

WHEN SHARING IS NOT CARING: CREATING AN EFFECTIVE CRIMINAL FRAMEWORK FREE FROM SPECIFIC INTENT PROVISIONS TO BETTER ACHIEVE JUSTICE FOR VICTIMS OF REVENGE PORNOGRAPHY

Ava Schein[†]

“The moral of the story is he doesn’t respect me If you can’t respect me, you have to respect the law.”¹

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[†] Notes Editor, *Cardozo Law Review*. J.D. Candidate (May 2019), Benjamin N. Cardozo School of Law; B.A., Barnard College, Columbia University, 2016. Thank you to all the survivors and activists for your bravery and dedication to shedding light on the issues I take up here. May we see a day in our lifetime where there is no more impunity for revenge porn perpetrators. I would also like to thank: Professor Ekow Yankah, my Faculty Note advisor, for your guidance and thoughtful feedback on this Note; Jessica Goudreault, my Note editor, for your edits and enthusiasm for my topic; the editors of the *Cardozo Law Review* for their diligence in ensuring that this Note be fit for publication; Barnard College, my alma mater, for empowering me to speak up and take action in the face of sexism and injustice; my friends and colleagues, for sending me an influx of articles every time the term “revenge porn” graced the news; and my family, for reading countless drafts and providing endless love and support throughout this process.

¹ Lisa Respers France, ‘Devastated’ *Blac Chyna* Granted Restraining Order Against *Rob Kardashian*, CNN (July 11, 2017, 4:21 PM), <http://www.cnn.com/2017/07/10/entertainment/blac-chyna-gma-restraining-order/index.html> [https://perma.cc/4X7C-SUV7] (quoting reality star *Blac Chyna*).

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INTRODUCTION

“Quick go in bathroom take quick pic for me . . . Do it u know u beautiful always to me,” he said.² She obliged.³ The very next day, the picture was on Instagram: “This is from Chyna yesterday to me. I never been so disrespected in my life . . . This woman is so disrespectful and I don’t care.”⁴ Calls of “revenge porn” ran rampant in the press: Rob Kardashian posted revenge porn to “slut-shame” his ex, Blac Chyna.⁵ The pictures, which Kardashian allegedly posted in response to learning that Chyna, his former fiancée, was dating someone new, went viral, with images of Chyna’s naked body seemingly ubiquitous on the internet. As one may expect, an abundance of sexually-charged slurs and other disparaging comments followed.⁶

It is a story that is becoming increasingly familiar: an ex-paramour is overtaken by jealous rage and resorts to sharing sexually explicit content online to seek vengeance.⁷ Although content of this nature can

² Francesca Bacardi, *Rob Kardashian Posts Revenge Porn of Blac Chyna*, PAGE SIX (July 5, 2017, 11:39 AM), <https://pagesix.com/2017/07/05/rob-kardashian-brings-blac-chyna-down-with-revenge-porn> [<https://perma.cc/M9RT-JDWT>].

³ *Id.*

⁴ Amy Zimmerman, *Rob Kardashian Posts Revenge Porn to Slut-Shame His Ex Blac Chyna*, DAILY BEAST (July 5, 2017, 2:06 PM), <https://www.thedailybeast.com/rob-kardashian-posts-revenge-porn-to-slut-shame-his-ex-blac-chyna> [<https://perma.cc/M7HL-9LZA>].

⁵ *See id.*

⁶ *Id.*

⁷ *See, e.g.,* Gabrielle Fonrouge, *Inside the Twisted Revenge Porn Site That’s Ruining*

be uploaded in a matter of seconds, the effects on its subjects are devastating and long-lasting. Victims are not, however, without legal recourse. Revenge porn,⁸ known less colloquially as “non-consensual pornography,” is a nascent legal doctrine that seeks to impute criminal liability to those who engage in behavior analogous to that of Kardashian.⁹ Generally, revenge porn occurs when an individual *knowingly* or *intentionally* disseminates an image depicting nudity or sexually-explicit content *without* the consent of the pictured subject.¹⁰ It

Women’s Lives, N.Y. POST (Sept. 22, 2017, 12:14 AM), <https://nypost.com/2017/09/22/revenge-porn-site-leaves-trail-of-innocent-victims> [<https://perma.cc/JGR7-8AU3>] (noting the existence of Anon-IB, “one of the world’s main online promoters of revenge porn[,]” where many former partners upload photographs without the consent of the subject); *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> [<https://perma.cc/56YZ-QSEP>] (noting, among others, Kim Kardashian’s victimization by ex-boyfriend Ray J, who leaked a sex tape without her consent in 2007); Cara McGoogan, *Facebook Sees 54,000 Revenge Porn Cases a Month, Documents Reveal*, TELEGRAPH (May 22, 2017, 5:26 PM), <http://www.telegraph.co.uk/technology/2017/05/22/facebook-faces-thousands-revenge-porn-cases-month-documents> (“Facebook users reported almost 54,000 incidents of sexual extortion and revenge porn in January . . .”); Stephanie Petit, *Mischa Barton Opens Up About ‘Emotionally Abusive’ Partner Who Leaked Her Sex Tape*, PEOPLE (Mar. 30, 2017, 10:12 AM), <http://people.com/tv/mischa-barton-talks-partner-leaked-sex-tape-dr-phil-emotional-abuse> [<https://perma.cc/C2JW-CVZP>] (describing a vengeful ex-boyfriend’s attempt to “ruin” Barton and profit off of the dissemination of a non-consensually created sex tape).

⁸ “Revenge porn,” while catchy, is a bit of a misnomer because its nomenclature excludes the prevalent incentives (i.e., not revenge) that compel the unlawful dissemination of revenge porn, as will be discussed later on. This Note will continue to refer to this crime interchangeably as “revenge porn” in acknowledgement of the term’s prevalence within the legal sphere, but must acknowledge that this is a legal issue that is less about revenge and more about privacy. Nonetheless, this Note will refer to “revenge porn” and “non-consensual porn” interchangeably.

⁹ See generally Danielle Keats Citron & Mary Anne Franks, *Criminalizing Revenge Porn*, 49 WAKE FOREST L. REV. 345 (2014).

¹⁰ Although this is perhaps the most common medium of revenge porn, and is the prototype that will generally be taken up in this Note, Professor Mary Anne Franks notes that this is by no means the only type of pornography to come under the categorical purview of revenge pornography. See Mary Anne Franks, *Why We Need a Federal Criminal Law Response to Revenge Porn*, CONCURRING OPINIONS (Feb. 15, 2013), <https://concurringopinions.com/archives/2013/02/why-we-need-a-federal-criminal-law-response-to-revenge-porn.html> [<https://perma.cc/B4TL-CARQ>] (“I want to emphasize at the outset that the problem of non-consensual pornography is not limited to the scenarios that receive the most media attention, that is, when A gives B (often an intimate partner) an intimate photo that B distributes without A’s consent. Non-consensual pornography includes the recording and broadcasting of a sexual assault for prurient purposes and distributing sexually graphic images obtained through hacking or other illicit means.”).

is not dispositive, as regards liability, whether the image was initially obtained with the subject's consent; rather, it is the absence of consent to the image's distribution that renders the perpetrator in violation of the law.¹¹

This dispositive factor—namely, the lack of consent to the image's dissemination—was decidedly at play within the Chyna-Kardashian episode, and it is on this ground that Chyna is empowered to initiate a criminal action against Kardashian.¹² She is able to do so because California, where the scandal occurred, is one of forty-three states plus Washington, D.C. to have criminal revenge porn legislation.¹³ Under the California statute,¹⁴ then, Kardashian may face potential jail time and/or fines¹⁵ should Chyna elect to take him to court.

The growing criminal framework for revenge pornography, coupled with the prevalence of social media use for sexual purposes,¹⁶ is

¹¹ See Citron & Franks, *supra* note 9; Mary Anne Franks, Criminalizing "Revenge Porn": Frequently Asked Questions (Oct. 9, 2013) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2337998 [hereinafter *Frequently Asked Questions*]; Margaret Talbot, *The Attorney Fighting Revenge Porn*, NEW YORKER (Dec. 5, 2016), <http://www.newyorker.com/magazine/2016/12/05/the-attorney-fighting-revenge-porn> [<https://perma.cc/FW5F-K36C>].

¹² Lindsay Kimble, *Rob Kardashian Could Face Revenge Porn Charges for Posting Explicit Photos of Blac Chyna*, *Expert Says*, PEOPLE (July 5, 2017, 1:36 PM), <http://people.com/tv/rob-kardashian-blac-chyna-instagram-rant-legal-expert-weighs-in-revenge-porn> [<https://perma.cc/RRR4-Y2AY>] ("Nobody has the right to take control of someone else's sexual privacy. When we're talking about revenge porn, we're talking about consent and control. And [Kardashian] took control away and his act of posting the images was without [Chyna's] consent.") (quoting attorney Carrie Goldberg).

¹³ 43 States + DC Now Have Revenge Porn Laws, CYBER C.R. INITIATIVE, <http://www.cybercivilrights.org/revenge-porn-laws> [<https://perma.cc/MKP3-ZY3S>] (last visited Mar. 22, 2019).

¹⁴ CAL. PENAL CODE § 647(j)(4) (West 2019).

¹⁵ *Id.*

¹⁶ See *How Common Is Sexting?*, AM. PSYCHOL. ASS'N (Aug. 8, 2015), <http://www.apa.org/news/press/releases/2015/08/common-sexting.aspx>; 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> [<https://perma.cc/NR55-D86Q>] ("Boomers might be baffled by this practice, but for many under 30 sexting isn't seen as particularly transgressive. 'It's embedded in modern relationships in a way that makes us feel safe,' The practice [of distributing nude pictures without the consent of the subject] has become common enough that the American Academy of Pediatrics developed a guide for parents on talking to children about sexting."); Michelle Drouin et al., *Let's Talk About Sexting, Baby: Computer-Mediated Sexual Behaviors Among Young Adults*, 29 COMPUTERS HUM. BEHAV. A25 (2013); Justin R. Garcia et al., *Sexting Among Singles in the USA: Prevalence of Sending, Receiving, and Sharing Sexual Messages and Images*, 13 SEXUAL HEALTH 428 (2016).

invaluable in its capacity to provide legal recourse for victims of revenge porn. This becomes apparent through analysis highlighting the ineffectiveness of available civil and copyright means.¹⁷ The particular shortcomings of those legal channels affirm that the criminal law is the best legal forum within which victims of revenge pornography can seek remedies for their suffered wrongs.¹⁸

There is, however, among the existing criminal statutes, a spectrum of efficaciousness by which victims can achieve rectification. One strand of legislative thought proffers a legislative prototype quite narrow in scope—one which, in effect, renders the perpetration of revenge porn a specific intent crime through its requirement of the “intentional infliction of emotional distress” and its actual effectuation.¹⁹ This type of revenge porn statute is problematic in that it: (1) necessarily precludes a finding of criminal liability for perpetrators who acted under *other*, non-affective motivations; (2) gives rise to an additional, onerous evidentiary burden that requires proof of mental state; and (3) speciously frames revenge porn as a crime of vengeance rather than as the grave breach of privacy that it is.²⁰

In its place, this Note proposes the widespread adoption of an analogue to Illinois’ statute,²¹ which, among several other redeeming facets, does not possess a specific intent element such as the “intentional infliction of emotional distress.” A statute of this nature more effectively allows for the successful prosecution of perpetrators who acted not to inflict emotional harm on their victims, but rather to achieve pecuniary gain, sexual gratification, notoriety, and the like.²² The Illinois statute’s framework, and its more inclusive and comprehensive scope, better situates victims of revenge porn to attain remedies for the harms incurred through the breach of their reasonable expectations of privacy.²³

Part I of this Note lays out the elements and effects of the perpetration of revenge porn. Part I additionally highlights the inadequacies of civil and copyright channels for remedying revenge

¹⁷ See *infra* Section I.C.

¹⁸ *Id.*

¹⁹ See *infra* Section II.B.

²⁰ See *infra* Part II.

²¹ 720 ILL. COMP. STAT. ANN. 5/11-23.5 (West 2019).

²² See *infra* Section II.A.

²³ *Id.*

porn perpetration and sets up the preconditions and justifications for the criminalization of revenge porn. Part II presents an overview of the current state of the criminal revenge porn scheme and analyzes the shortcomings of statutes employing specific intent provisions. Part II posits that vindictive motive clauses do more to hinder victims' access to justice than they do to facilitate it, as they are problematically narrowing, duplicative, and even superfluous from a constitutional standpoint. Part III proposes the ubiquitous adoption of a statute comparable to the Illinois statute, as its lack of a vindictive motive clause, among other redeeming elements, appropriately makes the criminalization of non-consensual porn less about revenge and more about privacy, which more comprehensively imputes liability to those in violation of the law. Part III also suggests that the Illinois legislature amend the statute to include a provision for the use of pseudonyms to ensure confidentiality for victims so as to not re-traumatize them, and so as to incentivize victims to utilize the legal system as a means of relief. This Note recommends that the Illinois statute, which lacks a specific intent clause, be deemed archetypal legislation, notwithstanding its current lack of a pseudonym provision, so as to more strongly deter potential perpetration of revenge porn and better achieve justice for revenge porn victims.

I. BACKGROUND

A. *The Elements and Prevalence of Revenge Pornography*

Revenge porn involves “the distribution of sexually graphic images of individuals without their consent.”²⁴ This includes images and videos originally obtained with (like in an intimate, romantic partner relationship) *and* without (like by hidden recordings or phone hacking) the consent of the pictured subject.²⁵ It is not significant from a legal standpoint whether the creation of the image or video was consented to: it is only significant that its public distribution was not.²⁶ This is a powerful standard. First, it avoids victim blaming and “slut shaming.”²⁷

²⁴ See Citron & Franks, *supra* note 9, at 346.

²⁵ *Id.*

²⁶ *Id.*

²⁷ See *id.* at 353 n.47; *Frequently Asked Questions*, *supra* note 11, at 3.

Second, it accounts for the fact that many revenge porn victims never willingly made their pictures available to anyone in the first place, like in the case of a recorded rape, a hidden camera, or even hacking.²⁸ Finally, it escapes imbuing the law with a moral agenda that simply forbids taking “sexy” pictures, which would do more to shame the victim than to punish the perpetrator.²⁹

Celebrity cases of revenge porn are high-profile³⁰ and serve as the most publicly recognizable form of revenge porn scandals. However, revenge porn is ubiquitous in scope and affects average Americans *en masse*.³¹ Fifty-seven percent of men and forty-five percent of women have received an explicit photograph from a partner.³² These are the

²⁸ See *Frequently Asked Questions*, *supra* note 11.

²⁹ *Id.* at 3 (“[S]haming people for engaging in consensual, adult sexual activity has no legal, moral, or logical basis. ‘Don’t take naked pictures’ is no more a solution to nonconsensual porn as ‘don’t get in a car’ is a solution to being hit by a drunk driver.”); see Talbot, *supra* note 11.

[Goldberg] mentioned the case of Erin Andrews, the former ESPN reporter, who was filmed, without her knowledge, by a man staying in an adjoining hotel room. “Are you just supposed to never take your clothes off?” she said. “You can’t get naked, you can’t take a shower?” She spoke of “upskirting”—the voyeuristic practice of taking unauthorized pictures beneath a woman’s dress. “Are you never supposed to go out in public in a skirt?” Goldberg said. “Or what about images where somebody’s face has been Photoshopped onto somebody else’s naked body? What’s getting distributed isn’t necessarily images that were consented to in the first place. That’s why it’s the *distribution* you have to focus on.” Goldberg went on, “But, even if you did take a naked picture and send it to somebody, that’s not necessarily reckless behavior. That’s time-honored behavior! G.I.s going off to war used to have pics of their wife or girlfriend in a pinup pose. It’s often part of intimate communication. It can be used as a weapon, but, the fact is, almost *anything* can be used as a weapon.”

Id.

³⁰ See, e.g., Emily Smith, *Hacked Celebs’ Lawyers Threaten to Sue Google*, PAGE SIX (Oct. 1, 2014, 11:04 PM), https://pagesix.com/2014/10/01/lawyers-for-hacked-celebs-sue-google-for-failing-to-removing-nude-pics/?_ga=2.41269088.315074894.1510503741-1266948690.1485994171 [<https://perma.cc/GK8C-M2ZJ>] (describing a massive leak of nude and/or sexual pictures of female celebrities by hackers).

³¹ Several case studies exist depicting the experiences of non-celebrity revenge porn victims. See Mary Anne Franks, “Revenge Porn” Reform: A View from the Front Lines, 69 FLA. L. REV. 1251 (2017) [hereinafter “Revenge Porn” Reform].

³² Mudasir Kamal & William J. Newman, *Revenge Pornography: Mental Health Implications and Related Legislation*, 44 J. AM. ACAD. PSYCHIATRY & L. 359, 361 (2016). As for data on sexting, see *Singles in America: Match.com Releases Third Annual Comprehensive Study on the Single Population*, MATCH (Feb. 5, 2013), <http://match.mediaroom.com/2013-02-05-Singles-in-America-Match-com-Releases-Third-Annual-Comprehensive-Study-on-the-Single-Population> [<https://perma.cc/MWX6-8QU8>] (“Over half of single men (57%) and 45% of single women have received a sext.”) (surveying 5,000 adults).

very images that later become wielded as weapons of destruction in the perpetration of revenge porn.

This is not just a celebrity issue, but an epidemic that plagues many individuals.³³ A 2016 study revealed that one in twenty-five Americans has been a victim of threats or posts of nearly nude or nude images without their permission.³⁴ In spite of this, 94% of Americans believe that their data and nude and/or sexual photos are safe in the hands of their romantic partners.³⁵ In actuality, one in ten ex-paramours have threatened exposure of sexually explicit photos online (with these threats being actualized approximately 60% of the time).³⁶ The study also found that 25% of the population has, post break-up, regretted sending intimate content, causing 32% of people to ask former partners to delete all personal content hitherto received.³⁷ Interestingly enough, despite the known risks, 36% of Americans surveyed still planned to send sexy or romantic photos electronically to their partners on Valentine's Day.³⁸

This demonstrates that despite an awareness of the potential for non-consensual dissemination, many Americans continue to transmit sexually explicit photos to their partners. Why? Likely because technology has emerged as a platform for experiencing sexuality, with sexting³⁹ as a modern manifestation of flirtation and love.⁴⁰ Although newfangled in medium, the transmission of sexy pictures is far from a

³³ See *supra* notes 31–32.

³⁴ AMANDA LENHART ET AL., DATA & SOC'Y RES. INST., NONCONSENSUAL IMAGE SHARING: ONE IN 25 AMERICANS HAS BEEN A VICTIM OF "REVENGE PORN" (2016), https://datasociety.net/pubs/oh/Nonconsensual_Image_Sharing_2016.pdf [<https://perma.cc/NP5S-RFMN>].

³⁵ *Lovers Beware: Scorned Exes May Share Intimate Data and Images Online*, BUS. WIRE (Feb. 4, 2013, 8:30 AM), <https://www.businesswire.com/news/home/20130204005437/en/Lovers-Beware-Scorned-Exes-Share-Intimate-Data> [<https://perma.cc/T9HR-4TYY>]; see also LENHART ET AL., *supra* note 34, at 4.

³⁶ See *Lovers Beware*, *supra* note 35.

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Sexting*, BLACK'S LAW DICTIONARY (10th ed. 2014) (defined as "[t]he creation, possession, or distribution of sexually explicit images via cellphones").

⁴⁰ See Kayleigh Dray, *Sexting: The New Dating Norm*, COSMOPOLITAN (July 27, 2012), <http://www.cosmopolitan.com/uk/love-sex/a16834/sexting-is-the-new-dating-norm-technique-for-young-adults> [<https://perma.cc/9VNV-P7U6>] (noting that sexting is "a regular part of modern dating"); *Singles in America*, *supra* note 32 ("A majority of singles believe sexting can hurt their reputation . . . career . . . self-esteem . . . and relationships Despite these fears, . . . [many] women . . . [and] men have sent a sext anyway.").

newfound dating ritual: the exchange of intimate photographs has long served as an expression of sexuality in the fabric of American culture.⁴¹ Consider the iconography of the pin-up girl and its deployment in boosting military morale during World War II.⁴² It was then commonplace for women to give soldiers intimate images as motivation to carry on; they were reminders of who they were fighting for.⁴³ In this sense, the place of pictures in intimacy is time-honored and long-established.⁴⁴ Therefore, there is precedent for respecting the barebones of what is ultimately transformed into revenge porn; to do otherwise would be to transgress enduring traditions of intimacy, and consequently, to infringe upon a fundamental piece of the human experience—sexuality.⁴⁵ This phenomenon only bolsters the notion that it is both inappropriate and ineffective to place the onus on those who choose to send sexy photos.⁴⁶

Revenge porn disproportionately afflicts *women*, who constitute 90% of revenge porn victims.⁴⁷ Conversely, men are most commonly the perpetrators and consumers of revenge porn.⁴⁸ Victims are most

⁴¹ See Priscilla Frank, *The History of the Pin-Up Girl, from the 1800s to the Present*, HUFFPOST (Dec. 6, 2017), https://www.huffingtonpost.com/2014/10/31/pin-up-girl-history_n_6077082.html [<https://perma.cc/SC72-25JQ>] (providing a history of sexual imagery in American culture).

⁴² *Id.*; see also Talbot, *supra* note 11.

⁴³ See Erin Kelly, *An Illustrated History of the Pin-Up Girl*, ALL THAT'S INTERESTING (Jan. 19, 2018), <http://all-that-is-interesting.com/pin-up-history> [<https://perma.cc/8LRU-F2W9>]; see generally Talbot, *supra* note 11.

⁴⁴ See generally Talbot, *supra* note 11.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ Because of this, when this Note discusses “revenge porn victims,” it will generally be referring to female victims and their experiences. This will be evinced through this Note’s use of female gender pronouns. See Mary Anne Franks, Drafting an Effective “Revenge Porn” Law: A Guide for Legislators 11 (Sept. 22, 2016) (unpublished manuscript), <https://www.cybercivilrights.org/wp-content/uploads/2016/09/Guide-for-Legislators-9.16.pdf> [<https://perma.cc/ZM6Y-XW9C>] [hereinafter *A Guide for Legislators*]. See also ASIA A. EATON ET AL., CYBER CIVIL RIGHTS INITIATIVE, 2017 NATIONWIDE ONLINE STUDY OF NONCONSENSUAL PORN VICTIMIZATION AND PERPETRATION: A SUMMARY REPORT 12–14 (2017), <https://www.cybercivilrights.org/wp-content/uploads/2017/06/CCRI-2017-Research-Report.pdf> [<https://perma.cc/3X84-JLYG>]; see also LENHART ET AL., *supra* note 34, at 5 (“One in 10 women under the age of 30 have experienced threats of nonconsensual image sharing.”).

⁴⁸ See EATON ET AL., *supra* note 47, at 15 (noting that men are more than twice as likely to report having been perpetrators of revenge porn than women); “*Revenge Porn*” Reform, *supra* note 31, at 1262.

commonly between the ages of eighteen and thirty,⁴⁹ and perpetrators are most commonly between the ages of eighteen and twenty-five.⁵⁰ Moreover, revenge porn is undeniably a gendered issue, and its prevalence is insolubly tied to age in a fashion commensurate with the use of technology more generally.⁵¹ The intersection of age, gender, and the internet positions revenge porn as a prevalent⁵² legal and social issue, and such primacy only exacerbates the harms incurred by its victims.

B. *The Effects of Revenge Pornography*

The effects of revenge porn on its victims are pervasive and enduring. They can be socially slanderous, psychologically profound, physically endangering, and professionally and academically fatal.⁵³ In

⁴⁹ *A Guide for Legislators*, *supra* note 47.

⁵⁰ EATON ET AL., *supra* note 47, at 16.

⁵¹ See ANDREW PERRIN & MAEVE DUGGAN, PEW RES. CTR., AMERICANS' INTERNET ACCESS: 2000–2015 4 (2015), http://www.pewresearch.org/wp-content/uploads/sites/9/2015/06/2015-06-26_internet-usage-across-demographics-discover_FINAL.pdf [<https://perma.cc/YAG3-4FYE>] (“[T]he proportion of young adults ages 18–29 who use the internet has always outpaced overall adoption levels among older groups In 2000, 70% of young adults used the internet and that figure has steadily grown to 96% today.”).

⁵² Revenge porn is not a new phenomenon, but only really entered public consciousness within the last couple of decades with the rise of the internet and designated revenge porn websites, which allow at once the mass, illicit distribution of sexual images, as well as the maintenance of the relative anonymity of the posters. See *A Guide for Legislators*, *supra* note 47, at 2; Dylan Love, *It Will Be Hard to Stop the Rise of Revenge Porn*, BUS. INSIDER (Feb. 8, 2013, 7:00 PM), <http://www.businessinsider.com/revenge-porn-2013-2> [<https://perma.cc/98V8-3XD4>]; *Revenge Porn: Misery Merchants*, ECONOMIST (July 5, 2014), <https://www.economist.com/news/international/21606307-how-should-online-publication-explicit-images-without-their-subjects-consent-be> [<https://perma.cc/KSJ8-XS5A>] (“At least 3,000 porn websites around the world feature the revenge genre, and the number is rising[.]”); Alexa Tsoulis-Reay, *A Brief History of Revenge Porn*, N.Y. MAG. (July 21, 2013), <http://nymag.com/news/features/sex/revenge-porn-2013-7> [<https://perma.cc/JQ4C-9L8M>] (noting that revenge porn’s modern day inception occurred in 1980, after Hustler magazine published stolen nude photos of a woman, and describing, alongside them, her fabricated sexual desires. The article details other important historic events in the progression of revenge porn as a prominent social phenomenon, including an Italian researcher’s 2000 identification of an emerging “realcore pornography” genre, a 2008 online intermediary’s admission of receiving weekly complaints of “revenge porn,” and a groundbreaking imprisonment of a perpetrator who posted revenge porn on Facebook in New Zealand in 2010).

⁵³ See *infra* note 58.

short, revenge porn can wield extensive damage to which every sphere of life is vulnerable, and none are exempt.

Revenge porn can not only destroy victims' intimate relationships, it can also become engrained in them.⁵⁴ Revenge porn can constitute domestic violence when it is used to prevent a partner from ending a relationship, reporting abuse, or obtaining custody of children.⁵⁵ It can be wielded by rapists who record their sexual assaults in order to humiliate victims and deter them from reporting the crime to the authorities.⁵⁶ Revenge porn is also used by sex-traffickers and pimps to coerce individuals into entering and remaining in the sex trade.⁵⁷

Revenge porn can also have deleterious effects on employment and education opportunities, and can even result in the termination of employment and expulsion from school.⁵⁸ Additionally, revenge porn victims are routinely threatened with sexual assault, bullied online, and solicited for sex by strangers because of their perceived promiscuity.⁵⁹

⁵⁴ Franks, *supra* note 28, at 1.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ See "Revenge Porn" Reform, *supra* note 31, at 1258; *A Guide for Legislators*, *supra* note 47, at 14 (describing the story of "Sarah," who was forced to perform sexual acts with another woman on film. The individual who filmed it, a sex trafficker, then threatened to send the video to Sarah's family if she ever attempted to escape from servitude).

⁵⁸ "Revenge Porn" Reform, *supra* note 31, at 10.

With regard to professional and educational impact, 42% of victims had to explain the situation to professional or academic supervisors, coworkers or colleagues. More than a quarter of victims left work or school for a period of time as a result of the disclosure. Eight percent quit their jobs or dropped out of school; 6% were fired from their jobs or expelled from school. More than half experienced difficulty concentrating at work or school due to the experience. Thirty-nine percent believed that the experience affected their professional advancement.

Id. See also M.C. Barnum, *It Happened to Me: I Was the Victim of Revenge Porn and Forced to Resign from My Job*, XOJANE (Oct. 7, 2015), <https://web.archive.org/web/20170908140627/http://www.xojane.com/it-happened-to-me/i-was-the-victim-of-revenge-porn> (detailing the author's forced resignation from her job after a nude photo of her was leaked by a former supervisor who hacked into her email account); Talbot, *supra* note 11 (describing the story of Connie, who after being victimized, suffered hardship in securing employment after being compelled to abandon her career) ("If [one] didn't mention the harassment in a job interview, [they] risked having the potential employer find graphic pictures of [them] online; if, like Connie, [one] erased [their] Internet presence, the employer might see nothing about [them] online, which was suspicious in its own way.").

⁵⁹ Franks, *supra* note 28, at 1; *Revenge Porn*, YOUR WEEKLY CONSTITUTIONAL (Nov. 22, 2013), https://www.podomatic.com/podcasts/ywc/episodes/2013-11-22T13_24_26-08_00 [<https://perma.cc/S6UW-NAFZ>] (downloaded on Podomatic).

Many are stalked, as their contact information⁶⁰ is often published alongside the images.⁶¹ This can compel some victims to change their names, and some are even forced to move.⁶²

These detrimental effects contribute to the profound psychological harm that revenge porn victims often suffer.⁶³ They manifest in anger, guilt, paranoia, depression, feelings of isolation, and even suicide.⁶⁴ Victims also experience low self-esteem and feelings of worthlessness.⁶⁵

A case study illustrating the tragic psychological effects that revenge porn has on its victims is that of Rehtaeh Parsons.⁶⁶ Rehtaeh, fifteen years-old, went to a party where she was raped while vomiting out of a window after consuming too much alcohol.⁶⁷ The rape was photographed, and an image of Rehtaeh being sodomized went viral

⁶⁰ Approximately 59% of revenge porn is posted with the subject's name; 49% is posted with social network information; 26% is posted with an email address; and 16% is posted with a home address. *A Guide for Legislators*, *supra* note 47.

⁶¹ This is called "doxing" (or "doxxing") and is an increasingly common phenomenon in the world of cybercrimes. See Joey L. Blanch & Wesley L. Hsu, *An Introduction to Violent Crime on the Internet*, in 64 U.S. ATT'YS' BULL. 2, 5 (2016), <https://www.justice.gov/usao/file/851856/download> [<https://perma.cc/L4KQ-7FS9>] ("Doxing . . . refers to broadcasting personally identifiable information about an individual on the internet. It can expose the victim to an anonymous mob of countless harassers, calling their phones, sending them emails, and even appearing at the victim's home.").

⁶² Kamal & Newman, *supra* note 32, at 363 (noting that a name change does not always result in an end to harassment, as a case study shows that a harasser simply reposted the explicit photographs and linked them to the victim's new name after learning of her new name).

⁶³ A recent study revealed that compared to those never victimized by revenge porn, victims had significantly worse mental health outcomes and higher levels of physiological problems. The same is true of those who were threatened, but not victimized, as compared to those who were neither threatened nor victimized. See EATON ET AL., *supra* note 47, at 23–24.

⁶⁴ See Kamal & Newman, *supra* note 32, at 362; see also *A Guide for Legislators*, *supra* note 47, at 11–13 (noting that 93% of victims reported suffering significant emotional distress due to being a victim; 42% of victims sought out psychological services due to being a victim; and 51% of victims had suicidal thoughts due to being a victim).

⁶⁵ Kamal & Newman, *supra* note 32, at 362.

⁶⁶ This is a Canadian case, so even though the perpetrator was given a mere probationary sentence, this case study is intended to be more about the effects of the dissemination and less about the particular legal framework that failed to adequately punish it. Additionally, because Rehtaeh was a minor, her assailant(s) would likely come under the scope of child pornography law rather than revenge porn law.

⁶⁷ John Barber, *Second Man Walks Free After Humiliation of Canadian Teen Rehtaeh Parsons*, GUARDIAN (Jan. 15, 2015, 3:38 PM), <https://www.theguardian.com/world/2015/jan/15/rehtaeh-parsons-second-man-walks-free-humiliation-canadian-teen-killed-herself> [<https://perma.cc/MW8N-N6GD>]; "Revenge Porn" Reform, *supra* note 31, at 1265.

around her school.⁶⁸ Slurs of “slut” and propositions for sex followed, notwithstanding the fact that this was *rape*—*not* consensual sex.⁶⁹ Approximately one and a half years later, Rehtaeh attempted suicide.⁷⁰ Her failed attempt left her in a coma, and she was taken off of life support shortly thereafter.⁷¹ Rehtaeh’s story serves as a tragic illustration of the grave, sometimes fatal effects of revenge porn, and its overtly non-consensual nature.⁷² Unfortunately, Rehtaeh is not alone; many women have faced similar realities, the circumstances often different, but the consequences eerily the same.⁷³

For women in particular, the harassment endured can take a formidable and enduring toll on sexuality.⁷⁴ If sexual autonomy is to be treated as an insoluble part of liberty, a woman’s liberty is necessarily infringed upon when she is compelled to repress her sexuality for fear of

⁶⁸ See sources cited *supra* note 67.

⁶⁹ See sources cited *supra* note 67.

⁷⁰ See sources cited *supra* note 67.

⁷¹ See sources cited *supra* note 67.

⁷² See sources cited *supra* note 11 and accompanying text; see also *supra* Section I.B.

⁷³ See, e.g., *Audrie Pott Suicide: Three Teens Arrested for Alleged Sexual Assault of Calif. Girl Who Committed Suicide*, CBS NEWS (Apr. 12, 2013, 11:04 AM), <https://www.cbsnews.com/news/audrie-pott-suicide-three-teens-arrested-for-alleged-sexual-assault-of-calif-girl-who-committed-suicide> [https://perma.cc/4Z6K-SNHV] (noting that a fifteen-year-old girl committed suicide eight days after she was sexually assaulted while unconscious, and after photo documentation of the assault was circulated around school); Nina Burleigh, *Sexting, Shame and Suicide: A Shocking Tale of Sexual Assault in the Digital Age*, ROLLING STONE (Sept. 17, 2013, 6:20 PM), <http://www.rollingstone.com/culture/news/sexting-shame-and-suicide-20130917> [https://perma.cc/ZBB9-XSYX] (describing Audrie Pott’s story and noting the stories of other teenage girls similarly situated); Annmarie Chiarini, *I Was a Victim of Revenge Porn. I Don’t Want Anyone Else to Face This*, GUARDIAN (Nov. 19, 2013, 7:30 AM), <https://www.theguardian.com/commentisfree/2013/nov/19/revenge-porn-victim-maryland-law-change> [https://perma.cc/X3ZQ-M25R] (describing the author’s suicide attempt after her ex-boyfriend released nude pictures of her); *Jessica Logan Suicide: Parents of Dead Teen Sue School, Friends Over Sexting Harassment*, HUFFPOST (Dec. 6, 2017), https://www.huffingtonpost.com/2009/12/07/jessica-logan-suicide-par_n_382825.html [https://perma.cc/6ULV-56FK] (reporting that a teen committed suicide after her ex-boyfriend circulated a nude photo of her that she had sexted to him while they were together); Kelly McLaughlin, *‘He Ruined My Life’: Victims Reveal How They Were Left Suicidal After Their Naked Photos Were Posted Online by ‘Revenge Porn’ Mastermind as He’s Finally Jailed for 18 Years*, DAILY MAIL (Apr. 5, 2015, 8:46 PM), <http://www.dailymail.co.uk/news/article-3026036/Revenge-porn-victims-speak-site-operator-sentenced-18-years-prison.html> [https://perma.cc/26Z8-7SDH] (reporting that a revenge porn victim attempted suicide after experiencing victim shaming).

⁷⁴ Mary Anne Franks, *Unwilling Avatars: Idealism and Discrimination in Cyberspace*, 20 COLUM. J. GENDER & L. 224, 246 (2011).

retribution.⁷⁵ Moreover, revenge porn and the shame and harassment it provokes can suppress a victim's sexuality, which in turn can suppress her sense of liberty.⁷⁶ This liberty has been deemed a precondition to gender equality; where it is lacking, there simply cannot be equality for women.⁷⁷

The inconceivable and potent detriment to revenge porn victims takes shape physically, psychologically, socially, occupationally, and sexually. Coupled with the prevalence of revenge porn within society, the profundity of these harms necessitates an effective and fruitful legal framework through which victims can seek justice and reclaim the facets of their lives that were unilaterally stripped from their control.⁷⁸ Although legal action will not rectify all of the damage incurred by victims, an effective legal regime can help to achieve closure for victims and provide the psychological, sociopolitical, and economic tools with which victims can begin to put the pieces back together.⁷⁹

C. *Recourse Prior to Criminalization: The Civil and Copyright Schemes*

Prior to the criminalization of revenge porn, victims had to seek legal recourse through civil and copyright means.⁸⁰ More specifically, victims could bring tort claims under the theories of invasion of privacy or intentional infliction of emotional distress, or could bring infringement of copyright claims under copyright law.⁸¹ These approaches are inadequate for several reasons,⁸² many of which are

⁷⁵ *Id.* at 246–47 (“Sexual autonomy is undoubtedly an important aspect of liberty; sexually autonomous agents do not repress, denigrate, or distance themselves from their sexuality because of fear of ridicule, threats, or vengeful disclosure of private intimate acts. Yet in an environment where women are frequently subjected to unwanted sexual attention, harassment, and public shaming for their sexuality, this is precisely what some women are forced to do.”).

⁷⁶ *Id.*

⁷⁷ *See id.* at 247 (“Where cyber harassment persists unchecked, women are not treated as equal members of society.”).

⁷⁸ *See A Guide for Legislators*, *supra* note 47, at 2, 11–13.

⁷⁹ *See Citron & Franks*, *supra* note 9, at 390–91.

⁸⁰ *See generally* Adrienne N. Kitchen, Note, *The Need to Criminalize Revenge Porn: How a Law Protecting Victims Can Avoid Running Afoul of the First Amendment*, 90 CHI.-KENT L. REV. 247, 250–51 (2015).

⁸¹ *See Citron & Franks*, *supra* note 9, at 349. *Cf. Franks*, *supra* note 10.

⁸² *Citron & Franks*, *supra* note 9, at 349.

common to both civil and copyright claims, and many of which are unique to one or the other.⁸³

Civil and copyright laws inadequately deter the perpetration of revenge porn.⁸⁴ This is evinced by the fact that we continue to see frequent incidents of revenge porn and an abundance of revenge porn websites.⁸⁵ If the function of the law and the punishments it prescribes is to be understood as a deterrent against wrongful actions, then civil and copyright law can be understood only as ineffective in preventing revenge porn perpetration.⁸⁶ With the increasing online presence of revenge porn,⁸⁷ the threat of litigation and monetary damages is insufficient to dissuade perpetration of revenge pornography.⁸⁸ Criminal penalties have a more persuasive effect.⁸⁹ Given their staying power, criminal convictions are much more likely to be contemplated prior to perpetration, engendering a stronger proclivity for avoidance.⁹⁰

Additionally, civil and copyright suits are costly.⁹¹ Many victims do not possess the means necessary to pursue litigation.⁹² This is largely due to the fact that many victims lose their jobs as a result of the pornography and cannot afford everyday living expenses, much less attorney's fees.⁹³ For those who *can* afford to bring suit, they may be limited in doing so to the degree that the perpetrator is insolvent, or is possessed of relatively scarce assets.⁹⁴ In this way, victims with limited access to the justice system face monetary hurdles in seeking justice under civil law, and those who have the necessary means to bring a legal action are limited by the corollary means of their assailants, who may be financially "judgment proof."⁹⁵ This gives rise to an imperfect system that obfuscates victims' ability to attain legal judgments regardless of the

⁸³ *See id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *See supra* notes 30–34 and accompanying text.

⁸⁸ *See* Citron & Franks, *supra* note 9, at 349.

⁸⁹ *Id.*

⁹⁰ *See id.* ("While perpetrators may have little fear of civil litigation or copyright claims, the threat of criminal penalties is a different matter. Since criminal convictions in most cases stay on one's record forever, they are much less likely to be ignored.").

⁹¹ *See Frequently Asked Questions, supra* note 11, at 2.

⁹² *See* Citron & Franks, *supra* note 9, at 358.

⁹³ *Id.*

⁹⁴ *Id.* at 349.

⁹⁵ *Id.* at 358.

means with which they are equipped, and whereby a perpetrator's insolvency can further victimize the victim by re-inscribing her powerlessness and lack of control over her situation.⁹⁶

Civil and copyright suits are also time-consuming,⁹⁷ and throughout the litigation process, sexually-explicit images of the victim can continue to be disseminated while the case is in adjudicatory limbo.⁹⁸ This allows for further reputational, professional, physical, and emotional damage to be incurred by the victim.⁹⁹ This also enables the increased frequency and scope of unlawful distributions, affording rather comprehensive impunity to those responsible downstream.¹⁰⁰

In addition, a civil suit—even one that garners a successful outcome—cannot stop the spread of an image already disseminated.¹⁰¹ Civil tort law does not effectively provide removal as a facet of recourse, as an injunction commanding that the poster remove the image does nothing to stop the hordes of individuals that have downloaded and reposted the image.¹⁰² This, at its core, suggests the inappropriateness of civil remedies for revenge porn victims, as most victims view removal of the material as paramount—not the recovery of damages.¹⁰³ Therefore, civil antidotes do little to ameliorate the plight of revenge porn victims as they do not accomplish their foremost priority—the removal of the slanderous material.¹⁰⁴

⁹⁶ See *id.* at 358–59.

⁹⁷ *Frequently Asked Questions*, *supra* note 11, at 2.

⁹⁸ See *id.*; “*Revenge Porn*” *Reform*, *supra* note 31, at 56 (“By the time most cases ever make it to court, the material will already have been sent to the victim’s family members, employers, peers, and may well have already been viewed, downloaded, and redistributed thousands of times.”).

⁹⁹ See Citron & Franks, *supra* note 9, at 365 (“Victims of nonconsensual pornography are harmed each time a person views or shares their intimate images.”).

¹⁰⁰ See “*Revenge Porn*” *Reform*, *supra* note 31, at 40, 56.

¹⁰¹ See Citron & Franks, *supra* note 9, at 349.

¹⁰² See *id.*; “*Revenge Porn*” *Reform*, *supra* note 31, at 37 (“[E]ven if a victim wins . . . an injunction forcing the poster to take down the image, there is literally nothing to stop the hundreds of other people that have already downloaded or re-posted her image.”). See also Mitchell J. Matorin, *In the Real World, Revenge Porn is Far Worse than Making It Illegal*, TALKING POINTS MEMO (Oct. 18, 2013, 2:00 AM), <http://talkingpointsmemo.com/cafe/our-current-law-is-completely-inadequate-for-dealing-with-revenge-porn> [<https://perma.cc/VL3M-95DF>].

¹⁰³ See Franks, *supra* note 10.

¹⁰⁴ See *id.*

Relatedly, civil and copyright means are inadequate in that they require the dissemination of the images that the plaintiff seeks to eradicate.¹⁰⁵ The very process by which relief is being pursued re-inflicts the harm for which rectification is sought.¹⁰⁶ There is thus a counter-productivity inherent in civil suits brought on behalf of revenge porn victims that mandates a shift to criminal processes and/or a shift to confidentiality and pseudonymous litigation.¹⁰⁷

In addition to the limited recourse that can be successfully sought against the individual distributors, there is an even less likelihood of success in attaining a judgment against the websites that hold and enable viewership of the images.¹⁰⁸ Such websites can claim immunity under § 230 of the Communications Decency Act (CDA),¹⁰⁹ which grants websites protection from tort liability stemming from content belonging to a third party.¹¹⁰ This means that the unlawful distribution of sexually explicit media to a revenge porn website cannot ground liability for the website displaying it because the content was not provided or solicited by the website.¹¹¹ Revenge porn websites are granted broad immunity, ostensibly insulating them from criminal and civil claims.¹¹² As websites house the pornography and enable mass viewership and downstream distribution, they are uniquely positioned as having the most remedial clout, and are thus logical targets for victims attempting to strip the content from the internet.¹¹³ Additionally, websites are far less judgment proof than individual purveyors, rendering them ideal targets for victims seeking monetary damages.¹¹⁴ Their protection under the CDA is therefore problematic, as

¹⁰⁵ *Id.* (“Perhaps most distressingly, [civil suits] often [require] further dissemination of the very material that harms the victim. The irony of privacy actions is that they generally require further breaches of privacy to be effective.”).

¹⁰⁶ *Id.*

¹⁰⁷ *But see infra* note 216.

¹⁰⁸ *See infra* note 115 and accompanying text; “*Revenge Porn*” Reform, *supra* note 31, at 32.

¹⁰⁹ 47 U.S.C. § 230 (2018).

¹¹⁰ 47 U.S.C. § 230(c)(1) (“No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.”).

¹¹¹ *See Citron & Franks, supra* note 9, at 359.

¹¹² *See id.* (“Courts have interpreted § 230 to largely immunize from liability website owners and operators for tortious material submitted by third-party users.”); “*Revenge Porn*” Reform, *supra* note 31, at 32.

¹¹³ *See A Guide for Legislators, supra* note 47, at 2; Franks, *supra* note 10.

¹¹⁴ *See* Stephen G. Gilles, *The Judgment-Proof Society*, 63 WASH. & LEE L. REV. 603, 606

it precludes victims from successfully bringing lawsuits,¹¹⁵ leaving them with little available recourse.

The CDA, however, does not immunize websites where copyright is at issue, as it does not cover federal intellectual property claims.¹¹⁶ Therefore, a victim may fare better in seeking relief under a copyright claim should she wish to bring suit against a revenge porn website.¹¹⁷ The conundrum there, however, raises another ground for inadequacy: a victim is barred from bringing a copyright claim if she did not take the picture or video in question, as she would not possess copyright ownership.¹¹⁸ This facet augments the onerousness of the copyright channel of recourse.¹¹⁹ While the vast majority of victims possess copyright ownership through the images' status as "selfies,"¹²⁰ several victims do not capture or take the images, themselves.¹²¹ Those victims are deprived of a means of remedy under copyright law.¹²² As such, this scheme lacks the comprehensiveness to effectively serve all victims of revenge porn and is therefore insufficient as a general remedy.

Those victims who do possess copyright ownership are precluded from suing for infringement until they register the image(s) with the U.S. Copyright Office.¹²³ This is problematic in that even though the

(2006) ("Knowing that they can collect at best a fraction of the plaintiff's claim even if they litigate and win, plaintiffs' attorneys typically decline to litigate meritorious tort claims against uninsured or underinsured individuals. In the absence of liability insurance, plaintiffs are effectively barred from bringing suit unless the tortfeasor is an asset-rich corporation or an affluent individual who neglects to take elementary precautions to protect his or her assets from tort liability.").

¹¹⁵ This is substantiated by available case law that unsuccessfully alleged liability for online intermediaries under § 230 of the Communications Decency Act (CDA). *See, e.g., GoDaddy.Com v. Toups*, 429 S.W.3d 752, 762 (Tex. App. 2014).

¹¹⁶ 47 U.S.C. § 230(e)(2) (2018) ("Nothing in this section shall be construed to limit or expand any law pertaining to intellectual property.").

¹¹⁷ *See "Revenge Porn" Reform, supra* note 31, at 27.

¹¹⁸ *See Franks, supra* note 10.

¹¹⁹ *See "Revenge Porn" Reform, supra* note 31, at 52–53.

¹²⁰ *See Amanda Levendowski, Note, Using Copyright to Combat Revenge Porn*, 3 N.Y.U. J. INTELL. PROP. & ENT. L. 422, 426 (2014) ("A survey of 864 revenge porn victims revealed that more than eighty percent of revenge porn images are "selfies," meaning that the author and the subject are the same.").

¹²¹ *Id.*

¹²² *See Franks, supra* note 10.

¹²³ *See* 17 U.S.C. § 411(a) (2018); Matorin, *supra* note 102; *see also* Fourth Estate Pub. Benefit Corp. v. Wall-Street.com, LLC, No. 17-571 (U.S. Mar. 4, 2019) (confirming that a copyright claimant may commence a suit for infringement when the Copyright Office registers

registration process¹²⁴ is not particularly difficult, it can be time-consuming and triggering for victims, as it requires further submission of the explicit image, in this case, to the government.¹²⁵

Once a victim legally possesses copyright ownership, she may submit a notice under § 512 of the Copyright Act, upon receipt of which the online intermediary would be required to take down the allegedly infringing content.¹²⁶ It has been observed, however, that revenge porn websites often ignore requests for removal, because they know that many victims are without the monetary means to sue and they can thus proceed relatively unscathed.¹²⁷ There is, therefore, little incentive for online intermediaries to responsively engage with § 512 filings, and as such, copyright methods are once again rendered ineffective as a means of legal relief for victims.

Even if a victim does prevail on a copyright infringement case, the pornography does not really disappear from the internet.¹²⁸ Although the defendant host website may be forced to take it down, the victim may find herself playing a game of virtual whack-a-mole, in which for every one website that removes the content, it pops up on several more.¹²⁹ Indeed, one victim reported that despite a successful copyright suit, she still finds many websites displaying the same sexually-explicit content of her.¹³⁰ The internet, then, is an entity where removed material is never truly removed, and where replications of content are

the copyright, but may also recover damages for infringement that occurred before and after registration).

¹²⁴ *Copyright Registration, WITHOUT MY CONSENT*, <http://www.withoutmyconsent.org/resources/copyright-registration> [<https://perma.cc/FD69-JS8K>].

¹²⁵ See Erica Fink, *To Fight Revenge Porn, I Had to Copyright My Breasts*, CNN: BUS. (Apr. 27, 2015, 1:32 PM), <http://money.cnn.com/2015/04/26/technology/copyright-boobs-revenge-porn/index.html> [<https://perma.cc/CZ3Z-5MMC>].

¹²⁶ See 17 U.S.C. § 512(c)(1)(C) (2018) (exempting a service provider from liability for monetary relief if, upon notification of claimed infringement, the provider responds expeditiously to remove the material).

¹²⁷ See Citron & Franks, *supra* note 9, at 360.

¹²⁸ See *id.* (“[E]ven successful copyright actions cannot put the genie back in the bottle. Once an image is released, getting it removed from one site does not mean that it will be removed from every other site to which it has migrated.”).

¹²⁹ In this case, victims must file individual takedown notices with each website displaying the content. This can be costly and time-consuming, and has even been described as a “full-time job.” See Talbot, *supra* note 11 (describing a mother and daughter who spent over 500 hours sending takedown requests).

¹³⁰ Fink, *supra* note 125.

made instantaneously and relatively permanently.¹³¹ Copyright remedies, therefore, are not really remedies at all.

There are many qualities inherent in civil and copyright fora that render them inadequate means through which victims of revenge porn can achieve justice.¹³² This is not to say that civil or copyright claims are wholly unfruitful as a curative means for victims;¹³³ rather, it is to suggest that the costs inherent in civil and copyright suits tend to outweigh the benefits emanating therefrom.¹³⁴ This reality, and the gaping holes it leaves in the reparative scheme for revenge porn victims, necessitates a shift to another, more effective venue for justice: criminal law.¹³⁵

II. THE SHORTCOMINGS OF CRIMINAL REVENGE PORN STATUTES WITH SPECIFIC INTENT PROVISIONS MANDATING THE INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

The wanton nature of its perpetration has caused state legislatures to begin criminalizing revenge porn, crystallizing it as taboo.¹³⁶ It is not merely the insufficiency of other legal and adjudicatory means that merits its criminalization, but also the overtly non-consensual, sexual nature of revenge porn's core.¹³⁷ While the criminal scheme has

¹³¹ For musings on online permanence, see, for example, DANIEL J. SOLOVE, *THE FUTURE OF REPUTATION: GOSSIP, RUMOR, AND PRIVACY ON THE INTERNET* (2007).

¹³² See *supra* Section I.C.

¹³³ There are, in fact, several examples of successful civil and copyright claims. See, e.g., *Taylor v. Franko*, No. 09-00002 JMS/RLP, 2011 WL 2746714 (D. Haw. July 12, 2011) (granting \$425,000 to a victim for intentional infliction of emotional distress, defamation, and invasion of privacy); Brian Rogers, *Jury Awards \$500,000 in 'Revenge Porn' Lawsuit*, HOUSTON CHRON. (Feb. 21, 2014, 10:33 PM), <http://www.houstonchronicle.com/news/houston-texas/houston/article/Jury-awards-500-000-in-revenge-porn-lawsuit-5257436.php> [<https://perma.cc/9LSK-8EY6>] (describing an award of a \$500,000 settlement to a revenge porn victim for the intentional infliction of emotional distress).

¹³⁴ See *supra* Section I.C.

¹³⁵ See *infra* Part II.

¹³⁶ Franks, *supra* note 10 (“[W]e should regard non-consensual pornography as a crime because that is the most accurate and principled characterization of its harm. Non-consensual pornography may indeed also be a violation of privacy or an infringement of copyright, but it is at its base an act of sexual use without consent.”). See Citron & Franks, *supra* note 9, at 349 (“Criminalizing nonconsensual pornography is . . . appropriate and necessary to convey the proper level of social condemnation for this behavior.”).

¹³⁷ See Citron & Franks, *supra* note 9, at 349.

recently—and laudably—proliferated, it has splintered into two distinct statutory schemes, one of which—the specific intent model—is innately flawed and hinders the effectuation of a fruitful criminal framework.

A. *An Overview of the [Bifurcated] Criminal Scheme*

For proponents of revenge porn’s criminalization, what was once merely aspirational became reality when New Jersey became the first state to criminalize revenge porn in 2004.¹³⁸ The New Jersey law—the first of its kind—made it a crime of the third-degree to disclose a nude or sexually-explicit photo without the consent of the subject.¹³⁹ Since 2004, and at the time of this writing, forty-three states¹⁴⁰ and

¹³⁸ Franks, *supra* note 11, at 371.

¹³⁹ N.J. STAT. ANN. § 2C:14-9(c) (West 2004).

An actor commits a crime of the third degree 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 another person whose intimate parts are exposed or who is engaged in an act of sexual penetration or sexual contact, unless that person has consented to such disclosure. For purposes of this subsection, “disclose” means sell, manufacture, give, provide, lend, trade, mail, deliver, transfer, publish, distribute, circulate, disseminate, present, exhibit, advertise or offer. Notwithstanding the provisions of subsection b. of N.J.S.2C:43-3, a fine not to exceed \$30,000 may be imposed for a violation of this subsection.

Id.

¹⁴⁰ 43 States + DC Have Revenge Porn Laws, *supra* note 13 (noting that the following states have enacted revenge porn laws: Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Michigan, Minnesota, Missouri, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, and Wisconsin). The New York City Council has approved and implemented legislation criminalizing revenge porn. New York State passed revenge porn legislation in February 2019, after a proposed bill had been passed by the State Assembly’s Code Committee in June 2018, but had otherwise been in limbo in Albany since 2013. As of this writing, the Bill has not yet been delivered to and signed by Governor Cuomo, but the Governor has vocalized his support of the new state proposal, under which offenders could face up to one year in jail. See Antonia Blumberg, *New York City Council Votes to Make Revenge Porn Illegal*, HUFFPOST (Nov. 16, 2017, 9:38 PM), https://www.huffingtonpost.com/entry/new-york-city-vote-revenge-porn_us_5a0e10c4e4b0e97dffec541d [<https://perma.cc/GA25-EQ5S>]; James Hetherington, *What Happened to New York’s Revenge Porn Bill?*, NEWSWEEK (June 21, 2018, 1:46 PM), <https://www.newsweek.com/what-happened-new-yorks-revenge-porn-bill-google-989666> [<https://perma.cc/MY8K-3AYM>]; Andrew Liptak, *The First Lawsuit Has Been Filed Under a New Revenge Porn Law in New York City*, VERGE (Apr. 15, 2018, 1:36 PM), <https://>

Washington, D.C. have enacted revenge porn laws.¹⁴¹ These laws typically make it a misdemeanor for one to willfully disclose media depicting nudity or acts of a sexual nature if the disclosure occurred without the consent of the pictured party.¹⁴² Although statutes vary in content across state lines, they overwhelmingly threaten jail time or the incurrance of fines should a determination of guilt be made in a court of law.¹⁴³ Although those punishments remain constants from state to state, a prevalent distinguishing factor amongst state laws is that of motive, particularly in those statutes that make revenge porn a specific intent crime. More specifically, several statutes, like those in California,¹⁴⁴ Colorado,¹⁴⁵ and Arkansas¹⁴⁶ mandate that sexually

www.theverge.com/2018/4/15/17239838/new-york-city-revenge-porn-law-first-complaint-tumblr [https://perma.cc/KZ9M-VUJR]; Julia Marsh, *CUNY Professor Files First Lawsuit Under New Revenge Porn Law*, N.Y. POST (Apr. 13, 2018, 1:14 PM), <https://nypost.com/2018/04/13/cuny-professor-files-first-lawsuit-under-new-revenge-porn-law> [https://perma.cc/NNB9-3MY7]; Sara Ashley O'Brien, *Revenge Porn Will Soon Be a Crime in New York City*, CNN: BUS. (Nov. 16, 2017, 7:56 PM), <http://money.cnn.com/2017/11/16/technology/nyc-revenge-porn-bill/index.html> [https://perma.cc/TF4L-W947] (“The city council voted on Thursday to make it a misdemeanor to disclose, or to threaten to disclose, the intimate images of someone without their consent and with the intent to cause harm. The act will be punishable of up to 1 year in prison, a \$1,000 fine, or both.”); Vivian Wang, *‘Revenge Porn’ Law Finally Passes in New York*, N.Y. TIMES (Feb. 28, 2019), <https://www.nytimes.com/2019/02/28/nyregion/revenge-porn-law.html>.

¹⁴¹ *43 States + DC Have Revenge Porn Laws*, *supra* note 13.

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ CAL. PENAL CODE § 647(j)(4)(A) (West 2019)

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.

Id.

¹⁴⁵ COLO. REV. STAT. ANN. § 18-7-107 (West 2018)

(1)(a) An actor who is eighteen years of age or older commits the offense of posting a private image for harassment if he or she posts or distributes through the use of social media or any web site any photograph, video, or other image displaying the private intimate parts of an identified or identifiable person eighteen years of age or older . . . :

(I) *With the intent to harass, intimidate, or coerce the depicted person;*

explicit media be disseminated *without consent* in order to *inflict psychological and emotional harm*. Indeed, as of August 2016, twenty-three states had “intent to harm” requirements in their revenge porn statutes.¹⁴⁷ The inclusion of such specific intent provisions is troubling. To see why this is, it is helpful to examine the Florida statute.¹⁴⁸

Florida’s non-consensual pornography statute defines “sexual cyberharassment” as the non-consensual publication of a sexually explicit image with the intent of causing “substantial emotional distress to the depicted person.”¹⁴⁹ In the state of Florida, then, a perpetrator will be convicted *only* if it can be proven that he disseminated sexually

(II)(A) *Without the depicted person’s consent; . . . and*

(III) *The conduct results in serious emotional distress of the depicted person.*

Id. (emphasis added).

¹⁴⁶ ARK. CODE ANN. § 5-26-314 (West 2019)

(a) A person commits the offense of unlawful distribution of sexual images or recordings if, being eighteen (18) years of age or older, *with the purpose to harass, frighten, intimidate, threaten, or abuse another person*, the actor distributes an image, picture, video, or voice or audio recording of the other person to a third person by any means if the image, picture, video, or voice or audio recording:

- (1) Is of a sexual nature or depicts the other person in a state of nudity; and
- (2) The other person is a family or household member of the actor or another person with whom the actor is in a current or former dating relationship.

Id. (emphasis added) (note the peculiarity of the Arkansas statute’s inclusion of a consanguinity or dating relationship requirement. This necessarily excludes imputing liability to hackers, rapists, or other individuals with no preexisting relationship with the victim. This provision would also preclude liability for former colleagues and even friends who perpetrate revenge porn. What with the specific intent facet and this provision, this statute comes under significant scrutiny).

¹⁴⁷ Steven Yoder, *Why Is It So Hard to Write a Decent Revenge Porn Law?*, VICE (Aug. 2, 2016, 3:00 PM), https://www.vice.com/en_us/article/kwka43/why-is-it-so-hard-to-write-a-decent-revenge-porn-law [<https://perma.cc/438M-8SFN>] (noting that at the time the Article was written, only eleven of the then thirty-four states with nonconsensual pornography laws did not have “intent to harm” requirements).

¹⁴⁸ See FLA. STAT. ANN. § 784.049 (West 2018).

¹⁴⁹ Section (2)(c) of the Florida statute states:

(2) As used in this section, the term: . . .

(c) “Sexually cyberharass” means to publish a sexually explicit image of a person that contains or conveys the personal identification information of the depicted person to an Internet website without the depicted person’s consent, for no legitimate purpose, with the intent of causing substantial emotional distress to the depicted person.

Id. § 784.049(2)(c).

explicit media principally with the intent to inflict “substantial emotional distress.”¹⁵⁰ Even more, perpetrators will likely evade liability if they posted explicit content with the expectation that the subject would never find out,¹⁵¹ which is frequently the case.¹⁵² By definition, then, if a perpetrator disseminated non-consensual pornography with the intent of pecuniary gain, or really for any reason other than vengeance, he will not be held criminally liable in the state of Florida.¹⁵³ This exclusivity has the practical effect of insulating many perpetrators from criminal convictions, and thus leaves many victims without recourse under the criminal law.¹⁵⁴

Alternatively, some states like New Jersey¹⁵⁵ and Illinois¹⁵⁶ omit such intent clauses, instead relying on language of *mens rea* like “knowingly” or “intentionally” disseminating illicit content, or some variation thereof, which effectively includes the requisite degree of agency and recklessness, yet fittingly does not mandate the infliction of emotional distress of any kind. This distinction in statutory thought is located at the junction of motive and *mens rea*; the former specific intent approach blurs the two, treating them as one, and the latter

¹⁵⁰ *Id.*

¹⁵¹ Take, for instance, the recent Marines scandal, wherein hordes of active-duty and veteran Marines were caught sharing hundreds, if not thousands, of naked pictures of female service members and veterans in a private Facebook group comprised of 30,000 members—all of whom were male. In this case, the Marines likely thought that the women pictured would never find out, given the all-male demographic of the group. For more information on this scandal, see Thomas James Brennan, *Hundreds of Marines Investigated for Sharing Photos of Naked Colleagues*, REVEAL (Mar. 4, 2017), <https://www.revealnews.org/blog/hundreds-of-marines-investigated-for-sharing-photos-of-naked-colleagues> [<https://perma.cc/BL6X-UTSS>]; Bill Chappell, *Nude-Photo Scandal May Expand Beyond ‘Marines United’ Facebook Group*, NPR (Mar. 10, 2017, 3:29 PM), <https://www.npr.org/sections/thetwo-way/2017/03/10/519682039/nude-photo-scandal-may-expand-beyond-marines-united-facebook-group> [<https://perma.cc/L3FY-4K4W>]; ‘Marines United’ Scandal, WAR HORSE, <https://www.thewarhorse.org/marines-united-scandal> [<https://perma.cc/F4CN-VVX6>] (last visited Mar. 4, 2018). See also Alter, *supra* note 16.

¹⁵² See Alter, *supra* note 16 (“[I]n many cases, like the Marine photo sharing scandal, the distribution of images isn’t intended to harass, because the victims were never supposed to know that their pictures had been shared. According to the CCRI’s June survey of 3,000 Facebook users, 79% of those who said they had spread a sexually explicit image of someone else said they did not intend to cause any harm.”).

¹⁵³ See FLA. STAT. ANN. § 784.049 (West 2018).

¹⁵⁴ See *infra* notes 172–73.

¹⁵⁵ N.J. STAT. ANN. § 2C:14-9 (West 2019).

¹⁵⁶ 720 ILL. COMP. STAT. ANN. 5/11-23.5 (West 2019).

approach separates them, subscribing to the value of *mens rea* while not being particularly concerned with motive.¹⁵⁷

B. *The Incompatibility and Superfluity of Specific Intent Provisions Within the Criminal Revenge Pornography Scheme*

While the infliction of emotional distress is often the practical effect of revenge porn,¹⁵⁸ its inclusion within revenge porn laws has a narrowing effect. It neglects and precludes criminal culpability for other prevalent motives behind engagement in revenge porn, including those of pecuniary motives, sexual gratification, entertainment, and the attainment of notoriety.¹⁵⁹ In so doing, these specific intent laws erroneously characterize revenge porn as a crime of vindictiveness rather than as a crime of the gravest invasion of privacy.¹⁶⁰

In recognition of this, another strand of legislative thought does not include vindictive motive within its statutory bounds. The revenge porn law in Illinois, for example, makes no mention of intent.¹⁶¹ Rather, it focuses on the known, or reasonably discoverable, absence of the subject's consent in dissemination as the dispositive factor for liability.¹⁶² This practice better achieves justice for revenge porn victims and serves to more strongly deter the future dissemination of revenge porn by acknowledging that other factors, in addition to the infliction of

¹⁵⁷ See Alex Jacobs, *Fighting Back Against Revenge Porn: A Legislative Solution*, 12 NW. J.L. & SOC. POL'Y 69, 87 (2016).

¹⁵⁸ See Mudasir Kamal & William J. Newman, *Revenge Pornography: Mental Health Implications and Related Legislation*, 44 J. AM. ACAD. PSYCHIATRY & L. 359, 362–63 (2016); see also Chiarini, *supra* note 73.

¹⁵⁹ See *A Guide for Legislators*, *supra* note 47, at 2.

¹⁶⁰ See Citron & Franks, *supra* note 9, at 387.

¹⁶¹ 720 ILL. COMP. STAT. ANN. 5/11-23.5 (West 2019).

¹⁶² *Id.*

(b) A person commits non-consensual dissemination of private sexual images when he or she:

- (1) intentionally disseminates an image of another person . . .
- (2) obtains the image under circumstances in which a reasonable person would know or understand that the image was to remain private; and
- (3) *knows or should have known* that the person in the image has not consented to the dissemination.

Id. (emphasis added).

emotional distress, motivate the unlawful distribution of revenge porn.¹⁶³

Further, malicious motive clauses are not mandated by the Constitution and are thus unnecessary from a jurisprudential and constitutional standpoint. The First Amendment is often cited as counter-authority to revenge porn laws, as some find the criminalization of revenge porn to run counter to the free speech and press guarantees enshrined therein.¹⁶⁴ However, the First Amendment does not mandate malicious motive clauses, and thus their inclusion does not serve any particular constitutional purpose.¹⁶⁵ The U.S. Supreme Court has even suggested that the attachment of motive requirements may make otherwise constitutional statutes, unconstitutional.¹⁶⁶ In light of this, the inclusion of an “infliction of emotional distress” clause is rendered obsolete from a constitutional standpoint, and its narrowing effects are rendered vulnerable to attack.¹⁶⁷

Additionally, the inclusion of a motive such as the “infliction of emotional distress” blurs the line between motive and *mens rea*.¹⁶⁸ It is argued that the operative mental state is cognizance of the lack of consent of the victim—not any particular sense of mal-intent.¹⁶⁹ This as an important distinction. It will preclude a finding of liability for those who act innocently and prudently, and enable convictions for those who do not, such as in the case of non-consensual pornography.¹⁷⁰ Moreover, the law should, in this arena, be less concerned with motive and more concerned with *mens rea* so as to impute liability to those who knowingly and recklessly act in contradiction to the law, and so as to not render criminal those who do not.¹⁷¹

¹⁶³ See *infra* note 172 and accompanying text.

¹⁶⁴ See generally John A. Humbach, *The Constitution and Revenge Porn*, 35 PACE L. REV. 215 (2014).

¹⁶⁵ See Citron & Franks, *supra* note 9, at 387.

¹⁶⁶ See, e.g., *R.A.V. v. City of St. Paul*, 505 U.S. 377, 391 (1992).

¹⁶⁷ See Citron & Franks, *supra* note 9, at 387.

¹⁶⁸ Alex Jacobs, *supra* note 157, at 87–88.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Id.* (noting the example of parents who share a bath time picture of their child). In this example, the parents have not acted with any malice or willful neglect (as in the context of *mens rea*); rather, they have likely acted under the motive of wanting to share with others the perceived attractiveness or savvy of their child. This is not the type of dissemination that the

The push for the exclusion of intentional infliction of emotional distress clauses from revenge porn legislation, and the movement against those statutes that make revenge porn a specific intent crime more generally, is substantiated by empirical data regarding the *actual* motivations behind the dissemination of non-consensual pornography.¹⁷² Indeed, one study revealed that the leading reason—capturing 79% of perpetrator participants—for distributing non-consensual porn was the desire to share a sexy photo they received with friends, *not* to hurt the pictured subject.¹⁷³ It would appear, then, that perpetrators frequently share sexy photos *not* out of malice, but in a reckless display of their perceived sexual prowess.¹⁷⁴ The push for intent-less statutes, therefore, is grounded in a factual basis that better accords with both reality and the needs of the victim than does a more restrictive, motive-driven statutory regime.¹⁷⁵ Should specific intent statutes prevail, hordes of perpetrators will walk away unscathed, leaving victims without relief.¹⁷⁶ Granted, this Note does not advocate for giving the State more power to put people in jail; rather, it suggests that individuals who unlawfully disseminate revenge porn merit

law seeks, or should seek, to punish. It is when one willfully or recklessly disseminates nude or sexual content that the law ought to intervene. The distinction between motive and *mens rea* thus turns on intent—and it is a distinction crucial to an effective legal framework.

¹⁷² See EATON ET AL., *supra* note 47, at 19 (“Of the 159 individuals who reported having perpetrated NCP by sharing sexually-explicit images of another person without his/her consent (5.2% of the entire sample, 159/3044), the most commonly chosen reason for perpetration was just to share ‘with friends’ without the intention ‘to hurt’ the person (79% of all self-identified perpetrators selected this option. Only 12% of perpetrators reported having committed NCP because they were upset with the victim and/or wanted to harm them.”). This same survey reported that 16% of survey respondents who were perpetrators reported that they sent sexual images non-consensually just for fun, or because they thought it was funny. *Id.*

¹⁷³ *Id.*; see also *Singles in America*, *supra* note 32 (noting that 23% of individuals who have received sexts shared them with others, and that 42% of men and 28% of women reported having shared the sext with three or more people).

¹⁷⁴ See Alter, *supra* note 16 (“The dissemination of images can be as much about impressing other men as it is about humiliating the victim. Boys once presented stolen underwear as trophies from conquests—now, a nude selfie can signal the same thing . . . ‘Lots of this isn’t intentional,’ says . . . a San Francisco attorney . . . ‘It’s just part of the hypermasculine culture: sex pictures become like currency.’”).

¹⁷⁵ See *supra* notes 172–73 and accompanying text.

¹⁷⁶ Only 12% of revenge porn perpetrators come under the scope of “intent to harm” legislation; accordingly, the 79% who perpetrated non-consensual pornography “just to share ‘with friends’” cannot be charged with criminal action under the specific intent regime. This deprives the vast majority of victims from seeking relief under the criminal law—a deeply problematic reality. See EATON ET AL., *supra* note 47.

criminal punishment because of the severity of the harm that they inflict. The law should provide penalties where penalties are due.

Finally, legislation mandating the intentional infliction of emotional distress places substantial barriers in a victim's path to justice and grossly mischaracterizes the essence of revenge porn.¹⁷⁷ To emphasize malicious intent is to shift the focus away from the victim and her consent—or the lack thereof—and towards the perpetrator and his vengeful mental state, which is notoriously difficult to prove.¹⁷⁸ A specific intent provision imposes an onerous evidentiary burden that can potentially hinder a finding of liability on mere grounds of inadequate proof.¹⁷⁹ Additionally, legislation making revenge porn a specific intent crime fundamentally misrepresents revenge porn, which is at its core an egregious invasion of privacy—not a form of revenge, despite its colloquial name.¹⁸⁰

This characterization of revenge porn—i.e., as fundamentally an issue of privacy—comes up against criticism that cites to instances where privacy has been “waived.”¹⁸¹ These include cases of once consensually shared porn (e.g., where the subject is a former commercial porn star) and deliberate nudity by professional strippers.¹⁸²

¹⁷⁷ See Franks, *supra* note 10.

¹⁷⁸ Chad S.C. Stover, *Best Practices in Proving Specific Intent and Malice. What Can Civil and Criminal Litigators Learn from One Another?*, AM. B. ASS'N 1 (2014), https://www.americanbar.org/content/dam/aba/administrative/litigation/materials/2014/2014_sac/2014_sac/best_practices.pdf [<https://perma.cc/36KK-A68G>] (“Proving intent in either the civil or criminal context is inherently difficult.”).

¹⁷⁹ Douglas R. Young, *Rethinking the Specific-General Intent Doctrine in California Criminal Law*, 63 CALIF. L. REV. 1352, 1356–57 (1975).

A particular mental state is one of the requisite elements of a specific intent crime . . . [these] so-called ‘intent’ crimes . . . obviously require proof of a specific intent. Evidence of a specific intent may be deduced from events surrounding the act or omission, and circumstantial evidence may be used. In no case, however, may the specific intent be presumed solely from the conscious commission of the unlawful act; rather, it must be proven beyond a reasonable doubt.

Id.

¹⁸⁰ See *Frequently Asked Questions*, *supra* note 11, at 1–2 (“The term ‘revenge porn’ though frequently used, is somewhat misleading. . . . Nonconsensual pornography is, among other things, a violation of privacy.”).

¹⁸¹ See Citron & Franks, *supra* note 9, at 356.

¹⁸² See Jake Hall, *Why We Have to Care About Rob Kardashian’s Revenge Porn Attack on Blac Chyna*, HIGHSNOBIETY (July 25, 2017), <https://www.highsnobiety.com/2017/07/25/rob-kardashian-blac-chyna-revenge-porn> [<https://perma.cc/3DJN-9F7G>] (discussing the Blac Chyna and Rob Kardashian scandal).

This sort of proposition—that, for example, former porn stars cannot object to the dissemination of old, consensual pornography—posits that consent to formerly shared media can never be rescinded, and that subjects are without the right to later demand removal of future disseminations of that same content.¹⁸³ This notion is both judgmental and gendered¹⁸⁴ and fundamentally mischaracterizes revenge porn as a tool to be used to shame and suppress sexuality.¹⁸⁵ Privacy is not a permanently waivable, binary entity, and consent granted on one occasion is not eternal.¹⁸⁶ Although the internet may forever remember, that does not automatically invalidate an individual's choice to forget. Moreover, revenge porn is a matter of privacy, and the inclusion of a specific intent provision disallows several such invasions of privacy from being criminalized through the imposition of an evidentiary burden unrelated to the crime's most central facet.

Online users . . . implied that strippers can't logically be victims of revenge porn because they consent to baring their bodies to rooms full of strangers. Or that the star sharing explicit pictures in the past means that she has consented to the sharing of any future explicit image—the obvious implication is that her body is fair game. This is a misguided argument deeply rooted in misogyny. As Chyna's attorney Lisa Bloom outlined in the earlier on-camera interview alongside her client, there is still a fundamental misunderstanding of the concept of consent, which this recent scandal has only served to underline. "Any explicit photos that she may have chosen to post in the past, that's her choice. This is like saying that a woman can't be raped if she previously chose to have sex with someone. It's her body, it's her choice each and every single time," Bloom said.

. . . Consent is relative[.]

Id.

¹⁸³ See Citron & Franks, *supra* note 9, at 355.

¹⁸⁴ Hall, *supra* note 182.

¹⁸⁵ *Id.*; see also Franks, *supra* note 74.

¹⁸⁶ See Citron & Franks, *supra* note 9, at 355.

Consent to share information in one context does not serve as consent to share this information in another context. When a person gives her credit card to a waiter, she is not consenting to let the waiter use that card to make personal purchases. When a person entrusts a doctor with sensitive health information, he is not authorizing that doctor to share that information with the public. What lovers share with each other is not equivalent to what they share with coworkers, acquaintances, or employers. Consent is contextual; it is not an on/off switch.

Id.

III. PROPOSAL: THE ILLINOIS REVENGE PORN STATUTE SHOULD BE
TREATED AS MODEL LEGISLATION TO BETTER ACHIEVE JUSTICE FOR
REVENGE PORN VICTIMS

The ideal revenge porn legislation is that which lacks a specific intent element. Accordingly, the Illinois statute criminalizing revenge porn should be used as a model for all state revenge porn laws,¹⁸⁷ including those states without revenge porn laws, and those with their own revenge porn laws already in effect. The Illinois statute's lack of a specific intent clause¹⁸⁸ allows for a less restrictive, more just basis for the prosecution of perpetrators of revenge porn. As other motives beyond the infliction of emotional distress often drive an individual to disseminate nude and/or sexual imagery of another without their consent,¹⁸⁹ and because the effects on the victim are ostensibly the same despite the motivation behind the crime,¹⁹⁰ justice calls for the elimination of vindictive motive clauses within revenge porn legislation

¹⁸⁷ Other state laws, such as that of New Jersey, also do not possess specific intent provisions, and that Illinois is not in a league of its own in this regard. I have, however, proffered Illinois' statute as model legislation because of its additional exemplary facets, which will be explored further on.

¹⁸⁸ 720 ILL. COMP. STAT. ANN. 5/11-23.5(b) (West 2019)

(b) A person commits non-consensual dissemination of private sexual images when he or she:

(1) intentionally disseminates an image of another person:

(A) who is at least 18 years of age; and

(B) who is identifiable from the image itself or information displayed in connection with the image; and

(C) who is engaged in a sexual act or whose intimate parts are exposed, in whole or in part; and

(2) obtains the image under circumstances in which a reasonable person would know or understand that the image was to remain private; and

(3) knows or should have known that the person in the image has not consented to the dissemination.

Id. Note that there is a lack of any mention of an intent to inflict emotional or psychological harm or distress. The only mention of intent is in the context of the actual dissemination itself and does not regard any of the driving motivations for doing so.

¹⁸⁹ See EATON ET AL., *supra* note 47.

¹⁹⁰ Of revenge porn victims, 93% reported suffering significant emotional distress due to being a victim, and 51% have had suicidal thoughts due to being a victim. See *A Guide for Legislators*, *supra* note 47, at 11, 13.

so that *all* cases of revenge porn may be properly adjudicated and resolved.

Apart from its omission of a malicious motive clause and its abstention from treating revenge porn perpetration as a specific intent crime, the Illinois law is exceptional for several other reasons.¹⁹¹ For example, the Illinois law includes selfies, extending the application of the law to those images taken by the victim, herself.¹⁹² This is significant given that the majority of the content distributed in revenge porn is in selfie form.¹⁹³ The inclusion of selfies within the scope of qualifying media is significant in that requiring the distributor and the photographer to be one in the same would exclude several incidents of non-consensual pornography from susceptibility to prosecution.¹⁹⁴ This provision is also a precondition to exemplary legislation in that it does not shame and reprimand the victim for taking a sexy, explicit picture of herself by insulating such picture from justiciability.¹⁹⁵

In addition, the Illinois law imposes robust punishments for perpetrators, creating a substantial deterrent against revenge porn perpetration.¹⁹⁶ Illinois makes revenge porn a Class 4 felony, punishable by one to three years in prison, fines of up to \$25,000, restitution to

¹⁹¹ Many of these attributes are shared by other states' statutes, as well, but their cumulative inclusion within the Illinois statute, coupled with its lack of an intent clause, positions it as exemplary legislation. See Barbara Herman, *Illinois Passes Revenge Porn Law with Teeth: 'Other States Should Copy,' Says Privacy Lawyer*, INT'L BUS. TIMES (Jan. 6, 2015, 4:18 PM), <http://www.ibtimes.com/illinois-passes-revenge-porn-law-teeth-other-states-should-copy-says-privacy-lawyer-1774974> [<https://perma.cc/48TR-VJX9>].

¹⁹² 720 ILL. COMP. STAT. ANN. 5/11-23.5(a) (West 2019) (defining "[i]mage" as including "a photograph, film, videotape, digital recording, or other depiction or portrayal of an object, including a human body," and notably not placing any restrictions on the identity of the photographer). See Carrie Goldberg, *Infographic: Making Good Revenge Porn Laws*, C. A. GOLDBERG, PLLC, <http://carrie-goldberg.squarespace.com/infographic-making-good-revenge-porn-laws> [<https://perma.cc/QS8N-FYPM>] (last visited Aug. 26, 2017); see also *supra* note 191.

¹⁹³ See Levendowski, *supra* note 120.

¹⁹⁴ The California revenge porn statute, in its original 2013 form, did not include non-consensual pornography that was in selfie form. Facing heavy criticism begrudging the statute's narrowness, the California legislature passed an amendment to the statute to include selfies. See Hunter Schwarz, *California's Revenge Porn Law, Which Notoriously Didn't Include Selfies, Now Will*, WASH. POST (Aug. 27, 2014), https://www.washingtonpost.com/blogs/govbeat/wp/2014/08/27/californias-revenge-porn-law-which-notoriously-didnt-include-selfies-now-will/?utm_term=.d30cb328042b [<https://perma.cc/UYN9-29J5>] (describing the sentencing consequences of being charged with a Class 4 felony).

¹⁹⁵ See *Frequently Asked Questions*, *supra* note 11, at 3.

¹⁹⁶ See Goldberg, *supra* note 192.

victims, and the forfeiture of any profits gained from the distribution of the material.¹⁹⁷ These penalties are less forgiving than those inscribed in many statutes.¹⁹⁸ Their severity is more conducive to deterring revenge porn and adequately punishes those who, undeterred, proceeded to disseminate non-consensual pornography.¹⁹⁹

Illinois also allows images that do not feature nudity to come under the purview of the statute.²⁰⁰ While some laws require a victim's "sexual" or "intimate" parts to be exposed, or nudity more generally,²⁰¹ the Illinois law "recognizes [that] victims can be deeply harmed by non-consensually distributed sexual images regardless of nudity."²⁰² Take, for example, the depiction of one performing oral sex or having been ejaculated upon.²⁰³ Both of those instances can show body parts other than "sexual parts," or can be performed while clothed or partially clothed, but are irrefutably sexually explicit.²⁰⁴ In those cases, disseminated proof of both acts would have extensive physical, psychological, and social effects on the victim commensurate to those

¹⁹⁷ 720 ILL. COMP. STAT. ANN. 5/11-23.5(f) (West 2019).

¹⁹⁸ See, e.g., VT. STAT. ANN. tit. 13, § 2606(b)(1) (West 2018) ("A person who violates this subdivision (1) shall be imprisoned not more than two years or fined not more than \$2,000.00, or both."); FLA. STAT. ANN. § 784.049(3)(a) (West 2018) (making sexual cyberharassment a misdemeanor of the first degree, punishable "by imprisonment up to one year (§ 775.082(4)(a)), or by fines no greater than \$1,000 (§ 775.083(1)(d)).

¹⁹⁹ See Citron & Franks, *supra* note 9, at 349.

²⁰⁰ 720 ILL. COMP. STAT. ANN. 5/11-23.5(b)(1)(C) (West 2019)

(b) A person commits non-consensual dissemination of private sexual images when he or she:

(1) intentionally disseminates an image of another person . . .

(C) who is engaged in a sexual act or whose intimate parts are exposed, in whole or in part[.]

Id.

²⁰¹ See, e.g., VA. CODE ANN. § 18.2-386.2 (West 2018) (requiring the depiction of a person who is "totally nude, or in a state of undress so as to expose the genitals, pubic area, buttocks, or female breast"); TENN. CODE ANN. § 39-17-318(a) (West 2018) (requiring that the image depict "the intimate part or parts of another identifiable person," wherein "[i]ntimate part' means any portion of the primary genital area, buttock, or any portion of the female breast below the top of the areola that is either uncovered or visible through less than fully opaque clothing."); IDAHO CODE ANN. § 18-6609 (West 2019) (criminalizing the dissemination of an image depicting "[i]ntimate areas," where "[i]ntimate areas' means the nude genitals, nude pubic area, nude buttocks or nude female nipple.").

²⁰² See Goldberg, *supra* note 192.

²⁰³ *Id.*

²⁰⁴ *Id.*

resulting from the circulation of nude imagery. As such, the Illinois law is consummate in its inclusion of depicted conditions other than mere nudity.

Additionally, the Illinois statute provides liability for third-party “downstream” distributors.²⁰⁵ Through its inclusion of a “reasonable person” standard, the Illinois law allows for the imputation of liability to one who would reasonably understand that the image was intended to remain private, and that consent had not been given to its circulation, but elects to circulate it anyway.²⁰⁶ Under this clause, one who continues to disseminate imagery can be held liable, even if they were not the initial and principal distributor, if it was relatively discernable that the content was understood to be for private use.²⁰⁷ This provision is significant in that it augments the deterrent quality of such legislation by discouraging reproductions of what can reasonably be inferred as representing non-consensual pornography.²⁰⁸

Lastly, the Illinois law contains beneficial provisions against doxing,²⁰⁹ or the posting of personal contact information.²¹⁰ This means

²⁰⁵ *Id.*

²⁰⁶ See 720 ILL. COMP. STAT. ANN. 5/11-23.5(b)(2) (West 2019).

²⁰⁷ The goal should not be to put innocent people in jail. Undoubtedly, a downstream distributor may be less culpable than a principal distributor because he may be unaware of the circumstances of the original dissemination. In light of this, this provision only imputes liability where downstream disseminators possessed the requisite awareness of the lack of consent, and continued to further disseminate the material, contrary to what a reasonable person would have done. See “*Revenge Porn*” Reform, *supra* note 31, at 1285–86 n.220.

Some have argued that the law should distinguish between “original” and “secondary” (sometimes also referred to as “downstream”) distributors. The underlying assumption of this, I believe, is that people who forward or redistribute nonconsensual pornography are less culpable than the original discloser. But regardless of whether one’s act of disclosure is the first, the second, or the hundredth disclosure, the question of culpability should still turn on the individual’s state of mind. If secondary disclosers are less culpable in the sense that the fact of previous disclosures could lead them to conclude that such disclosures are consensual, then they are not acting recklessly and thus would not be accountable under the statute. Another way of putting this is to say that the distinction between primary and secondary disclosers only matters insofar as it communicates something meaningful with regard to the discloser’s state of mind.

Id.

²⁰⁸ See Citron & Franks, *supra* note 9, at 349.

²⁰⁹ Also spelled “doxxing.”

²¹⁰ See Blanch & Hsu, *supra* note 61 (“[D]oxing [sic] . . . refers to broadcasting personally identifiable information about an individual on the internet. It can expose the victim to an

that the Illinois law does not apply only when a victim is facially identifiable, but also in cases where identifying information²¹¹ is displayed adjacent to an image wherein the subject is not physically identifiable. This allows for greater breadth in ameliorating the harms suffered by revenge porn victims, as it recognizes that revenge porn is harmful despite the degree to which the subject is facially identifiable within the images.²¹² As doxing is generally what enables downstream distributors and third parties to stalk the subject—both online and in person—and provided that stalking is a common and endangering side effect of the dissemination of revenge porn,²¹³ the statute’s prohibition against doxing is powerful both as a deterrent and as a basis for penalty.

There is one element missing from the Illinois statute that would bolster its preeminence: the ability of victims to use pseudonyms in a court of law.²¹⁴ In this sphere, California is distinct.²¹⁵ The California

anonymous mob of countless harassers, calling their phones, sending them email, and even appearing at the victim’s home.”); Goldberg, *supra* note 192; Sameer Hinduja, *Doxing and Cyberbullying*, CYBERBULLYING RES. CTR., <https://cyberbullying.org/doxing-and-cyberbullying> [<https://perma.cc/X3AY-YSKM>] (last visited Nov. 13, 2017) (“It has been argued that hackers use doxing as a “tactic of harassment,” . . . [t]he goal of those who seek, find, and then release personal information of others is ostensibly to bully or scare targets by destroying their sense of privacy and rendering them vulnerable to victimization by future harassers.”). Because it tends to preempt threats of virtual or actual harassment, there are ongoing efforts to federally proscribe doxing. See Online Safety Modernization Act of 2017, H.R. 3067, 115th Cong. § 301 (2017) (making it a criminal violation to knowingly publish a person’s personally identifiable information with the intent of harassing or enabling another to harass the person and creating a civil action for victims against perpetrators); Jennifer Becker, *The Online Safety Modernization Act Is a Much-Needed Response to a Growing Problem*, HILL (Sept. 12, 2017, 3:30 PM), <http://thehill.com/blogs/congress-blog/judicial/350296-the-internet-safety-modernization-act-is-a-much-needed-response> (noting the introduction of the Online Safety Modernization Act, which “aims to curb the forms of online harassment” such as doxing by updating federal criminal statutes to explicitly prohibit such forms of online harassment and by providing civil remedies for victims of these offenses).

²¹¹ See Online Safety Modernization Act of 2017, *supra* note 210 (defining “personally identifiable information” as any information that can be used to establish identity, such as name, social security number, date or place of birth, employment or educational information, or sexual orientation). Approximately 59% of revenge porn is posted with the subject’s name; 49% is posted with social network information; 26% is posted with an email address; and 16% is posted with a home address. See *A Guide for Legislators*, *supra* note 47, at 10.

²¹² See *A Guide for Legislators*, *supra* note 47, at 10–11.

²¹³ *Id.* at 10 (“49% [of victims] said they have been harassed or stalked online by users that have seen their material [and] 30% said they have been harassed or stalked outside of the Internet (in person, over the phone) by users that have seen the material online[.]”).

²¹⁴ For an overview of the importance of protecting plaintiffs’ privacy rights in criminal law cases, see *Protecting Victims’ Privacy Rights: The Use of Pseudonyms in Criminal Cases*, NAT’L

legislature recently signed a bill permitting victims of revenge porn, in *civil actions*, to use pseudonyms in order to abate further breaches of privacy and to preclude increased harm.²¹⁶ This provision mandates that a victim's pseudonym be used in all pleadings, documents, proceedings, and other case records, and further posits that any personal contact information or images of the plaintiff must be either redacted or excluded from court files.²¹⁷ These confidentiality measures are laudable in that they curb the enduring criticism of legal channels in the handling of revenge porn perpetration: that victims seeking legal relief must endure further dissemination of the very images that have harmed them.²¹⁸ Additionally, these privacy protections may induce more victims to come forward and seek legal relief by virtue of the promise of confidentiality.²¹⁹ While the images may still need to be produced in

CRIME VICTIM L. INST., <https://law.lclark.edu/live/files/21757-protecting-victims-privacy-rights-the-use-of> [<https://perma.cc/8X8A-7UMD>] (last visited Nov. 18, 2017).

The availability of [pseudonyms] is important because the loss of privacy can have serious consequences for victims. Unwanted publicity can subject victims to public scorn and harassment and to other forms of revictimization at the hands of the justice system Compelling disclosure of a victim's identity may also weaken confidence in the criminal justice system as a means to protect and serve the public. Thus, allowing victims to proceed by pseudonym in criminal proceedings not only helps prevent "secondary victimization," but also assists with the proper functioning of the system.

Id.

²¹⁵ See Jazmine Ulloa, 'Revenge Porn' Victims Will Be Able to Maintain Privacy in Court Under New Law Signed by Gov. Brown, L.A. TIMES (Sept. 12, 2017, 8:29 AM), <http://www.latimes.com/politics/essential/la-pol-ca-essential-politics-updates-revenge-porn-victims-will-be-able-to-1505229357-htmstory.html> [<https://perma.cc/58Y-XYPW>].

²¹⁶ CAL. CIV. CODE § 1708.85(f)(1) (West 2019).

A plaintiff in a civil proceeding pursuant to subdivision (a), may proceed using a pseudonym, either John Doe, Jane Doe, or Doe, for the true name of the plaintiff and may exclude or redact from all pleadings and documents filed in the action other identifying characteristics of the plaintiff. A plaintiff who proceeds using a pseudonym and excluding or redacting identifying characteristics as provided in this section shall file with the court and serve upon the defendant a confidential information form for this purpose that includes the plaintiff's name and other identifying characteristics excluded or redacted. The court shall keep the plaintiff's name and excluded or redacted characteristics confidential.

Id. See Ulloa, *supra* note 215.

²¹⁷ See *supra* note 216.

²¹⁸ See Franks, *supra* note 105.

²¹⁹ See *Protecting Victims' Privacy Rights*, *supra* note 214.

court, the ability to use pseudonyms and the requirement that images and contact information be excluded from court files are significant in limiting the degree to which further harm can be inflicted on victims who take legal action.²²⁰

The advancement of confidentiality measures such as those in California's Civil Code properly frame non-consensual pornography as a matter of privacy rather than as a matter of malice, and thus it logically follows that they should be included in any scheme seeking to ameliorate grave breaches of privacy.²²¹ The expansion of such confidentiality provisions to the criminal revenge porn channel would have a profoundly positive impact on the victims who look to legal mechanisms for relief, and as such, should be implemented to better achieve justice for revenge porn victims.²²²

In this regard, the Illinois statute is, admittedly, deficient. Should the Illinois legislature amend its statute to allow for the use of pseudonyms in legal actions, the Illinois statute would be even more archetypal. Given the fact that the provision of pseudonyms in revenge porn legislation is a recent development, and further, that it currently exists in the civil, *not* criminal context, it is possible that Illinois will soon follow suit—a likelihood evinced by the statute's progressiveness in its current form.²²³

Due to its lack of a specific intent provision, and for the foregoing reasons, the Illinois law should be treated as model revenge porn legislation. The emphasis that it places on consent rather than depravity appropriately frames the crime as one of privacy, and not one of mere wickedness or retribution.²²⁴ The Illinois statute is exemplary even without the provision of pseudonyms for victims, but this Note urges the Illinois legislature to consider amending it to include a pseudonym provision like that of California's civil law.²²⁵ The lack of a pseudonym provision notwithstanding, the Illinois statute should be used as a template for all other states, and perhaps even in the eventual implementation of a federal law criminalizing the unlawful

²²⁰ See Franks, *supra* note 105.

²²¹ See Citron & Franks, *supra* note 9, at 354–55; see *supra* note 214.

²²² See *supra* notes 105–06 and accompanying text.

²²³ See Herman, *supra* note 191; Goldberg, *supra* note 234 (noting that Illinois is a pioneer in the realm of revenge porn legislation).

²²⁴ See Citron & Franks, *supra* note 9, at 354–55.

²²⁵ CAL. CIV. CODE § 1708.85(f)(1) (West 2019).

dissemination of revenge porn,²²⁶ to best achieve justice for revenge porn victims.

A. *Potential Objections*

A criminal revenge porn statute akin to Illinois' may be viewed as infringing upon First Amendment guarantees.²²⁷ More specifically, it may be argued that criminal prohibitions on the dissemination of protected media violate the freedom of expression necessary to a democratic system.²²⁸ In response, there are two avenues of rebuttal, one pertaining to the statute itself, and the other to the fundamental essence

²²⁶ There is a robust movement calling for the federalization of criminal non-consensual pornography laws. It is an extremely worthy and beneficial cause, and I, too, agree that there should be a single, uniform law whereby victims can seek legal recourse under criminal law, but I have chosen not to take this issue up within my Note because such an achievement does not seem imminent, and because it draws on several criminal procedure issues that do not directly deal with the immediate topic at hand. In venerating the Illinois statute, and lack of specific intent provisions, I hope to leave my proposal sufficiently open so as to be particularized to legislative agendas on differing scales, whether it be state or federal. Additionally, even if a federal law is implemented one day, state criminal laws will remain beneficial in those instances where cases cannot come under the purview of federal jurisdiction, such as those instances that occur entirely within one state's lines. For ongoing legislative efforts, see Intimate Privacy Protection Act of 2016, H.R. 5896, 114th Cong. (2d Sess. 2016) (potentially making it a crime to knowingly distribute a "visual depiction of a person who is identifiable from the image itself or information displayed in connection with the image and who is engaging in sexually explicit conduct, or of the naked genitals . . . of the person, with reckless disregard for the person's lack of consent to the distribution"); Alter, *supra* note 16 (describing U.S. Representative Jackie Speier's efforts to push the bill through, with backing from Facebook and Twitter, bipartisan support from seven Republican co-sponsors, and despite criticism by the ACLU and others). For general literature on the federal revenge porn law movement, see generally Katlyn M. Brady, *Revenge in Modern Times: The Necessity of a Federal Law Criminalizing Revenge Porn*, 28 HASTINGS WOMEN'S L.J. 3 (2017); Aubrey Burris, Note, *Hell Hath No Fury like a Woman Porne: Revenge Porn and the Need for a Federal Nonconsensual Pornography Statute*, 66 FLA. L. REV. 2325 (2014); Erica Souza, Note, "For His Eyes Only": *Why Federal Legislation is Needed to Combat Revenge Porn*, 23 UCLA WOMEN'S L.J. 101 (2016).

²²⁷ See, e.g., *Texas v. Johnson*, 491 U.S. 397, 414 (1989) ("If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.").

²²⁸ See, e.g., Erin Fuchs, *Here's What the Constitution Says About Posting Naked Pictures of Your Ex to the Internet*, BUS. INSIDER (Oct. 2, 2013, 3:08 AM) <https://www.businessinsider.com.au/is-revenge-porn-protected-by-the-first-amendment-2013-9> [<https://perma.cc/YNG7-AZMG>] ("Criminalizing the distribution of that which was freely given and freely received would be invalidated under the First Amendment . . . The First Amendment is not the guardian of taste.") (quoting former judge Andrew Napolitano).

of the crime. First, the Illinois statute is carefully drafted so as to honor the First Amendment.²²⁹ It achieves this objective by exempting the dissemination of sexually explicit content in order to report illegal conduct²³⁰ or to serve other “lawful public purpose[s].”²³¹ The inclusion of such exceptions²³² precludes journalists from incurring liability for posting images depicting nudity or sex acts in connection with their work²³³ and enables pornography enthusiasts to continue to peruse and

²²⁹ See Goldberg, *supra* note 192 (the law is “narrowly tailored so as not to sweep up expressive conduct vital to a free society”).

²³⁰ 720 ILL. COMP. STAT. ANN. 5/11-23.5(c)(2) (West 2019) (exempting “the intentional dissemination of an image of another identifiable person who is engaged in a sexual act or whose intimate parts are exposed when the dissemination is for the purpose of, or in connection with, the reporting of unlawful conduct.”).

²³¹ 720 ILL. COMP. STAT. ANN. 5/11-23.5(c)(4). See also *Free Speech and Media Groups Applaud Governor’s Veto of Overbroad “Revenge Porn” Bill*, AM. C.L. UNION (June 21, 2016), <https://www.aclu.org/news/free-speech-and-media-groups-applaud-governors-veto-overbroad-revenge-porn-bill> [<https://perma.cc/X32J-ATQJ>] (although this clause has garnered some criticism in the realm of the freedom of the press, as skeptics note that “an exemption for items that are ‘in the public interest,’ . . . [does not] offer news publishers any meaningful protection, as the final determination of whether the material constitutes a matter ‘in the public interest’ would be left to a jury. Editors and producers would have no way of knowing in advance whether an image would be deemed to fall into this category or not, which would create a substantial and unconstitutional chilling effect on speech.”) (quoting Steven Brown, Executive Director of the ACLU of Rhode Island).

²³² 720 ILL. COMP. STAT. ANN. 5/11-23.5(c) (West 2019).

(a) The following activities are exempt from the provisions of this Section:

- (1) The intentional dissemination of an image of another identifiable person who is engaged in a sexual act or whose intimate parts are exposed when the dissemination is made for the purpose of a criminal investigation that is otherwise lawful.
- (2) The intentional dissemination of an image of another identifiable person who is engaged in a sexual act or whose intimate parts are exposed when the dissemination is for the purpose of, or in connection with, the reporting of unlawful conduct.
- (3) The intentional dissemination of an image of another identifiable person who is engaged in a sexual act or whose intimate parts are exposed when the images involve voluntary exposure in public or commercial settings.
- (4) The intentional dissemination of an image of another identifiable person who is engaged in a sexual act or whose intimate parts are exposed when the dissemination serves a lawful public purpose.

Id.

²³³ See *Free Speech and Media Groups Applaud Governor’s Veto of Overbroad “Revenge Porn” Bill*, *supra* note 231 (this narrowness precludes the actualization of a “chilling effect in a society

share commercial, federally sanctioned pornography websites with one another, free from criminal liability.²³⁴ By excepting dissemination under such enumerated circumstances, the statute avoids running afoul of protections relating to speech, the pursuit of justice, and the press.²³⁵ Consequentially, the Illinois statute passes constitutional muster.²³⁶

Second, the Illinois statute does not infringe upon a constitutional right to share sexual photos without the consent of the subject because no such right is afforded under the Constitution.²³⁷ Any proposition to the contrary willfully ignores the non-consensual nature of revenge porn distribution, under which it is without import that an image was freely given and received.²³⁸ It is the very unilateral essence of revenge porn perpetration that ought to insulate any piece of revenge porn legislation from First Amendment challenges.²³⁹

where a free press is essential to our democracy”) (quoting Linda Lotridge Levin of the Rhode Island Press Association).

²³⁴ Carrie Goldberg, *Seven Reasons Illinois is Leading the Fight Against Revenge Porn*, CYBER C.R. INITIATIVE (Dec. 31, 2014), <https://www.cybercivilrights.org/seven-reasons-illinois-leading-fight-revenge-porn> [<https://perma.cc/ZM65-BP9R>].

²³⁵ See Goldberg, *supra* note 192.

²³⁶ See Humbach, *supra* note 164.

²³⁷ See Talbot, *supra* note 11 (“The First Amendment does not protect a right to invade a person’s privacy by publicizing, without consent, nude photographs or videos of sexual activity.”) (quoting Representative Jackie Speier of California).

²³⁸ See *supra* note 136 and accompanying text.

²³⁹ This is substantiated by the fact that commercial porn is legally sanctioned by the federal government. In that case, though equally graphic, the content is protected by the Constitution. Child pornography, however, is barred for reasons of the harm it inflicts on the child subjects. Revenge porn ought to be given similar treatment. For more information on the constitutional protection afforded, and not afforded to, different types of pornography, see David L. Hudson Jr., *Pornography & Obscenity*, FREEDOM F. INST., <https://www.freedomforuminstitute.org/first-amendment-center/topics/freedom-of-speech-2/adult-entertainment/pornography-obscenity> [<https://perma.cc/6WET-HSWK>] (last updated July 2009). See also Mary Emily O’Hara, *The ACLU Is Fighting to Keep Revenge Porn Safe and Legal for Pervs*, VICE (Nov. 13, 2014, 1:00 AM), <https://www.vice.com/da/article/wd4yq9/why-the-aclu-is-fighting-to-keep-revenge-porn-safe-and-legal-for-pervs> [<https://perma.cc/4LC5-VAFP>].

[T]he US has plenty of laws that *do* restrict speech and protect private information. Federal HIPAA laws protect people’s sensitive medical information from being leaked by medical professionals and FERPA law protects the privacy of educational records. The list of laws protecting consumer credit information is so long it’s almost ridiculous.

So why do the spate of emerging revenge porn laws keep colliding with concerns about free speech?

“It’s absurd that there are not laws that protect us from having [pictures of] our

It may also be submitted that the right to privacy finds friction in a capacious online world.²⁴⁰ Opponents of Illinois' statutory scheme may claim that, in the context of the internet, privacy "waived" once is eternally so, and that as an archive, the internet remembers without regard to one's desire to forget.²⁴¹ Specifically, critics may point to instances of the unknowingly illicit dissemination of once consensually shared pornography.²⁴² In this instance, it may be argued that the line of criminal culpability proffered by the Illinois statute becomes difficult to navigate. Opponents will caution against the potential for unknowing purveyors to be swept up by the statute's downstream distribution provision.²⁴³

This concern is rebutted by the statute's inclusion of the "reasonable person" standard, under which criminal liability is imputed *only* in such instances where a reasonable person *would or should* have known that the image's initial dissemination was not consented to.²⁴⁴ In practice, then, innocent people will not be picked up by Illinois' criminal scheme if they exercise reasonable prudence in the circulation of sexually explicit media.

CONCLUSION

Revenge porn wields profoundly devastating impact on its victims. Given the pervasive and abiding nature of these effects, victims deserve a legal scheme whereby they can effectively, and with relative ease, seek legal and equitable rectification for their suffered wrongs. The Illinois

genitals released," [Carrie] Goldberg told VICE. "Besides HIPAA and credit card laws, there are also laws against obscenity and hate speech, and laws against sexual harassment. [Those] were opposed in the beginning."

Id.

²⁴⁰ See Citron & Franks, *supra* note 9, at 354–55.

²⁴¹ Such a proposition erroneously frames privacy as a binary entity, under which consent to dissemination granted once can never be rescinded. See *Smith v. Maryland*, 442 U.S. 735, 749 (1979) (Marshall, J., dissenting) ("Privacy is not a discrete commodity, possessed absolutely or not at all."); see *supra* note 186. Cf. Jeffery Rosen, *The Right to Be Forgotten*, 64 STAN. L. REV. ONLINE 88 (2012) (discussing the European "right to be forgotten," which could make "Facebook and Google, for example, liable . . . if they fail to remove photos . . . even if the photos have been widely distributed already").

²⁴² See *supra* notes 182–83 and accompanying text.

²⁴³ See *supra* notes 181–82, 205–07 and accompanying text.

²⁴⁴ See *supra* notes 205–07 and accompanying text.

statute effectively creates a structural framework whereby all victims, despite the minute particularities of their cases, can be venerated in a court of law, and can begin to heal and pick up the pieces. Should every state possess a revenge porn statute akin to Illinois', fewer women would suffer the sorts of devastation incurred by Blac Chyna and Annmarie Chiarini on one end of the spectrum, and by Rehtaeh Parsons and Audrie Pott on the other. Should analogues to the Illinois statute be enacted, more women would be able to take down their virtual and physical assailants more painlessly, effectively, and successfully, and those assailants would not abscond with impunity. Through this form of model legislation, revenge porn victims are empowered to seek revenge on their attackers through the law, and ex-paramours and perpetrators of other kinds are in turn disempowered from pressing "send."