisions, focused on the implication of innocent third parties.<sup>92</sup> Section 21.16(b) of the Texas NCP law states: "A person commits an offense if[,] without the effective consent of the depicted person[,] . . . the person intentionally discloses visual material depicting another person with the person's intimate parts exposed or engaged in sexual conduct."<sup>93</sup> The court reasoned that the statute unfairly penalizes third parties who may receive and forward an intimate photograph or video, thus the law was overly broad because it confined the First Amendment rights belonging to a third party who desired to forward the picture to others.<sup>94</sup>

The court determined that, because the statute "does not use the least restrictive means of achieving what we assumed to be compelling government interest of preventing the intolerable invasion of a substantial privacy interest, it is an invalid content-based restriction in violation of the First Amendment[.]" and it is applied too broadly.<sup>95</sup> Dr. Mary Anne Franks, along with others in the legal community, critiqued the opinion;

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89. A regulation on free speech is considered overbroad when it prohibits protected as well as non-protected free speech. A regulation that is over-broad is unconstitutional if it regulates a substantial amount of constitutionally protected expression. Content-based restrictions on free speech are only constitutional if it is based on a compelling state interest and is so narrowly tailored that it achieves only that purpose. See *Ex Parte Jones*, No. 12-17-00346-CR, 2018 WL 2228888 (Tex. Ct. App. May 16, 2018), *petition for discretionary review granted* (July 25, 2018).

90. *Id.* at \*8.

91. TEX. PENAL CODE ANN. § 21.16 (West 2015); Emma Platoff, *State Appeals Court Rules Texas' "Revenge Porn" Law Violates the First Amendment*, TEX. TRIB. (Apr. 19, 2018), <https://www.texastribune.org/2018/04/19/appeals-court-strikes-down-texas-revenge-porn-law/> [<https://perma.cc/4VCY-LEAH>].

92. *Ex Parte Jones*, 2018 WL 2228888, at \*8.

93. TEX. PENAL CODE ANN. § 21.16(b)(1) (West 2015)

94. *Ex Parte Jones*, 2018 WL 2228888, at \*8.

95. *Id.* at \*7.

Franks stated that the court interpreted the Texas law in an “unjustifiably aggressive and expansive way.”<sup>96</sup>

In 2019, the Texas Senate voted unanimously to amend the law and it has since been reenacted with the addition of an “intent to harm the person” element.<sup>97</sup> The change, which responded to critiques set forth in Jones, is intended to protect free speech and protect innocent parties who did not have malicious intent when transmitting nonconsensual pornography.<sup>98</sup>

Missouri’s previously mentioned nonconsensual pornography law falls on the severe end of the sentencing spectrum.<sup>99</sup> Missouri’s NCP laws are notably harsh, particularly when contextualizing the law within the inconsistency of laws across the United States. By far, Missouri carries the most severe charges because it punishes the threat of circulating nonconsensual pornography as a felony.<sup>100</sup> Though the statute appears well-intentioned and aimed at helping victims, examining this statute with a critical eye reveals overbreadth and vagueness. The statute states:

Threatening the nonconsensual dissemination of private sexual images, offense of — elements — penalty. — 1. A person commits the offense of threatening the nonconsensual dissemination of private sexual images if he or she gains or attempts to gain anything of value, or coerces or attempts to coerce another person to act or refrain from acting, by threatening to disseminate an image of another person, which was obtained under circumstances in which a reasonable person would know or understand that the image was to remain private, against the will of such person:

- (1) Who is at least eighteen years of age;
- (2) Who is identifiable from the image itself or information displayed in connection with the image; and

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96. Melanie Ehrenkranz, *Texas Court Strikes Down Revenge Porn Law for Being ‘Overbroad,’* GIZMODO (Apr. 20, 2018), <https://gizmodo.com/texas-court-strikes-down-revenge-porn-law-for-being-ove-1825429020> [<https://perma.cc/964H-F5LS>].

97. TEX. PENAL CODE ANN. § 21.16(b)(1) (West 2019); *see also* Stephen Young, *Texas Fixes Its Revenge Porn Law*, DALL. OBSERVER (May 20, 2019), <https://www.dallasobserver.com/news/texas-passes-revenge-porn-fix-11668838> [<https://perma.cc/HW97-M2J9>].

98. Young, *supra* note 97.

99. *See* Morgan Gstalter, *Missouri Governor Signs ‘Revenge Porn’ Bill Hours Before Leaving Office over Revenge Porn Allegations*, THE HILL (June 1, 2018), <https://thehill.com/homenews/state-watch/390323-missouri-governor-signs-revenge-porn-bill-hours-before-leaving-office> [<https://perma.cc/4HLR-GC9Q>].

100. MO. REV. STAT. § 573.110 (2019). Arizona and West Virginia both criminalize a threat to disseminate NCP as a misdemeanor. ARIZ. REV. STAT. § 13-1425 (2016); W. VA. CODE ANN. § 61-8-28 (2017).



(3) Who is engaged in a sexual act or whose intimate parts are exposed, in whole or in part.

2. The offense of threatening the nonconsensual dissemination of private sexual images is a class E felony.<sup>101</sup>

In attempting to stop nonconsensual pornography before it even starts, the Missouri law has potential to be subjected to a constitutional challenge, much like the challenge that overturned the Texas NCP law.<sup>102</sup> Although I believe this law rightfully attempts to capture the variety of scenarios from which NCP might emerge, it lacks an intent element, like the original Texas NCP law. Those who oppose the law may use this to allege the law is unconstitutionally over-broad and a content-based restriction, which would violate the First Amendment.

To avoid the possibility of a constitutional challenge for overbreadth, states may be tempted to craft a law that is narrow in language, resulting in an application that fails to address some instances of NCP. For example, in 2013, California's initial attempt at a law specifically targeting nonconsensual pornography was criticized for its loopholes.<sup>103</sup> Yale Law Fellow and Slate Senior Editor, Emily Bazelon, noted the 2013 California law left open a loophole because it required that an offender must have distributed the image with intent to cause serious emotional distress.<sup>104</sup> Additionally, the law only applied when the person accused of spreading the images online is also the photographer.<sup>105</sup> However, the Cyber Civil Rights Initiative reports up to eighty percent of nonconsensual pornography victims have taken the photo themselves; California's law then would leave the majority of NCP victims without recourse.<sup>106</sup> In an interview with CNN, Professor Franks, a professor at Miami Law School, described the law as having "a 'blame the victim' mentality" because the

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101. MO. REV. STAT. § 573.112 (2018).

102. *See Ex Parte Jones*, No. 12-17-00346-CR, 2018 WL 2228888, at \*8 (Tex. Ct. App. May 16, 2018).

103. Julia Dahl, "Revenge Porn" Law in California a Good First Step, but Flawed, Experts Say, CBS NEWS (Oct. 3, 2013), <https://www.cbsnews.com/news/revenge-porn-law-in-california-a-good-first-step-but-flawed-experts-say/> [<https://perma.cc/824K-3LWA>].

104. Emily Bazelon, *Why Do We Tolerate Revenge Porn?*, SLATE (Sept. 25, 2013), <https://slate.com/human-interest/2013/09/revenge-porn-legislation-a-new-bill-in-california-doesnt-go-far-enough.html> [<https://perma.cc/WR45-S4L3>].

105. *Id.*

106. Heather Kelly, *New California 'Revenge Porn' Law May Miss Some Victims*, CNN (Oct. 3, 2013), <https://www.cnn.com/2013/10/03/tech/web/revenge-porn-law-california/index.html> [<https://perma.cc/J94L-Q4JG>].

drafters did not include photographs taken by the victim.<sup>107</sup> In 2013, California amended the law to include images taken by the victim.<sup>108</sup>

Crafting a nonconsensual pornography law that prohibits the distribution of nude photographs and videos, and yet avoids the First Amendment constitutional challenges, has proven difficult. First Amendment constitutional protections have blurred the line between freedom of expression and the right to privacy.<sup>109</sup> Laws created to criminalize NCP have come under attack for restricting freedom of speech. However, these challenges fail to recognize the restriction of freedom imposed upon victims of nonconsensual pornography. In the most extreme cases, victims have committed suicide due to the emotional trauma and utter humiliation that results from NCP.<sup>110</sup> Victims suffer economically when they lose their jobs and suffer emotionally from the loss of self-confidence and mental freedom that results from the exposure of intimate content of which they are the subject.<sup>111</sup>

Minnesota's NCP statute—the Nonconsensual Dissemination of Private Sexual Images statute—is the closest to a well-balanced law.<sup>112</sup> The law provides a range of charges that start at a misdemeanor and progress to a gross misdemeanor level if aggravating factors are present.<sup>113</sup> Although language that pertains to aggravating factors is not necessarily relevant to a constitutional analysis, the language assists in narrowly tailoring the law to relevant crimes and helps escape criticism for over-breadth. Minnesota considers the following to be aggravating factors:

1. the person depicted in the image suffers financial loss due to the dissemination of the image;
2. the actor disseminates the image with intent to profit from the dissemination;

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107. *Id.*

108. CAL. PENAL CODE § 647(j)(4) (West 2017); *California's "Revenge Porn" Law Penal Code 647(j)(4) PC*, SHOUSE CAL. L. GROUP, <https://www.shouselaw.com/revenge-porn.html> [https://perma.cc/GJK6-PD3Y].

109. See Anne Harrison, *Revenge Porn: Protected by the Constitution?*, 18 J. GENDER, RACE & JUST.: BLOG, <https://jgrj.law.uiowa.edu/article/revenge-porn-protected-constitution> [https://perma.cc/K7AJ-5BNT].

110. Rossalyn Warren, *A Mother Wants the Internet to Forget Italy's Most Viral Sex Tape*, THE ATLANTIC (May 16, 2018), <https://www.theatlantic.com/technology/archive/2018/05/tiziana-cantone-suicide-right-to-be-forgotten/559289/> [https://perma.cc/4L8J-MA4L].

111. See *End Revenge Porn*, CYBER C.R. INITIATIVE, <https://www.cybercivilrights.org/wp-content/uploads/2014/12/RPStatistics.pdf> [https://perma.cc/R97J-7BPX].

112. MINN. STAT. § 617.261 (2016).

113. *Id.*

3. the actor maintains an Internet website, online service, online application, or mobile application for the purpose of disseminating the image;
4. the actor posts the image on a website;
5. the actor disseminates the image with intent to harass the person depicted in the image;
6. the actor obtained the image by committing a violation of section 609.52, 609.746, 609.89, or 609.891; or
7. the actor has previously been convicted under this chapter.<sup>114</sup>

The inclusion of aggravating factors is vital for the prosecution of nonconsensual pornography. Although instances of nonconsensual pornography often take a common form with a scorned lover as the perpetrator, there are varying types of NCP that inflict a wide spectrum of harm on the victim. Because a victim has not been financially harmed does not lead to the conclusion that he or she has not suffered other harms, including psychological and reputational injuries.

#### IV. FOREIGN NONCONSENSUAL PORNOGRAPHY LAWS

The United States is behind in criminalizing nonconsensual pornography on a federal level. In 2015, the Criminal Justice and Courts Act made NCP a crime in England and Wales. Under this Act, a person charged and convicted of this offense would face a sentence of up to two years in prison.<sup>115</sup> In 2016, within the first year of the offense becoming classified, a report by the Crown Prosecution Service stated that 206 people were prosecuted for the crime.<sup>116</sup> The Criminal Justice and Courts Act<sup>117</sup> was passed in response to the increasing use of the internet to control and degrade victims.<sup>118</sup> From April 2015 to December 2015, there were 1,160 reported incidents of NCP, with the youngest victim as young as eleven years old.<sup>119</sup>

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114. *Id.* at Subdivision 2(b).

115. Nick Titchener, *What Is the UK Revenge Porn Law?*, LAWTONS SOLICITORS (Sept. 19, 2017), <https://www.lawtonslaw.co.uk/resources/what-is-the-uk-revenge-porn-law/> [https://perma.cc/SN94-8QN6].

116. *Revenge Porn: More Than 200 Prosecuted under New Law*, BBC NEWS (Sept. 6, 2016), <https://www.bbc.com/news/uk-37278264> [https://perma.cc/HHL6-SZC9].

117. *See generally* Criminal Justice and Courts Act 2015, c. 2 (Eng.), <http://www.legislation.gov.uk/ukpga/2015/2/contents/enacted> [https://perma.cc/Y6RR-JWN].

118. *See* Press Release, Ministry of Justice & Rt. Hon. Chris Grayling Member of Parliament, New Law to Tackle Revenge Porn (Oct. 12, 2014), [www.gov.uk/government/news/new-law-to-tackle-revenge-porn](http://www.gov.uk/government/news/new-law-to-tackle-revenge-porn) [https://perma.cc/DJ2U-CVWN].

119. *Revenge Porn: More Than 200 Prosecuted Under New Law*, *supra* note 116.

In 2015, Germany's Bundesgerichtshof (High Court) ruled that a person has the right to demand that their ex-partner delete naked pictures of them.<sup>120</sup> The heart of the ruling was to remove an ex's ability to use naked photos as leverage against a victim.<sup>121</sup> The ruling allowed a person to keep photos of their ex-lover so long as the person was clothed in an everyday situation, and the photo was not capable of damaging the person's reputation.<sup>122</sup> Germany's position on the issue of nonconsensual pornography was born out of an increased use of technology and the sharing of sexual images, as well as an acknowledgment of the threat that compromising photos place on an individual's personal rights.<sup>123</sup> In Germany, a person convicted of a nonconsensual pornography offense faces up to two years in prison.<sup>124</sup>

Other countries, such as Ireland, have contemplated but not passed nonconsensual porn legislation. New Irish legislation proposed in May 2018 would sentence offenders up to seven years in prison.<sup>125</sup> Fiona O'Loughlin, a member of the Irish Parliament, criticized the Irish government for not having a law criminalizing NCP.<sup>126</sup> In addition, Frances Fitzgerald, former Minister for Justice in Ireland, outlined for the Irish Times that she would create criminal offenses "making it illegal to intentionally post intimate images of a person online without their consent" and she would expand these to include forms of voyeurism, including secret photographing and videotaping a person's private parts in a public place.<sup>127</sup>

While Ireland contemplates the possibility of an NCP law, Australia has passed a law with hefty punishments for offenders. In late 2018, Australia's parliament passed the Enhancing Online Safety (Non-Consensual Sharing of Intimate Images) Bill 2018. Under the Act, offenders could face "civil penalties of up to AU\$105,000 and corporations of up to AU\$525,000 if they do not remove an image when

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120. Frida Garza, *Germany Just Made It a Lot More Complicated to Keep Nude Photos of Your Ex*, QUARTZ (Dec. 23, 2015), <https://qz.com/580663/germany-just-made-it-a-lot-more-complicated-to-keep-nude-photos-of-your-ex/> [<https://perma.cc/CX94-CC49>].

121. *Id.*

122. Ben Knight, *In Germany, Your Ex Must Destroy Nude Photos on Request*, DW (Dec. 22, 2015), <https://www.dw.com/en/in-germany-your-ex-must-destroy-nude-photos-on-request/a-18934921> [<https://perma.cc/DD2B-ECNU>].

123. *See id.*

124. *Id.*

125. Juno McEnroe, *Legislation Could See Seven-Year Jail Terms for 'Revenge Porn,'* IRISH EXAMINER (May 9, 2018), <https://www.irishexaminer.com/ireland/legislation-could-see-seven-year-jail-terms-for-revenge-porn-470427.html> [<https://perma.cc/693L-2699>].

126. Sarah Bardon, *Ireland 'Behind the Curve' in Legislation to Tackle Revenge Porn*, THE IRISH TIMES (Jan. 24, 2018), <https://www.irishtimes.com/news/politics/ireland-behind-the-curve-in-legislation-to-tackle-revenge-porn-1.3367294> [<https://perma.cc/EHS9-8H67>].

127. *Id.*

requested.”<sup>128</sup> Like other countries, Australia enacted this legislation in response to studies showing the increasing volume and impact of nonconsensual pornography, particularly on indigenous, LGBTI, and disabled people.<sup>129</sup> According to a study by RMIT University and Monash University, 1 in 5 respondents in a 4,200-person study had suffered “image-based abuse.”<sup>130</sup> In Australia, a victim of nonconsensual pornography must report the abuse to an eSafety Commissioner who launches a complaint in an online portal.<sup>131</sup>

#### V. ATTEMPTS AT A U.S. FEDERAL NONCONSENSUAL PORNOGRAPHY LAW

The Stopping Harmful Image Exploitation and Limiting Distribution Act of 2019 (SHIELD Act)<sup>132</sup> is the United States’ latest attempt at a federal law criminalizing NCP. Under the bill, it would be a criminal offense to “knowingly use any means or facility of interstate or foreign commerce to distribute an intimate visual depiction of an individual (1) with knowledge or reckless disregard for the [individual’s lack of consent] . . . and the reasonable expectation . . . the depiction would remain private, and (2) without an objectively reasonable belief that such distribution touches upon a matter of public concern.”<sup>133</sup>

This proposal for the SHIELD Act was preceded by a 2017 bill when Senator Kamala Harris and a bipartisan group of U.S. Senators including Richard Burr (R-N.C.) and Amy Klobuchar (D-Minn.) introduced the ENOUGH Act (Ending Nonconsensual Online User Graphic Harassment) that would “address the malicious exploitation of private, explicit images, such as ‘revenge porn’ and ‘sextortion.’”<sup>134</sup> The legislation aimed to make the dissemination and threat of dissemination of nonconsensual pornography a federal crime, with a penalty of five years in prison, a fine,

128. Corinne Reichert, *Australia Passes ‘Revenge Porn’ Legislation*, ZDNET (Aug. 16, 2018), <https://www.zdnet.com/article/australia-passes-revenge-porn-legislation/> [<https://perma.cc/2YLM-MPA4>].

129. Alana Schetzer, *Revenge Porn: What to Do If You’re a Victim*, SBS (Sept. 14, 2018), <https://www.sbs.com.au/topics/life/culture/article/2017/08/01/revenge-porn-what-do-if-youre-victim> [<https://perma.cc/RK4H-U3FK>].

130. Gosia Kaszubska, *Not Just ‘Revenge Porn’—Image-Based Abuse Hits 1 in 5 Australians*, RMIT U. (May 8, 2017), [https://www.rmit.edu.au/news/all-news/2017/may/not-just-\\_revenge-porn—image-based-abuse-hits-1-in-5-australian](https://www.rmit.edu.au/news/all-news/2017/may/not-just-_revenge-porn—image-based-abuse-hits-1-in-5-australian) [<https://perma.cc/4TED-BCGK>].

131. Schetzer, *supra* note 129.

132. *See generally* H.R. 2896, 116th Cong. (2019).

133. *Id.* at § 2(b).

134. Press Release, *Sens. Harris, Burr, Klobuchar and Rep. Speier Introduce Bipartisan Bill to Protect Against Online Exploitation of Private Images*, KAMALA D. HARRIS: U.S. SENATOR FOR CAL. (Nov. 28, 2017), <https://www.harris.senate.gov/news/press-releases/sens-harris-burr-klobuchar-and-rep-speier-introduce-bipartisan-bill-to-protect-against-online-exploitation-of-private-images> [<https://perma.cc/7S3A-BR46>] [hereinafter *Harris*].

or both.<sup>135</sup> The Senators built the ENOUGH Act with scraps left over from a previous attempt at nonconsensual pornography legislation, known as the Intimate Privacy Protection Act proposed by California Congresswoman Jackie Speier in July 2016.<sup>136</sup>

The Intimate Privacy Protection Act was aimed at protecting victims but garnered criticism from the ACLU.<sup>137</sup> The ACLU, citing the First Amendment as a weapon of criticism, claimed that the bill would be overly broad and result in a chilling effect on free speech.<sup>138</sup> However, these claims have been “unequivocally rejected” by constitutional law experts.<sup>139</sup> In fact, in a panel held by the Cyber Civil Rights Initiative, Professor Erwin Chemerinsky, a highly esteemed constitutional legal scholar, stated his support of a federal law criminalizing nonconsensual pornography, proving that one can be a “staunch advocate of freedom of speech,” but recognize the need for the protection of an individual’s intimate privacy.<sup>140</sup> Chemerinsky stated, “I don’t see anything in the First Amendment that says there has to be an intent to cause harm to the victim . . . . Any time there’s the dissemination of sexually explicit material without consent, that should be impermissible.”<sup>141</sup>

During the panel, Chemerinsky acknowledged the need for a federal law due to the weakness of state laws and made a call to amend § 230 of the Communications Decency Act because, as it stands, there is no statutory incentive for providers to remove sexually explicit images that have been disseminated without consent.<sup>142</sup>

In a press release announcing the proposed bill, Congresswoman Speier said, when discussing the current state of recourse for victims of nonconsensual pornography, “What makes these acts even more despicable is that many predators have gleefully acknowledged that the vast majority of their victims have no way to fight back. Even in states that have laws on the books, the average person can’t afford to take on these

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135. S. 2162, 115th Cong. § 2(c) (2019).

136. See generally H.R. 5896, 114th Cong. (2016); Colin Daileda, *Congresswoman Introduces Bill to Criminalize Revenge Porn Across the U.S.*, MASHABLE (July 14, 2016), <https://mashable.com/2016/07/14/jackie-speier-revenge-porn-federal-law/#ls9ZqNCNUaqz> [<https://perma.cc/53Y9-TMQL>].

137. See Talia, *Congresswoman Jackie Speier Introduces Federal Bill Against NCP*, CYBER C.R. INITIATIVE (July 18, 2016), <https://www.cybercivilrights.org/fed-bill-intro/> [<https://perma.cc/VHX3-PBQR>]. See generally H.R. 5896, 114th Cong. (2016).

138. Talia, *supra* note 137.

139. *Id.*

140. *Professor Erwin Chemerinsky and Expert Panelists Support Bipartisan Federal Bill Against Nonconsensual Pornography*, CYBER C.R. INITIATIVE (Oct. 6, 2017), <https://www.cybercivilrights.org/2017-cybercrime-symposium/> [<https://perma.cc/HZ6P-L2BL>].

141. *Id.*

142. See *id.*

predators in civil courts.”<sup>143</sup> Supporters of the ENOUGH bill acknowledged the need for federal legislation in this age of increasing technology where a person’s life could be ruined with a click of a button.<sup>144</sup> Further, they recognize the need for a victim-centered approach when crafting a law that empowers rather than diminishes the pain and humiliation victims face.<sup>145</sup>

Though the SHIELD Act is well-written and seems to avoid the constitutional difficulties presented when composing a nonconsensual pornography law, this law only imposes the possibility of a fine, up to five years of jail time, or both in comparison to what has been recognized as a lifetime of pain for the victim.<sup>146</sup> This law dances around penalizing the heart of the issue of nonconsensual pornography—humiliation. The act of nonconsensual pornography is motivated by a desire to control a victim, whether that is to silence them, humiliate them, or upend their life as a form of vengeance.

#### VI. FEDERAL LAW: A PROPOSAL

Victims of nonconsensual porn deserve a justice system on which they can rely. As discussed previously, a victim’s life is upended when their intimate images are shared either online—where it is nearly impossible to be sure that the photos have been removed—or with the victim’s family, friends, and co-workers. A federal law must consider these aggravating factors in order to adequately remedy instances of nonconsensual pornography. Moreover, the United States federal government must respond to the ever-increasing use of technology as a part of the average American’s romantic life. In a 2014 study, nine percent of cell-phone users have sent a sexual image and twenty percent have received one.<sup>147</sup> Young people are more likely to take part in sexting than older adults.<sup>148</sup> Forty-four percent of respondents in the age range eighteen to twenty-four in the study said that they had sent and received a sext while thirty-four percent of those in the twenty-five to thirty-four range stated they had received a sext.<sup>149</sup>

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143. Press Release, *Rep Speier and Sens Harris, Burr, and Klobuchar Introduce Bipartisan Bill to Address Online Exploitation of Private Images*, CONGRESSWOMAN JACKIE SPEIER (Nov. 28, 2017), <https://speier.house.gov/2017/11/rep-speier-and-sens-harris-burr-and-klobuchar-introduce-bipartisan-bill> [<https://perma.cc/HK96-KUE6>].

144. *See id.*

145. *Harris, supra* note 134.

146. H.R. 2896, 116th Congress § 2(c) (2019).

147. Amanda Lenhart & Maeve Duggan, *Main Report*, PEW RSCH. CTR. (Feb. 11, 2014), <http://www.pewinternet.org/2014/02/11/main-report-30/> [<https://perma.cc/4VJ6-8XVN>].

148. *Id.*

149. *Id.*

A federal law must have language that avoids constitutional challenges of overbreadth, while also avoiding narrow language that makes applying the law nearly impossible. Further, like Australia, a federal law should penalize companies and websites with large fines that will incentivize them to take action to protect victims.<sup>150</sup>

To construct an effective federal law, the statute should be broken into degrees that consider the variety of circumstances out of which nonconsensual pornography arises. For example, a person may send an intimate image to another, then that person may forward it to a friend. In such a circumstance, the impact, although traumatizing for the victim, is fairly isolated when compared to more egregious actions, such as sending the intimate image to the victim's family, friends, and co-workers and posting the image on the internet with the intent to humiliate the victim. To accommodate this continuum, the federal statute should be comprised of separate degrees of the offense, with the offense escalating based on the presence of aggravating factors that accompany the distribution of NCP.

For example, Minnesota's law considers some important aggravating factors such as:

[T]he person depicted in the image suffers financial loss due to the dissemination of the image; the actor disseminates the image with intent to profit from the dissemination; the actor maintains an Internet website, online service, online application, or mobile application for the purpose of disseminating the image; the actor posts the image on a website; the actor disseminates the image with intent to harass the person depicted in the image; . . . the actor has previously been convicted.<sup>151</sup>

These factors should also be included within a federal statute. In addition, the federal statute should consider the use of an image to extort, blackmail, or harass and the recording of a sexual assault aggravating factors. An offender who discloses intimate images without any additional aggravating factors should be charged as a misdemeanor, punishable by a fine of several hundred dollars, requiring the offender to both perform community service and attend a sexual harassment prevention course.

Where one or more aggravating factors are present, the baseline offense would move into a more serious "first-degree" category. The first-degree would be the baseline—distributing nonconsensual pornography—

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150. Facebook announced in March 2019 that it would roll out a new artificial intelligence software to fight nonconsensual pornography. See EJ Dickson, *Facebook Says It's Putting an End to Revenge Porn Once and For All*, ROLLING STONE (Mar. 15, 2019) <https://www.rollingstone.com/culture/culture-news/facebook-revenge-porn-ai-software-808867/> [<https://perma.cc/8XRX-ZXL4>].

151. MINN. STAT. § 617.261 (2019).



plus one or more aggravating factor, charged as a felony, with sentencing determined by a sliding scale based on the egregiousness of the offender's actions. The highest penalty would require the offender to serve a minimum of three years jail time, pay a fine of several thousands of dollars, and register as a low-risk sex offender.

According to the Cyber Civil Rights Initiative, sixty percent of participants in a study about sensitive images responded that requiring to register as a sex offender would deter them from distributing nonconsensual pornography.<sup>152</sup> For example, New York introduced a bill in 2018 that, if passed, would require registration as a sex offender.<sup>153</sup> Requiring bad actors to register as sex offenders is a strong deterrent as nonconsensual pornography is sexually exploitative.

The dissemination of nonconsensual pornography is not a crime that looks the same every time. NCP is used as a tool of oppression over victims, yet that oppression manifests itself in many different ways. As a result, the language of a federal NCP law should be crafted with consideration of the constitutional challenges that state laws have faced so as to target true NCP offenders. Additionally, it is vital that a federal NCP law contemplate aggravating factors that may accompany the offense and provide enough freedom in sentencing in order to achieve equity in punishing NCP offenders.

### CONCLUSION

Nonconsensual pornography is an insidious crime that continues to affect victims even after the crime has been settled in court. Justice for victims should not depend on the state where they live because NCP does not affect a person differently based on the state he or she lives in; therefore, it is imperative that we create a federal law to ensure equity in sentencing. Studies and interviews have proven that victims continue to face negative psychological, emotional, and professional trauma after their intimate images are spread to others.<sup>154</sup> To fully address the life-altering impact this crime has on its victims, society must punish the crime with the weight it deserves. The dissemination of intimate images is not a petty

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152. DR. ASIA EATON, DR. HOLLY JACOBS & YANET RUVALCABA, CYBER C.R. INITIATIVE, 2017 NATIONWIDE ONLINE STUDY OF NONCONSENSUAL PORN VICTIMIZATION AND PERPETRATION 22 (June 2017), <https://www.cybercivilrights.org/wp-content/uploads/2017/06/CCRI-2017-Research-Report.pdf> [<https://perma.cc/9HEB-L6BK>].

153. Gov. Press Office, *Governor Cuomo Unveils 11th Proposal of the 2018 State of the State: Ending Sextortion Now*, Governor Andrew M. Cuomo, N.Y. ST. (Dec. 21, 2017), <https://www.governor.ny.gov/news/governor-cuomo-unveils-11th-proposal-2018-state-state-ending-sex-tortion-now> [<https://perma.cc/ZF9A-2HDV>].

154. See generally Mudasir Kamal & William J. Newman, *Revenge Pornography: Mental Health Implications and Related Legislation*, 44 J. AM. ACAD. PSYCHIATRY & L. 359 (2016).

crime. Instead, these serious instances should be treated as felonies, requiring the perpetrator to register as a sex offender. Given the technological nature of the crime and the jurisdictional obstacles, the varied landscape of state laws are too varied and ultimately insufficient placeholders for a federal law. As a society, we must advocate for victims and provide sufficient deterrents and punishments for those who violate the privacy, trust, and personal rights of others.