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Jennifer Esposito

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**THE MODERN-DAY SCARLET LETTER: ERASING THE
SCAR OF NON-CONSENSUAL PORNOGRAPHY
THROUGH AFFIRMATIVE CONSENT**

*JENNIFER ESPOSITO**

“She had wandered, without rule or guidance, in a moral wilderness . . . Her intellect and heart had their home, as it were, in desert places, where she roamed as freely as the wild Indian in his woods . . . The scarlet letter was her passport into regions where other women dared not tread. Shame, Despair, Solitude! These had been her teachers,—stern and wild ones,—and they had made her strong, but taught her much amiss.”¹

Most have heard the phrase “revenge pornography” via the various websites that have infiltrated the internet for the sole purpose of posting this type of content. Not only do these websites display photos and videos of the victim in their most intimate moments, but they also often include names, addresses, phone numbers, and other identifying information. While many people know what revenge pornography is, they are completely unaware of the devastating impact that revenge pornography has on victims, the majority of which are women. As a result of revenge pornography, victims often suffer from mental illnesses (depression, anxiety, suicidal ideation, post-traumatic stress disorder, etc.), loss of job, isolation, and loss of friends and family. As it stands, about 50% of people have sent an intimate photo or video, and of that percentage, 10% have been threatened with

* J.D. Candidate, Brooklyn Law School, 2019; B.A. in Political Science, Quinnipiac University, 2016. Thank you to my family and friends for all of their support throughout law school and the note writing process. Thank you to the *Journal of Law and Policy* staff and Professor Cynthia Godsoe for your insight, edits, and recommendations.

¹ NATHANIEL HAWTHORNE, *THE SCARLET LETTER* 233–34 (Ticknor and Fields 2nd ed. 1850).

distribution of the image. This is no small statistic, but it is one that could be lowered with proper criminalization. Currently, several states have revenge pornography laws, however, none have proven to be all that effective due to a requirement by most to show "intent." This makes it nearly impossible for victims to achieve any sort of justice. Civil remedies are few and far between due to victims choosing not to bring suit to maintain anonymity, the difficulty of proving their case, and most defendants being judgment-proof. Copyright law has shown to be ineffective—most takedown notices are ignored, and even when they are not, nothing is ever truly deleted from the internet. As such, the most effective remedy would be to enact a federal criminal law. This would enable enforcement across all fifty states, something that is important when dealing with cybercrimes. Additionally, the threat of jail time and a criminal record could prove to be much more of a deterrent than any civil remedies, particularly when the defendant is judgment-proof. An effective federal law would have no intent requisite, have the potential of jail time, require offenders to register as a sex offender, and classify the offense as a felony.

INTRODUCTION

Today, most people would be appalled at the idea of gathering around a town square to gawk at, humiliate, and punish those viewed as morally reprehensible "sinners." This simply does not happen in our progressive, civilized society; or so everyone thinks. While the concept of bestowing someone with the scarlet letter "A" to admonish them for their moral wrongs might seem ridiculous, it is happening to one in twenty-five Americans.² Though it is not commonplace to punish adultery in this manner, as was done to Hester Prynne,³ we as a society punish women for

² Amanda Lenhart, Michelle Ybarra, & Myeshia Price-Feeney, *Nonconsensual Image Sharing: One in 25 Americans Has Been a Victim of "Revenge Porn,"* DATA & SOC'Y RESEARCH INST. 1, 4 (Dec. 13, 2016), https://datasociety.net/pubs/oh/Nonconsensual_Image_Sharing_2016.pdf.

³ Hester Prynne is the protagonist of the classic novel, *The Scarlet Letter*, which was set to take place between 1642 and 1649. She was married to an older man, Roger Chillingworth, while in England and then sent ahead to the United States. Before Chillingworth's arrival, she had an affair with a man and became

expressing their sexuality by not punishing those who post what is colloquially known as “revenge porn.”⁴ The town square has transformed into a website, where one can not only see their own, but every other town square in existence.⁵ Additionally, instead of merely having a visible scarlet “A,” pictures, videos, names, phone numbers, addresses, and other identifying information are displayed for anyone with internet access to view.⁶

Despite developments in technology, there are still little to no legal ramifications for the tormenters of revenge porn victims.⁷

pregnant. She was punished for her adultery by being forced to wear a scarlet letter “A” on her chest. *See generally* HAWTHORNE, *supra* note 1. In today’s day and age, people’s private photos and videos being posted to the internet is the equivalent of wearing a scarlet letter “A.” While the “A” in the Scarlet Letter designated that Hester Prynne was an adulteress, the posting of revenge pornography serves the same purpose by implying to society that the person being posted is promiscuous.

⁴ Rachel Budde Patton, Note, *Taking the Sting Out of Revenge Porn: Using Criminal Statutes to Safeguard Sexual Autonomy in the Digital Age*, 16 GEO. J. GENDER & L. 407, 420 (2015).

⁵ These sites include, but are not limited to: IsAnyoneUp, IsAnybodyDown, Texxxan, YouGotPosted, MyEx, DickiLeaks, but it is impossible to name them all because as one is deleted, a new one pops up. *See generally* Samantha Grasso, *20 Facts You Should Probably Know About Revenge Porn*, THE DAILY DOT (June 29, 2017), <http://www.dailydot.com/irl/revenge-porn/> (discussing various revenge porn websites); *see generally* Kashmir Hill, *This Guy Hunts Down the Men Behind Revenge Porn Websites*, FORBES (April 23, 2014), <https://www.forbes.com/sites/kashmirhill/2014/04/23/this-guy-hunts-down-the-men-behind-revenge-porn-websites/#72f4c7f06c7b> (discussing various revenge porn websites).

⁶ Carrie Goldberg, *Let’s Talk About Dox, Baby*, C.A. GOLDBERG PLLC (Mar. 10, 2014), <http://www.cagoldberglaw.com/lets-talk-about-dox-baby> (“It’s the doxing that is arguably the most harmful part of revenge porn in that it establishes the umbilical cord between the image and the person’s name, activating the search engine problem—when you google her name, the highest ranked items are the intimate photos. Victims then face the wrath of the revenge porn consumers, who inevitably bully and harass the subjects.”).

⁷ Antoinette Raffaella Huber, *Revenge Porn Law is Failing Victims—Here’s Why*, THE CONVERSATION (Jan. 25, 2018), <https://theconversation.com/revenge-porn-law-is-failing-victims-heres-why-90497>.

The Roger Chillingsworths⁸ of the current day, for the most part, remain unscathed.⁹ By not putting legal provisions in place to protect the victims of citizen-created moral punishment we are essentially validating perpetrators of revenge porn.¹⁰ In doing so, we are “allowing both the blame for and the consequences . . . to lay with the female victim, whom we feel should never have taken the picture[s] in the first place. In holding the victim responsible for the actions of the distributor, we reaffirm the sexual double standard and, by extension, the broader issue of gender inequality.”¹¹ Without proper consequences for perpetrators of revenge pornography, victims are left to be victimized a second time and create no deterrent to stop revenge porn perpetrators.

Part I of this note outlines what revenge porn entails, and the effect that it has on its victims. Part II explains how both technology and the act of non-consensual pornography has developed, and what prompted it to become the epidemic it has grown into today. Part III illustrates the various solutions and remedies to the problem of revenge porn including both civil and criminal legislation. This section also examines the pros and cons to each remedy. Part IV compares the California affirmative consent statute and analogizes its purported goals to those of

⁸ Roger Chillingsworth was the antagonist in *The Scarlet Letter*. He arrived in the United States to find Hester, his wife, being punished for adultery. He then decided to take matters into his own hands to punish the man she committed adultery with—much like NCP perpetrators take matters into their own hands to punish their victim. See HAWTHORNE, *supra* note 1.

⁹ MC-Barnum, *It Happened To Me: I Was The Victim of Revenge Porn And Forced To Resign From My Job*, EVERYDAY FEMINISM (Jan. 3, 2016), <https://everydayfeminism.com/2016/01/i-was-victim-of-revenge-porn/> (detailing a victim who was unable to take action against the person who distributed her pictures because she had no money, resources, or time to go up against him. He was able to continue on with no criminal or civil repercussions or any changes in his daily life). See also Kashmiri Gander, *'Badass': The Revenge Porn Victim Fighting For Justice*, NEWSWEEK (Feb. 26, 2018), <https://www.newsweek.com/badass-revenge-porn-victim-who-turned-anger-activism-818047> (describing how the victim, Katelyn Bowden lived in Ohio, which like around half the states in the US, does not have any laws to protect revenge porn victims).

¹⁰ Patton, *supra* note 4.

¹¹ *Id.*

revenge porn. Finally, Part V details a proposed federal criminal model law as the best solution to deal with non-consensual pornography.

I. WHAT IS REVENGE PORN?¹²

Revenge porn, non-consensual pornography (“NCP”), and “sextortion” all refer to a form of sexual assault whereby a person distributes “nude or sexually explicit photos or videos of an individual without their consent.”¹³ While this is generally seen as a somewhat new issue, cases of NCP have been happening since before the internet was commonplace; such as in 1980 when *Hustler* published stolen nude photos and featured them alongside false statements about the woman’s sexual desires.¹⁴ With technology continuously advancing, people now have the newfound ability to post a picture with the simple click of a button, leading to cases of NCP becoming increasingly prevalent.¹⁵ It is important to keep in mind that in most cases, when someone sends an intimate photo, they carry the expectation that it will be seen by only the person they are sending it to, thus creating a reasonable expectation of privacy.¹⁶ A study by McAfee, a leading company in cybersecurity,¹⁷ found that fifty percent of those surveyed have

¹² In this note I will use the terms “revenge porn” and “NCP” interchangeably.

¹³ Luke Fiedler, *Public Shaming in the Digital Age: Are Criminal Laws the Most Effective Means to Regulate Revenge Porn?*, 34 LOY. L.A. ENT. L. REV. 155, 157 (2013–2014).

¹⁴ Alexa Tsoulis-Reay, *A Brief History of Revenge Porn*, NEW YORK MAGAZINE (July 21, 2013), <http://nymag.com/news/features/sex/revenge-porn-2013-7/>. See also *infra* Section III.

¹⁵ See Fiedler, *supra* note 13, at 156–57.

¹⁶ DANIELLE KEATS CITRON, HATE CRIMES IN CYBERSPACE 147 (2014) (“[C]onsent within a trusted relationship does not equal consent outside of that relationship. We should no more blame individuals for trusting loved ones with intimate images than we blame someone for trusting a financial advisor, support group, or waiter [i.e. with credit card information] not to share sensitive personal information with others.”).

¹⁷ “McAfee helps businesses orchestrate cyber environments that are truly integrated, where protection, detection, and correction of threats happen

sent “intimate photos” to their significant others.¹⁸ Moreover, one in ten of those respondents received threats of distribution of said photos, and sixty percent of those who made threats actually did post the photos.¹⁹ Based on these numbers, NCP is clearly a pervasive issue in our society that needs to be reexamined to find a deterrent.

a. Non-Consensual Pornography: A Female-Centric Crime

Revenge porn is not often thought of as an act that warrants punishment.²⁰ This is due to the belief that the victim is the one choosing to send the image and thus, must face the consequences of his or her actions.²¹ For example, Professor Eric Goldman suggested that if people do not wish to be victims of revenge porn,

simultaneously and collaboratively.” MCAFEE, <https://www.mcafee.com/en-us/index.html> (last visited July 30, 2018).

¹⁸ Sarah Bloom, Note, *No Vengeance for ‘Revenge Porn’ Victims: Unraveling Why This Latest Female-Centric, Intimate-Partner Offense is Still Legal, And Why We Should Criminalize It*, 42 *FORDHAM URB. L.J.* 233, 238 (2014).

¹⁹ *Id.* See also Sameer Hinduja, *Revenge Porn Research, Laws, and Help for Victims*, CYBERBULLYING RESEARCH CENTER, <https://cyberbullying.org/revenge-porn-research-laws-help-victims> (last visited July 30, 2018) (stating that in a convenience sample survey, “of the 1,606 respondents from the ages of 18 to 30 in their most recent survey from 2015, 61% (about 980 people) said they had taken nude photos or videos of themselves and shared them with someone else, and 23% of respondents (361 people) had been victims of revenge porn.”). See also CYBER CIVIL RIGHTS INITIATIVE, *Guide for Legislators*, <https://www.cybercivilrights.org/guide-to-legislation/> (last visited July 30, 2018) (stating that there are some estimated 3,000 revenge porn websites throughout the world at the time of this article).

²⁰ *Research Finds a Majority Endorsing Revenge Porn*, THE AM. ASS’N FOR THE ADVANCEMENT OF SCI., (Mar. 2, 2017), https://www.eurekalert.org/pub_releases/2017-03/uok-rfa030217.php (stating that psychological research from the University of Kent has demonstrated that a majority of people who participated in a study could endorse the use of revenge porn).

²¹ See Eric Goldman, *What Should We Do About Revenge Porn Sites Like Texxxan?*, FORBES (Jan. 28, 2013), <https://www.forbes.com/sites/ericgoldman/2013/01/28/what-should-we-do-about-revenge-porn-sites-like-texxxan/#5a5da6ae7eff>.

they should simply not take pictures or videos of themselves in the nude.²² Julia Sorenson summarizes one critic's position in the following way: "revenge porn is the direct consequence of 'slutty' women's own actions, for which they should take responsibility."²³ However, this take on the subject of NCP is an oversimplification, and fails to address the many nuances surrounding the issue.²⁴ Carrie Goldberg, an attorney who specializes in NCP cases, countered this viewpoint by pointing out the cases of women being photographed without their knowledge while showering or changing clothes, photo-shopped images, as well as the history of intimate pictures being shared. She argued:

Are you just supposed to never take your clothes off? [. . .] You can't get naked, you can't take a shower? [. . .] 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 [. . .] 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 pic[ture]s of their wife or girlfriend in a pinup pose. It's often part of intimate

²² *Id.*

²³ Julia M. Sorenson, Note, *Forgive and Regret: Analysis and Proposed Changes to Connecticut's Revenge Porn Statute*, 35 QUINNIPIAC L. REV. 559, 563 (2017) (stating "ninety percent of victims are female."); see also Mark Webster, *Why Feminism is to Blame for Revenge Porn*, RETURN OF KINGS (July 4, 2015), <http://www.returnofkings.com/66488/why-feminism-is-to-blame-for-revenge-porn> (asserting that this generation of women are brainwashed by feminism to believe that there are no consequences for their actions).

²⁴ Mary Anne Franks, *Adventures in Victim Blaming: Revenge Porn Edition*, CONCURRING OPINIONS (Feb. 1, 2013), <https://concurringopinions.com/archives/2013/02/adventures-in-victim-blaming-revenge-porn-edition.html> (stating that nonconsensual pornography falls into the same category as sexual harassment and domestic violence).

communication. It can be used as a weapon, but, the fact is, almost *anything* can be used as a weapon.²⁵

Ms. Goldberg's analysis nicely illustrates another prevailing argument surrounding NCP: that the act of revenge porn is just another method of limiting women's freedom to make their own choices, and punish them for something that men regularly take part in with little to no repercussions.²⁶ NCP has simply become another tool to assist society in victim-blaming and shaming women's sexual activity.²⁷

Some people tend to blame the victims, who are predominantly women, for taking the picture or video,²⁸ but not whoever made the unsavory decision to distribute it to the public.²⁹ When sending an intimate picture, there should be a "reasonable expectation of privacy" that it will not be shared with anyone else.³⁰ As Danielle Citron, one of the leading experts on NCP law,³¹ aptly stated, "What individuals share with lovers is not equivalent to what they would share with the world. Common sense teaches us that consent is contextual; consent does not operate as an on/off switch."³² To state it another way, when a person hands a waiter their credit card to charge for dinner, the person is only consenting to be charged for that one transaction.³³ The customer is not, for example, consenting for the restaurant to charge for something outside of the

²⁵ Margaret Talbot, *The Attorney Fighting Revenge Porn*, *The New Yorker* (Dec. 5, 2016), <https://www.newyorker.com/magazine/2016/12/05/the-attorney-fighting-revenge-porn>.

²⁶ Franks, *supra* note 24.

²⁷ Sorenson, *supra* note 23.

²⁸ *Id.*

²⁹ See James T. Dawkins IV, Comment, *A Dish Served Cold: The Case for Criminalizing Revenge Pornography*, 45 CUMB. L. REV. 395, 402–03 (2014) ("It is easier to place blame on the person featured in a sexually graphic image than it is to fault the parties outside of the frame, namely, the person who disseminated the photograph and the website that hosts the picture.").

³⁰ See CITRON, *supra* note 16, at 146, 152.

³¹ Danielle Citron is a professor of law at University of Maryland Francis King Carey School Law. She has written several law review articles, as well as a book, concerning revenge porn. Citron is quoted often on the subject. *Danielle Citron Bio*, <http://www.daniellecitron.com/bio/> (last visited Sept. 25, 2018).

³² CITRON, *supra* note 16, at 147.

³³ See *id.*

dinner transaction or to sell the card to identity thieves.³⁴ The same can be said about pictures one shares with an intimate partner. One must examine the entirety of the circumstances surrounding an incident of revenge pornography—if someone does not consent to having their picture or video posted on the internet, the poster is violating their expectation of privacy.

b. Effects of Revenge Pornography on Victims

When considering the need for increased criminalization and harsher criminal penalties for revenge pornography, it is important to understand the profound impact that this crime has on its victims. There are many that would argue that revenge porn victims are to blame for anything that occurs as a result of the NCP.³⁵ However, this is simply not the case, and one would not make the same argument for victims of other forms of harassment or cyber-bullying. Many revenge porn victims face serious mental health issues such as paranoia, depression, and anxiety.³⁶ Victims also face deterioration of personal relationships, repercussions to their career and financial situation, and fear for their personal safety.³⁷ Accordingly, numerous victims have attempted, and even succeeded, in taking their own lives due to the shame, feelings of worthlessness, and desperation that they encountered after dealing with their most intimate pictures being posted for the world to see.³⁸

³⁴ *See id.*

³⁵ *See* Dawkins, *supra* note 29; Webster, *supra* note 23.

³⁶ Muasir Kamal and William J. Newman, *Revenge Pornography: Mental Health Implications*, 44 J. AM. ACAD. PSYCHIATRY LAW 359, 362 (2016).

³⁷ *Id.* (stating that revenge porn victims face similar long-term consequences as victims of child pornography); *see also* Nina Bahadur, *Victims of 'Revenge Porn' Open Up on Reddit About How it Impacted Their Lives*, HUFFINGTON POST (Jan. 10, 2014), https://www.huffingtonpost.com/2014/01/09/revenge-porn-stories-real-impact_n_4568623.html (listing the various consequences that revenge porn victims face including humiliation, concern for their safety, a need for hypervigilance, fear of being watched during sex, and body shame).

³⁸ Kamal & Newman, *supra* note 36.

In 2013 Annie Seifullah, a former principal at a high school in Queens, lost her job after her ex-boyfriend delivered pictures of her in fishnet lingerie to her school's superintendent and city investigators, as well as posting the same to the internet.³⁹ Ms. Seifullah's ex told the superintendent that she had sex on and off school grounds with students, parents, and educators.⁴⁰ Even though these were proven to be lies, Seifullah was still demoted from principal to teacher, and sent to a "rubber room."⁴¹ In 2016, Seifullah had to take a yearlong medical leave due to "extreme post-traumatic stress and anxiety."⁴² The leave was almost entirely unpaid, she lost her pension, ran out of money, and the Department of Education attempted to terminate her.⁴³ Instead, she was suspended for one year without pay and once she returns, she will again be assigned to the "rubber room."⁴⁴ Ms. Seifullah's life will never be the same as a result of her ex-boyfriend's malicious posting. It is important to think about how all-encompassing the effects of revenge pornography were on Ms. Seifullah's life—her career, health, and reputation with friends and family were all affected.⁴⁵ Ms. Seifullah is just one of many victims of NCP and her story illustrates how great the need is for increased criminalization so that more people's lives are not destroyed.

II. FROM AN ERA OF PRIVACY TO DISCLOSURE: HOW NON-CONSENSUAL PORNOGRAPHY DEVELOPED

One of the first notable cases of NCP occurred prior to the internet era when LaJuan Wood sued Hustler Magazine for publishing nude photos of her that someone had stolen and

³⁹ Annie Seifullah, *Revenge Porn Took My Career. The Law Couldn't Get It Back.*, JEZEBEL (July 18, 2018), <https://jezebel.com/revenge-porn-took-my-career-the-law-couldnt-get-it-bac-1827572768>.

⁴⁰ *Id.*

⁴¹ *Id.* (defining a rubber room as a reassignment center for educators accused of misconduct while their case is waiting to be heard by an arbitrator).

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

submitted to the magazine.⁴⁶ The photos were taken during a camping trip with her husband, Billy.⁴⁷ They each took pictures of each other nude with the intention not to share them with anyone.⁴⁸ One of their neighbors stole the pictures and submitted one of LaJuan to Hustler, along with personal information (such as name and address) and a false allegation that LaJuan had a “fantasy of being ‘tied down and screwed by two bikers.’”⁴⁹ Wood sued for invasion of privacy based on being portrayed in a “false light.”⁵⁰ The Fifth Circuit held that, “[T]he states are permitted, consistent with the First and Fourteenth Amendments, to impose liability⁵¹ for actual damages on publishers who negligently place private figures in an offensive false light.”⁵² Just two years later, Hustler was sued again in *Ashby v. Hustler Magazine, Inc.*⁵³ This case presented a very similar situation to that in *Wood*, where a woman’s photos were stolen, someone forged a consent form, and submitted them to Hustler.⁵⁴ Like *Wood*, Ms. Ashby sued for invasion of privacy on the “false light” premise.⁵⁵ The Sixth Circuit held in Hustler’s favor, stating that Ashby did not meet the requirements to sustain “false light” tort liability.⁵⁶ Even though Wood & Ashby both prevailed in their cases, the photos were still

⁴⁶ *Wood v. Hustler Mag., Inc.*, 736 F.2d 1084, 1085 (5th Cir. 1984).

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.* at 1086.

⁵⁰ *Id.* at 1089.

⁵¹ Please note that this differs from the protections granted by the Communications Decency Act because it was Hustler actually publishing the photos in their magazine, and not a separate party posting it as it would be on a website that allows third-parties to post. See Ann Bartow, *Copyright Law and Pornography*, 91 Or. L. Rev. 1, 45 (2012).

⁵² *Wood*, 736 F.2d 1092.

⁵³ *Ashby v. Hustler Mag., Inc.*, 802 F.2d 856, 857 (6th Cir. 1986).

⁵⁴ *Id.* at 858.

⁵⁵ *Id.* at 860.

⁵⁶ *Id.* at 860 (“The two basic requirements to sustain such an action are (1) the false light in which the other was placed would be highly offensive to a reasonable person and (2) the publisher had knowledge of, or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other was placed.”).

out there for the public to see, which is why deterrence is so important in these types of cases.

While there are clearly negative effects resulting from these pre-internet era cases, the effects of NCP distributed on the internet are much more far-reaching.⁵⁷ The next wave of NCP occurred around the year 2000, as the internet became more accessible, and a genre of pornography, dubbed “realcore porn,” became popular.⁵⁸ “Realcore porn” emerged in “Usenet groups”⁵⁹ where users began sharing intimate photos and videos of their ex-girlfriends, and essentially was the early name for revenge porn.⁶⁰ However, between 2005 and 2007, around the same time as the conception of YouTube, NCP began to take off in popularity.⁶¹ Once it became easy for anyone to upload videos to the internet, “NSFW copycats” of YouTube—sites to which “amateurs” could upload their own porn (including videos of their exes)—began to pop up online.⁶² Sites such as XTube indicated that they started receiving two to three complaints per week from people whose photos and videos were posted without their consent.⁶³ While all of this was occurring within the internet, mobile phone technology

⁵⁷ Marissa Lang, *Revenge Porn is Target of Intimate Privacy Protection Act*, S. F. CHRONICLE (Sept. 30, 2016), <http://www.sfchronicle.com/business/article/Intimate-Privacy-Protection-Act-to-take-on-9517671.php> (“Once images are published on the Internet . . . they become like wildfire: fast-spreading and hard to control.”).

⁵⁸ Emma Grey Ellis, *It’s Time for Facebook to Deal with the Grimy History of Revenge Porn*, WIRED (Mar. 14, 2017), <https://www.wired.com/2017/03/revenge-porn-facebook/>.

⁵⁹ *Id.* (“Dear millennials: Usenet groups were basically decentralized Reddit.”).

⁶⁰ *Id.* See also Tsoulis-Reay, *supra* note 14 (outlining the history of revenge porn from 1980-2013).

⁶¹ Ellis, *supra* note 58.

⁶² *Id.* (“NSFW” stands for “not safe for work” which is used as an indicator to people that the content that they are about to view contains inappropriate, and often sexually explicit material. The phrase “NSFW copycat” in regards to YouTube implies a video sharing website similar to YouTube, but where sexually explicit content is posted). See also Tsoulis-Reay, *supra* note 14 (discussing websites where users could submit their own videos to sites such as XTube).

⁶³ Tsoulis-Reay, *supra* note 14.

was expanding so that almost all cellphones had cameras, which prompted the more frequent taking of and exchange of intimate pictures.⁶⁴ This expansion of technology created the perfect storm for revenge pornography to take off on the internet. “[T]his trend came to a head,”⁶⁵ according to Citron, when people realized the popularity of revenge porn and the potential market for it, and thus websites specifically for revenge porn were created.⁶⁶ In 2010, the infamous Hunter Moore⁶⁷ launched the website IsAnyoneUp.com which “specialized” in posting revenge porn.⁶⁸ He took it a step further than other sites and posted women’s full names, links to social media profiles, addresses, phone numbers, and other personal information.⁶⁹ Not only did Moore post content obtained from exes, he also hacked into personal email accounts in order to

⁶⁴ See Whitney Strachan, Note, *A New Statutory Regime Designed to Address the Harms of Minors Sexting While Giving A More Appropriate Punishment: A Marrying of New Revenge Porn Statutes with Traditional Child Pornography Laws*, 24 S. CAL. REV. L & SOC. JUST. 267, 273 (2015).

⁶⁵ Ellis, *supra* note 58 (quoting Professor Danielle Citron).

⁶⁶ See *id.* See also Tsoulis-Reay, *supra* note 14 (discussing popularity of “realcore pornography” and how that led to the rise of revenge pornography).

⁶⁷ Hunter Moore is the creator of IsAnyoneUp, a website which posted naked selfies alongside screenshots of the person’s Facebook profile so that they could be easily identified. He was dubbed “the most hated man on the internet” by Rolling Stone Magazine. Alex Morris, *Hunter Moore: The Most Hated Man on the Internet*, ROLLING STONE (Nov. 13, 2012), <https://www.rollingstone.com/culture/culture-news/hunter-moore-the-most-hated-man-on-the-internet-184668/>. He is known for laughing at people’s anger at him and responding to a cease and desist letter from Facebook by sending them a picture of his penis. See generally Kashmir Hill, *How Revenge Porn King Hunter Moore Was Taken Down*, FORBES (Jan. 24, 2014), <https://www.forbes.com/sites/kashmirhill/2014/01/24/how-revenge-porn-king-hunter-moore-was-taken-down/> (outlining background information on who Hunter Moore is and how he got into legal trouble through his involvement in the revenge pornography website IsAnyoneUp).

⁶⁸ Doug Bolton, *‘King of Revenge Porn’ and IsAnyoneUp Owner Hunter Moore Given Two And A Half Years In Prison*, THE INDEPENDENT (Dec. 4, 2015), <http://www.independent.co.uk/life-style/gadgets-and-tech/news/hunter-moore-jail-isanyoneup-revenge-porn-a6761126.html> (describing what types of photos and videos Hunter Moore posted and how he obtained them).

⁶⁹ *Id.*

steal, and later post their nude photos.⁷⁰ He was arrested in 2014 and sentenced to thirty months in prison and given a \$2,000 fine.⁷¹ Unfortunately, these charges were for “unauthorized access to a protected computer to obtain information for purposes of private financial gain and one count of aggravated identity theft,” and thus have no effect on revenge porn law,⁷² but would be helpful in an NCP case where someone’s personal computer or email account was hacked.⁷³ Around the time of Moore’s arrest, several celebrities had their iCloud⁷⁴ accounts hacked and their naked photos posted to the internet, which was dubbed as “celebgate.”⁷⁵ The hacker was prosecuted for the same charges as Moore and sentenced to pay restitution to one of the victims, as well as serve nine months in prison.⁷⁶ Overall, the “celebgate” incident was helpful in sparking discussions on the potential legal solutions to NCP.⁷⁷

While some progress has been made, there are still significant strides that need to be taken. In 2015 several companies, including “Facebook, Reddit, Twitter, . . . and Microsoft,” banned NCP on

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Man Who Operated ‘Revenge Porn’ Website Pleads Guilty in Hacking Scheme That Yielded Nude Photos from Google E-Mail Accounts*, DEP’T OF JUSTICE (Feb. 25, 2015), <https://www.justice.gov/usao-cdca/pr/man-who-operated-revenge-porn-website-pleads-guilty-hacking-scheme-yielded-nude-photos>.

⁷³ When someone is hacked versus sending a picture to a significant other, the charges received by Moore can come into play because by hacking into someone’s computer, he is not authorized access to the picture. However, the charge cannot come into play if the person was sent the picture, and therefore, generally, retains authority to own it. *See* 18 U.S.C. § 1030 (2018).

⁷⁴ iCloud is a “suite of free cloud-based services from Apple that helps users store and synchronize digital content across computers and numerous iOS-supported devices.” Vangie Beal, *iCloud*, WEBOPEDIA, <http://www.webopedia.com/TERM/I/icloud.html> (last visited Aug. 21, 2018).

⁷⁵ Jason Mesiner, *Chicagoan Gets Prison for ‘Celebgate’ Nude-Photo Hacking That Judge Calls ‘Abhorrent’*, CHICAGO TRIBUNE (Jan. 24, 2017), <http://www.chicagotribune.com/news/local/breaking/ct-celebgate-hacking-scandal-sentencing-met-20170123-story.html>.

⁷⁶ *Id.*

⁷⁷ Ellis, *supra* note 58.

their platforms.⁷⁸ While this was a step in the right direction, these bans were not severe enough to completely eliminate NCP from these social networks.⁷⁹ NCP experts state that websites need more preemptive measures to fight NCP, as opposed to remedial action.⁸⁰ As stated previously, once something is posted to the internet, it is never completely gone, so it is important for there to be a deterrent for revenge pornography.

III. SOLUTIONS & REMEDIES

As more victims of NCP step forward, the need for an effective legal remedy increases. The United States has yet to find one in particular that addresses the harm, breach of privacy and trust, and properly deters the future perpetration of this crime.⁸¹ When forming a legal response to relatively new forms of harassment, a balancing act occurs between not burdening the creation of new technology while addressing harms created by such advances.⁸² Furthermore, many oppose legislation surrounding NCP because they argue that this constitutes a First Amendment violation.⁸³ Even so, as of August 2018, forty states and Washington D.C. have laws addressing NCP.⁸⁴ Before examining potential solutions, it is important to first analyze the current laws, as well as the pros and cons that accompany them.

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ 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, 269 (2015).

⁸² Danielle Keats Citron, *Cyber Civil Rights*, 89 B.U. L. REV. 61, 115 (2009).

⁸³ *See id.* at 101; *see also* Andrew Koppelman, *Revenge Pornography and First Amendment Exceptions*, 65 EMORY L.J. 661, 666 (2016) (outlining why he believes revenge pornography is not a clearly established exception to the First Amendment); *see also infra* Section IV.b.ii.

⁸⁴ *40 States + DC Have Revenge Porn Laws*, CYBER C.R. INIT., <https://www.cybercivilrights.org/revenge-porn-laws/> (last visited July 30, 2018) (outlining the relevant revenge porn laws in each state).

a. *Civil Law*

Civil law remedies for victims of NCP include tort law, copyright law, and third-party liability.⁸⁵ While some argue that civil law is an effective remedy for revenge porn victims due to the ability to win damages, it has proven to be ineffective.⁸⁶

i. Tort Law

A common civil remedy for victims of NCP is to bring a tort claim —such as defamation, public disclosure of private facts, intentional infliction of emotional distress, or intrusion.⁸⁷ While in theory, tort law is an appropriate area to address the harm created by NCP,⁸⁸ it comes with many barriers. First of all, it is extremely difficult to identify perpetrators because anonymity is one of the most enticing qualities of the internet, and part of what makes posting NCP so easy.⁸⁹ Secondly, even if victims are able to identify the perpetrator and prove in court that the perpetrator did distribute NCP, a vast majority of defendants are “judgment-proof.”⁹⁰ Someone who is judgment-proof effectively has nothing to lose by posting NCP and thus, in many cases, there is no deterrent effect in bringing a tort suit.⁹¹ Furthermore, victims often are unable to receive injunctive relief, so by bringing a tort suit against a judgment-proof defendant, the victim in most cases will 1) not receive damages; 2) not be able to remove the photos or

⁸⁵ See *supra* Sections III.a.

⁸⁶ CITRON, *supra* note 16, at 122–23 (stating that civil suits are not always helpful because victims bear the costs of bringing them, attackers often do not have assets, bringing the suit in their real name may bring more attention, few courts accept pseudonyms, and many lawyers are unwilling to take online abuse cases).

⁸⁷ Citron, *supra* note 82, at 87–88.

⁸⁸ See *id.* at 87 (stating that victims who pursue general tort claims such as defamation would not need to prove special damages).

⁸⁹ Kitchen, *supra* note 81, at 252.

⁹⁰ See *id.* If a defendant has no money to pay out for damages, he/she is considered “judgment-proof.”

⁹¹ *Id.* at 252–53.

videos from the internet; and 3) incur costs in bringing the suit.⁹² This essentially puts the victim in a worse position than they were previously.⁹³ Tort claims are further ineffective for victims because bringing a suit may bring more attention to the matter than if left alone. The last thing that victims of revenge pornography want is more attention brought to their situation. A lawsuit may bring an increase of negative attention, public scrutiny, and force the victim to undergo more humiliation because of the increased publicity.⁹⁴

ii. Copyright Law

Copyright law is arguably the least effective of all the proposed solutions for NCP victims. For a victim to have a copyright claim in the first place, they must have taken the picture themselves (a selfie⁹⁵).⁹⁶ Even then, it is difficult to require websites to comply with the Digital Millennium Copyright Act (“DMCA”) takedown notice, and in most cases it is a very time-consuming process with virtually no reward for the victim.⁹⁷ Even if one website takes the photo(s) down, it is likely that the photo exists on several other sites or that it was downloaded onto someone’s personal device(s).⁹⁸ Additionally, when someone prevails on a copyright claim, injunctive relief is the only potential outcome, unless they

⁹² *Id.* at 252 (“Although judgment-proof defendants may be subject to injunctive relief, most victims would fail to meet the four requirements. To obtain an injunction, plaintiffs must prove: (1) [they] suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate . . . ; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction.”).

⁹³ *See id.*

⁹⁴ *Id.* at 254.

⁹⁵ Defined by Merriam Webster as “an image of oneself taken by oneself using a digital camera especially for posting on social networks.” *Definition of Selfie*, MIRRIAM WEBSTER, <https://www.merriam-webster.com/dictionary/selfie> (last visited Sept. 12, 2018).

⁹⁶ Kitchen, *supra* note 81, at 258.

⁹⁷ *See id.* at 259; 17 U.S.C.A. § 503 (West 2018).

⁹⁸ Talbot, *supra* note 25. (“Some of the images, Goldberg explained, could still turn up on porn sites that would refuse to take them down; the images could also have been saved to people’s laptops and phones.”).

registered the image with the United States Copyright Office.⁹⁹ Damages are only a viable option when the image was registered.¹⁰⁰ Moreover, it is unreasonable to expect a person who is sending an intimate image to a partner to register said image with the United States Copyright office.

However, there have been some positive moves made regarding copyright law and NCP.¹⁰¹ One positive to making a copyright claim is that if a claim is made and the website does not respond, they lose immunity from lawsuits.¹⁰² Additionally, *In re Craig Brittain*, which involved allegations that the owner of Isanybodydown.com¹⁰³ tricked women into sharing nude photos of themselves, which he promised would remain confidential, is a good example of a successful NCP copyright case.¹⁰⁴ The Federal Trade Commission (“FTC”) stated in their complaint that it was unfair for someone to “exploit personal information shared in confidence for commercial gain.”¹⁰⁵ The Secretary of the Commission held¹⁰⁶ that the website must destroy anything that is posted without written consent, must obtain written consent from the people who they post pictures or videos of, keep copies of all consent forms so that they could provide them to the FTC if needed, and must not misrepresent material facts.¹⁰⁷

⁹⁹ Kitchen, *supra* note 81, at 258.

¹⁰⁰ *Id.*

¹⁰¹ See generally Margaret Chon, *Copyright's Other Functions*, 15 CHI.-KENT J. INTEL. PROP. 364 (2016) (describing how copyright law can serve revenge porn victims).

¹⁰² Tom Harton, *Victims of Revenge Porn Have Legal Recourse*, 61 RES GESTAE 11 (2017).

¹⁰³ This website was used to post NCP, similar to Hunter Moore's Isanyoneup.com.

¹⁰⁴ Craig Brittain, F.T.C. 132 3120 (Jan. 8, 2015), <https://www.ftc.gov/system/files/documents/cases/160108craigbrittaincmpt.pdf>.

¹⁰⁵ Chon, *supra* note 101, at 369.

¹⁰⁶ *Id.* Please note that this is different from Section 230 of the Communications Decency Act because it involves content posted by the creator of the website, not content posted by a third-party. See *infra* Section III.b.iv. Therefore, this holding does not create internet service provider (ISP) liability for NCP.

¹⁰⁷ Chon, *supra* note 101, at 369.

In a more recent decision, plaintiff, Jane Doe, received a judgment of \$6,462,000.00 against her ex-boyfriend, David K. Elam II.¹⁰⁸ While this is a positive for future copyright cases, the plaintiff prevailed on a default judgment after the defendant ceased communication with the Court and his counsel.¹⁰⁹ Had the defendant participated in his defense, even in a minor capacity, the case may not have been as successful. This case arose from Elam's impersonation of Doe on the dating website, OkCupid, after they ended their romantic relationship.¹¹⁰ Elam distributed Doe's phone number for people to send her sexual images and instructed people to visit her home address for sex.¹¹¹ He also posted several pictures and videos to various pornography and revenge porn websites.¹¹² Jane was the registered copyright holder of these images and thus, was able to issue takedown notices through her attorney.¹¹³ Like most takedown notices, they were unsuccessful, causing continuous harm to the plaintiff.¹¹⁴ While the plaintiff was able to prevail and receive damages in this case, she still faced irreparable harm that the copyright takedown notices did not rectify.¹¹⁵ Further, without the money to hire an attorney for this civil suit, she would have been unable to pursue justice. This situation

¹⁰⁸ Default Judgment at 9, Doe v. Elam, No. 2:14CV9788(PSG) (C.D. Cal. April 4, 2018).

¹⁰⁹ *Id.* at 5.

¹¹⁰ First Amended Complaint, Doe v. Elam, No. 2:14CV9788(PSG), at 2 (C.D. Cal. February 12, 2015).

¹¹¹ *Id.*

¹¹² *Id.* at 3–4.

¹¹³ *Id.* at 5; see Christine Hauser, *\$6.4 Million Judgment in Revenge Porn Case Is Among Largest Ever*, NY TIMES, (Apr. 11, 2018) <https://www.nytimes.com/2018/04/11/us/revenge-porn-california.html> (Noting that “when he [Mr. Elam] started to publish them without her permission, she registered her ownership, which is a prerequisite for her to seek relief under federal copyright laws”).

¹¹⁴ First Amended Complaint at 5, Doe v. Elam.

¹¹⁵ See Tom McKay, *Federal Court Awards California Woman \$6.45 Million in Revenge Porn Lawsuit*, GIZMODO (April 10, 2018), <https://gizmodo.com/federal-court-awards-california-woman-6-45-million-in-1825134719>. A copyright takedown notice does not insure that the image is completely removed from the internet. Additionally, it does not rectify the emotional distress that comes from being stalked and harassed.

further illustrates just how important deterrence is when it comes to revenge porn.

iii. Third Party Liability

Being able to hold websites liable for posting NCP would not only be helpful in prevention, but also seems like a logical next step.¹¹⁶ As the American legal scholar, William Prosser stated, a business owner is responsible for the conduct of a third person present on his or her premises, and therefore must exercise his power to control the situation in order to prevent any injury to visitors.¹¹⁷ Since most websites receive profits through their running, it would be proper to describe them as a business.¹¹⁸ Furthermore, some courts have found that an injury does not need to be physical for a third-party business to be held liable.¹¹⁹ For example, the Supreme Court of Alabama held a hotel liable when one of its guests invaded the privacy of another guest by looking through a hole in the wall.¹²⁰ As of now it is unclear why the law differentiates a physical business from one that is virtual.

Currently, Section 230 of the Communication Decency Act¹²¹ states that internet service providers are immune from liability for what third-parties post on their website.¹²² This is an area of the law which requires further analysis. When considering this from a

¹¹⁶ See Nancy Kim, *Imposing Tort Liability to Websites for Cyber-Harassment*, YLJ Forum (Dec. 15, 2008), <https://www.yalelawjournal.org/forum/imposing-tort-liability-on-websites-for-cyber-harassment>.

¹¹⁷ *Id.* See also RESTATEMENT (SECOND OF TORTS) §344 (1965) (“A possessor of land who holds it open for the public for entry for his business purposes is subject to liability to members of the public while they are upon the land for such a purpose, for physical harm caused by the accidental, negligent, or intentionally harmful acts of third persons or animals, and by the failure of the possessor to exercise reasonable care to (a) discover that such acts are being done or are likely to be done, or (b) giving warning adequate to enable the visitors to avoid the harm, or otherwise protect them against it.”).

¹¹⁸ Kim, *supra* note 116, at 117.

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ 47 U.S.C.S. § 230 (LexisNexis 2018).

¹²² Bartow, *supra* note 51.

logical standpoint, revenge porn websites can be created for financial gain.¹²³ As Hunter Moore said, “Somebody was gonna monetize this, and I was the person to do it.”¹²⁴ It is necessary that we hold third parties liable in order to be able to prevent something that is so lucrative, yet so detrimental to the people being portrayed that actually make it lucrative. As Ann Bartow, a professor of law at Pace University School of Law pointed out, copyright law needs to be revamped in order to prevent the possibility of exploitation of revenge porn for financial gain.¹²⁵

Further, when so many defendants are judgment-proof, third-party liability may be the only means for plaintiffs to obtain financial relief. Carrie Goldberg commented on this aspect of NCP litigation when discussing her case *Herrick v. Grindr, LLC*.¹²⁶ In this case, the ex-boyfriend of the plaintiff made several fake profiles impersonating Herrick and stating that he was into unprotected sex and “serious kink and many fantasy scenes.”¹²⁷ Here, Herrick faced a dilemma common of people in his situation— suing his ex-boyfriend would not have achieved anything, but a judgment against Grindr could deter NCP and the spread of false information from occurring in the future.¹²⁸ Grindr moved to dismiss, and the motion was granted on January 25, 2018.¹²⁹ Herrick filed an appeal on February 9, 2018 and the case is still ongoing, with oral arguments expected to occur in winter of 2019.¹³⁰

¹²³ See Morris, *supra* note 67.

¹²⁴ See *id.* (stating that sometimes, Moore made “as much as \$30,000 a month”).

¹²⁵ Bartow, *supra* note 51, at 45.

¹²⁶ Larry Neumeister, *Grindr Asks Judge to Toss Suit Condemning Gay Dating App*, ASSOCIATED PRESS (June 29, 2017), <https://apnews.com/96a335acc203447ca2c1bedc1fb66ea>.

¹²⁷ *Herrick v. Grindr, LLC*, 306 F. Supp. 3d 579, 585 (S.D.N.Y. 2018).

¹²⁸ See *id.* (“Herrick’s attorneys, Carrie Goldberg stated, “[we] did not sue his ex-boyfriend because lawsuits and judgments don’t deter individuals who are ‘judgment-proof, hell-bent, erratic, retaliatory, impulsive, escalatory, unemployed, unemployable, tech-savvy, and untethered to any financial or family or professional responsibilities.’”).

¹²⁹ *Herrick*, 306 F. Supp. 3d at 601.

¹³⁰ *Herrick v. Grindr, LLC*, ELECTRONIC PRIVACY INFORMATION CENTER, <https://epic.org/amicus/230/grindr/> (last visited Oct. 29, 2018); Carrie Goldberg,

b. Criminal Law

As stated previously,¹³¹ forty states have laws regarding NCP.¹³² While this is beneficial, these laws are relatively new, not all of them create a criminal cause of action, and in the ones that do, the vast majority only hold penalties of a misdemeanor.¹³³ This is a step in the right direction, but thus far, have not proven to be successful as a deterrent or regulator of the act of distributing NCP.¹³⁴ A significant cause for this is that misdemeanors often do not have the same deterrent effect as other criminal penalties do because law enforcement will often disregard these charges so as not to waste resources on what is viewed as a minor offense.¹³⁵ There are many different theories on how to best criminalize revenge porn— some feel that existing laws, such as sexual assault, should be altered to include revenge porn, while others feel that entirely new laws should be created.¹³⁶ Both of these theories have their pros and cons; however, creating new laws which deal directly with NCP seems to be the better solution.

Matthew Herrick v. Grinder LLC, C.A. GOLDBERG P.L.L.C. (Sept. 10, 2018), <http://www.cagoldberglaw.com/matthew-herrick-v-grindr-llc/>.

¹³¹ See *supra* Part III.

¹³² CYBER CIVIL RIGHTS INITIATIVE, *supra* note 84; *Revenge Porn Laws by State*, FINDLAW, <http://criminal.findlaw.com/criminal-charges/revenge-porn-laws-by-state.html#> (last visited Aug. 4, 2018).

¹³³ See Carrie Goldberg, *State Revenge Porn Laws*, C.A. GOLDBERG P.L.L.C. (Apr. 16, 2018), <http://www.cagoldberglaw.com/states-with-revenge-porn-laws/>.

¹³⁴ See Laura K. Hamilton, Note, *Let Me Tell You Who I Am: Establishing a Federal Remedy for Interference with Online Identity*, 69 FED. COMM. L.J., 173, 183 (2017) (“[o]f those [states which have criminalized revenge porn] New Jersey’s statute has been rarely used, and California’s statute classifies revenge porn as a disorderly conduct misdemeanor.”).

¹³⁵ Alexis Fung Chen Pen, Note, *Striking Back: A Practical Solution To Criminalizing Revenge Porn*, 37 T. JEFFERSON L. REV. 405, 434 (2015) (“[I]mposition of a criminal statute that classifies revenge porn violations as misdemeanor conduct will fail to increase prosecutions under the statute because law enforcement may be reluctant to commit resources to misdemeanor investigations. Additionally, a misdemeanor charge is unlikely to prevent a perpetrator from committing the harm again, similar to the ineffectual nature of monetary damages in this context.”).

¹³⁶ Patton, *supra* note 4, at 427–29.

In regard to revising existing laws, leading experts on the subject of revenge porn, Danielle Citron and Mary Anne Franks, note that the United States could base NCP laws on international criminal law such as the International Criminal Tribunal for Rwanda (“ICTR”) and the International Criminal Tribunal for the former Yugoslavia (“ICTY”).¹³⁷ Both tribunals have implemented a definition for “sexual violence” that does not require there to be physical contact.¹³⁸ Therefore, should the United States, implement a definition of sexual violence that encompasses sexual violence without the requirement of physical contact, NCP could be more effectively criminalized.¹³⁹

It has been argued that, without specific NPC laws, police may not regard revenge porn offenses as seriously as they should.¹⁴⁰ This problem relates back to the discussion on victim-blaming.¹⁴¹ Rachel Budde Patton states that though someone might not view revenge porn as a crime in itself, that does not mean the solution is making its own specialized statute.¹⁴² The solution lies in educating law enforcement on the damage that can be done by NCP and Patton contends that “allowing them to operate within the statutes they already know may make them more comfortable with pressing charges against offenders.”¹⁴³ Essentially, as a society we need to become more educated on the negative ramifications that revenge porn inflicts on its victims.

While the statutes that do exist often penalize the crime as a misdemeanor, many scholars argue that creating statutes which are narrow and specifically address revenge porn is the better option.¹⁴⁴ The handful of states that have begun to craft revenge porn specific legislation often offer only meager punishments that do not have the necessary deterrent effect.¹⁴⁵ Though meager, law

¹³⁷ Danielle Keats Citron & Mary Anne Franks, *Criminalizing Revenge Porn*, 49 WAKE FOREST L. REV. 345, 363 (2014).

¹³⁸ *Id.*

¹³⁹ *See id.*

¹⁴⁰ Patton, *supra* note 4, at 442.

¹⁴¹ *See supra* Section I.b..

¹⁴² Patton, *supra* note 4 at 442.

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 432.

¹⁴⁵ *See supra* Section III.b.

makers can draw from this legislation to draft new legislation with the appropriate deterrent effect. New Jersey, California, and New York are important leaders in the criminalization of revenge porn and thus, it is important to examine their laws.

i. New Jersey

New Jersey is oftentimes considered the first state to have created a law addressing revenge porn.¹⁴⁶ While the 2004 legislation is technically considered an “invasion of privacy” statute, and was intended to combat cyber-bullying, the language used also relates to revenge porn offenses.¹⁴⁷ The statute specifically states that it is considered a third-degree crime if a person who does not have the authority to do so, “discloses any photograph, film, videotape, recording or any other reproduction of the image” of someone “whose intimate parts are exposed or who is engaged in an act of sexual penetration or sexual contact”¹⁴⁸ Professors Citron and Franks consider New Jersey’s statute to be the “broadest.”¹⁴⁹ While broad may sound like it has a negative connotation, in the case of revenge pornography, it is a positive because it omits the intent requisite which most other state laws have.

Most notably, this law was used in the prosecution of Dahrin Ravi in *State v. Ravi*.¹⁵⁰ In 2010, Ravi was a freshman at Rutgers University and assigned to be roommates with Tyler Clementi.¹⁵¹ He found out Clementi was gay via an internet search while trying to learn more about his new roommate.¹⁵² In September 2010, Clementi asked Ravi if he could have the dorm room to himself for a few hours.¹⁵³ Before leaving, Ravi set up his webcam to

¹⁴⁶ See Citron & Franks, *supra* note 137, at 371.

¹⁴⁷ Patton, *supra* note 4, at 429.

¹⁴⁸ N.J. STAT. ANN. § 2C:14-9 (West 2018).

¹⁴⁹ Citron & Franks, *supra* note 137, at 371 (stating that the designation of “broad” is meant comparatively to states that stipulate a need to prove actual harm suffered).

¹⁵⁰ *Id.* at 372.

¹⁵¹ *State v. Ravi*, 147 A.3d 455, 459 (N.J. Super Ct. App. Div. 2016).

¹⁵² *Id.*

¹⁵³ *Id.* at 460.

automatically accept video chat requests, then went across the hall to his friend's room, and called himself from his friend's computer.¹⁵⁴ He saw Clementi kissing another man, and tweeted about what he saw.¹⁵⁵ When Clementi asked for the room again a few days later, Ravi tweeted to tell his followers to video chat him between 9:30 p.m. and 12 a.m. to watch Clementi.¹⁵⁶ Clementi found out about this soon after the incident and took his own life by jumping off the George Washington Bridge.¹⁵⁷ The New Jersey Superior Court stated, "Defendant was not charged with causing or contributing to [Clementi's] death. However, the social environment that transformed a private act of sexual intimacy into a grotesque voyeuristic spectacle must be unequivocally condemned in the strongest possible way."¹⁵⁸ This case speaks to how harmful the effects of NCP can be.¹⁵⁹ However, although this case was and still is considered a win for the criminalization of revenge porn, Ravi was sentenced to just thirty days in jail.¹⁶⁰

ii. California

While New Jersey's law is the first that has an overarching applicability to revenge porn,¹⁶¹ California is the first state to have a technical "revenge porn" statute.¹⁶² California states in California Penal Code Section 647(j)(4)(A) that someone is guilty of the misdemeanor of disorderly conduct if one:

¹⁵⁴ *Id.* at 460–61.

¹⁵⁵ *Id.* at 270.

¹⁵⁶ *Id.* at 274.

¹⁵⁷ *Id.* at 279–82 (noting that Clementi had been reading Ravi's tweets).

¹⁵⁸ *Id.* at 300.

¹⁵⁹ Bloom, *supra* note 18, at 241.

¹⁶⁰ Michael Koenings et al., *Rutgers Trial: Dharun Ravi Sentenced to 30 Days in Jail*, ABC NEWS (May 21, 2012), <https://abcnews.go.com/US/rutgers-trial-dharun-ravi-sentenced-30-days-jail/story?id=16394014>.

¹⁶¹ See Law Offices of Edward G. Appel, *New Jersey's Invasion of Privacy Law Criminalizes Revenge Porn*, HG LEGAL SERVICES, <https://www.hg.org/legal-articles/new-jersey-s-invasion-of-privacy-law-criminalizes-revenge-porn-39357> (last visited Oct. 29, 2018).

¹⁶² David Stout, *Another State to Criminalize 'Revenge Porn'*, TIME (Apr. 25, 2014), <http://time.com/76957/revenge-porn-criminalized/>.

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.¹⁶³

The California law has a much narrower scope than its New Jersey counterpart.¹⁶⁴ As a result, the language employed by California legislators raises many questions and considerations to keep in mind when crafting new legislation.¹⁶⁵ For example, the phrases “identifiable person,” “knows or should know that distribution . . . will cause serious emotional distress,” and “the person . . . suffers that distress” all create questions that might provide the defendant with a defense.¹⁶⁶ Lori Andrews, a professor at Chicago-Kent College of Law, explains this dilemma in her commentary on California’s legislation.¹⁶⁷ She discusses how it would not cover selfies that someone took of themselves and sent to someone who later posted it.¹⁶⁸ Further:

[e]ven when an ex-boyfriend did take a photo and post it, it would be hard for the woman to prove that their understanding was that it would remain private. Didn’t she know there was at least a chance

¹⁶³ CAL. PENAL CODE § 647(j)(4)(A) (West 2018).

¹⁶⁴ Patton, *supra* note 4, at 431; *see also* Citron & Franks, *supra* note 137, at 373 (stating that California’s law is the narrowest).

¹⁶⁵ *See* Patton, *supra* note 4, at 431–34.

¹⁶⁶ PENAL CODE § 647(j)(4)(A).

¹⁶⁷ Lori Andrews, *California’s Revenge Porn Statute: A Start but Not a Solution*, ON THE EDGES OF SCIENCE AND LAW: THE INST. FOR SCI., LAW, AND TECH. BLOG (Oct. 3, 2013), <http://blogs.kentlaw.iit.edu/islat/2013/10/03/californias-revenge-porn-statute-a-start-but-not-a-solution/>.

¹⁶⁸ *Id.*

he was going to show it to his friends? And the requirement that he must have ‘the intent to cause serious emotional distress’ is both hard to prove and too narrow. A man might evade punishment by claiming that by posting the photo he was just trying to brag that his girlfriend was hot.¹⁶⁹

Granted, California has successfully prosecuted cases despite these issues with the narrowness of the law; however, they tend to be more clear-cut.¹⁷⁰ For example, in *People v. Iniguez*, a man was charged with distributing a private image when he posted a photo to his ex-girlfriend’s work Facebook page that featured her exposed breasts.¹⁷¹ He argued that the statute violated his due process rights because it was not specific enough,¹⁷² and that the evidence was not sufficient because there was “lack of proof” that the term “distribute” applied to the posting on Facebook.¹⁷³ He said that the burden was not met because prosecution did not prove that “serious emotional distress” occurred.¹⁷⁴ The Court disagreed with the defendant’s contentions on these issues, stating that his due process was not violated because “a person of common intelligence” would be able to understand the meaning of the statute¹⁷⁵ and that posting on Facebook was sufficient to be deemed distribution.¹⁷⁶ Finally, the Court reasoned that it did not matter whether they used a specialized definition of “serious emotional distress” to analyze the situation because regardless, since the victim stated she considered killing herself, it was sufficient to meet the standard.¹⁷⁷ While this shows that the statute can succeed, this was an extreme case in which the victim had a restraining order against the defendant after he constantly harassed

¹⁶⁹ *Id.*

¹⁷⁰ *See, e.g., People v. Iniguez*, 202 Cal. Rptr. 3d 237 (App. Dep’t. Super. Ct. 2016).

¹⁷¹ *Id.* at 240–41; PENAL CODE § 647 (j)(4)(A).

¹⁷² *Id.* at 242.

¹⁷³ *Id.* at 245.

¹⁷⁴ *Id.* at 246.

¹⁷⁵ *Id.* at 242.

¹⁷⁶ *Id.* at 245.

¹⁷⁷ *Id.* at 246.

and stalked her.¹⁷⁸ He then posted the nude photo, not to his private Facebook page, but to the Facebook page of his ex-girlfriend's place of employment.¹⁷⁹ These circumstances likely elicited strong feelings from those who heard it, which makes it not the typical case utilizing the California statute. While it is a positive for revenge pornography criminalization that this case had the disposition that it did, the majority of cases will not have such extreme circumstances.

iii. New York

One could argue that New York passed a statute criminalizing revenge porn in 2014 because it passed legislation making it a second-degree felony for people to “broadcast or record another person engaged in sexual conduct without their consent”¹⁸⁰ However, this statute does not cover classic revenge porn cases since the language used refers more to people who are recorded unknowingly;¹⁸¹ moreover, it does not cover those who willingly sent a picture or video to someone.¹⁸² Further, this law has proven to be unsuccessful in practice.¹⁸³ *People v. Barber* was the first time a New York Court considered punishing someone who posted NCP criminally.¹⁸⁴ In *Barber*, a Brooklyn man posted nude photographs of his ex-girlfriend to Twitter in 2013, and was found not guilty of any crimes because “the man had not obtained the pictures unlawfully; nudity alone doesn't constitute ‘offensive sexual material’; and posting on Twitter did not amount to ‘public display,’ since Twitter is a ‘subscriber-based social networking service.’”¹⁸⁵ It is unclear how sending someone a picture in a

¹⁷⁸ *Id.* at 240.

¹⁷⁹ *Id.* at 240–41.

¹⁸⁰ Teri Weaver, ‘Revenge Porn’ Now Illegal in New York, SYRACUSE (Aug. 1, 2014), http://www.syracuse.com/news/index.ssf/2014/08/revenge_porn_now_illegal_in_new_york.html.

¹⁸¹ *See id.*

¹⁸² *See id.*

¹⁸³ *See, e.g.,* *People v. Barber*, 992 N.Y.2d 159 (Crim. Ct. 2014).

¹⁸⁴ *Id.* at 159.

¹⁸⁵ Talbot, *supra* note 25.

private text message gave him permission to post them to the internet on a public website.

However, in 2018, New York attempted to pass a bill that would criminalize posting pictures “captured consensually.”¹⁸⁶ While this was a start, this law would only be punishable as a misdemeanor,¹⁸⁷ which is not always a powerful deterrent in these crimes.¹⁸⁸ The bill was supposed to be voted on in June 2018, however, the Senate chose to delay the matter after the Internet Association, as well as Google, joined the case to defend against the bill.¹⁸⁹ As such, the vote has been adjourned until next year.¹⁹⁰ New York City has also enacted their own law criminalizing revenge porn.¹⁹¹ The law provides both civil and criminal relief for victims of the crime.¹⁹² It is similar to the state law in that it is criminally punishable as a misdemeanor.¹⁹³ It also has an intent requirement which has shown to be difficult to prove based on

¹⁸⁶ See generally James Hetherington, *What Happened To New York’s Revenge Porn Bill?*, NEWSWEEK (June 21, 2018), <https://www.newsweek.com/what-happened-new-yorks-revenge-porn-bill-google-989666> (describing lobbyists’ efforts to get the bill passed); See also Kimberly Lawson, *New York’s Revenge-Porn Bill Killed After Google Campaign*, BROADLY (June 21, 2018), <https://www.thedailybeast.com/new-yorks-revenge-porn-bill-killed-after-google-campaign> (describing Google’s efforts to lobby against the bill).

¹⁸⁷ Patrick Lohmann, *New York Senate Passes Bill to Make ‘Revenge Porn’ a Crime*, SYRACUSE (June 8, 2017), http://www.syracuse.com/state/index.ssf/2017/06/new_york_senate_passes_bill_to_make_revenge_porn_a_crime.html.

¹⁸⁸ See *supra* Section III.b.

¹⁸⁹ Hetherington, *supra* note 186. See also Lawson, *supra* note 186 (describing googles efforts to lobby against the bill).

¹⁹⁰ Hetherington, *supra* note 186.

¹⁹¹ Sarah Ashley O’Brien, *Revenge Porn Will Soon Be a Crime in New York City*, CNN (Nov. 16, 2017), <http://money.cnn.com/2017/11/16/technology/nyc-revenge-porn-bill/index.html>.

¹⁹² N.Y.C., Admin. Code Int. No. 1267-A (2017), <https://legistar.council.nyc.gov/LegislationDetail.aspx?ID=2834718&GUID=EF014C38-03AA-45C7-A7DE-A35F54F4EA61>.

¹⁹³ *Id.*; N.Y. State S., S. Res. 642, 2017-2018 Reg. Sess. (N.Y. 2017), <https://www.nysenate.gov/legislation/bills/2017/S642>.

other states who have included similar language.¹⁹⁴ Again, while this is a start, it is not enough to serve as a significant deterrent in order to prevent revenge porn from happening in the first place.

iv. Federal Legislation

Many argue that the only way to solve NCP is to enact legislation at the federal level.¹⁹⁵ Danielle Citron argues that a federal criminal law could be effective because it would protect revenge porn victims in cases where the state does not yet have a law, or law enforcement has chosen not to act due to it being a low-level offense.¹⁹⁶ Another argument, raised by Mary Anne Franks, is that a federal criminal law would override the protections of the Communications Decency Act (CDA).¹⁹⁷ The CDA safeguards “interactive computer services” from liability for material posted on their domains by third-parties.¹⁹⁸ These protections were put in place to encourage the continued development of the internet.¹⁹⁹ While the development of the internet is obviously important, federal criminalization could carve out exceptions so that revenge porn victims receive the necessary protections that they deserve.

Representative Jackie Speier of California introduced federal legislation for NCP in 2016.²⁰⁰ The legislation, named the Intimate Privacy Protection Act,²⁰¹ proposed that it would be a federal crime “to post online or distribute naked or sexually explicit

¹⁹⁴ O’Brien, *supra* note 191. See also N.Y.C., ADMIN. CODE Int. No. 1267-A, *supra* note 192 (stating “with the intent to cause economic, physical or substantial emotional harm to such depicted individual.”).

¹⁹⁵ Michelle Dean, *The Case for Making Revenge Porn a Federal Crime*, GAWKER (Mar. 27, 2014), <http://gawker.com/the-case-for-making-revenge-porn-a-federal-crime-1552861507>.

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ 47 U.S.C.A. § 230 (West 2018).

¹⁹⁹ *Id.*

²⁰⁰ Steven Nelson, *Federal ‘Revenge Porn’ Bill Will Seek to Shriveled Booming Internet Fad*, US NEWS (Mar. 26, 2014), <https://www.usnews.com/news/articles/2014/03/26/federal-revenge-porn-bill-will-see-to-shriveled-booming-internet-fad>.

²⁰¹ H.R. 5896, 114th Cong. (2016).

images with ‘reckless disregard’ for the lack of consent of the person in the photos or videos.”²⁰² Nothing ever came of this bill after it was introduced in the House.²⁰³

While the Intimate Privacy Protection Act was never passed, Congress introduced legislation based largely on that bill on November 28, 2017.²⁰⁴ This legislation, created by Senators Kamala Harris, Richard Burr, and Amy Klobuchar is entitled the Ending Nonconsensual Online User Graphic Harassment Act or the “ENOUGH” Act.²⁰⁵ While it bears many similarities to the Intimate Privacy Protection Act, the previous bill was drafted more clearly.²⁰⁶ The ENOUGH act puts the burden of proof on the victim, a problem that exists in many female-centric crimes.²⁰⁷ The victim must prove that both the victim and the perpetrator knew that the victim had an expectation that the images would remain private, and that there would be a negative effect from the sharing of the images.²⁰⁸ This is a high and unnecessary burden to meet.

Part of the reason for including an intent to cause harm requirement in the legislation of this bill is to avoid First Amendment challenges.²⁰⁹ This largely results from objections by the American Civil Liberties Union (“ACLU”) that NCP is protected by the First Amendment.²¹⁰ This new bill aimed to “strike an effective balance between protecting the victims of these

²⁰² Mario Trujillo, *Revenge Porn Bill Unveiled After Struggle to Bring Tech on Board*, THE HILL (July 14, 2016), <http://thehill.com/policy/technology/287773-revenge-porn-bill-unveiled-after-struggle-to-bring-tech-on-board>.

²⁰³ Jillian Roffer, *Nonconsensual Pornography: An Old Crime Updates Its Software*, 27 Fordham Intell. Prop. Media & Ent. L. J. 935, 958 (2017); Madeleine Aggeler, *This Bill Would Make Revenge Porn a Federal Crime*, THE CUT (Nov. 28, 2017), <https://www.thecut.com/2017/11/bipartisan-bill-would-make-revenge-porn-a-federal-crime.html>.

²⁰⁴ Aggeler, *supra* note 203.

²⁰⁵ *Id.*

²⁰⁶ Melanie Ehrenkranz, *We Need a National Revenge Porn Law, But This Bill Is Flawed*, GIZMODO (Nov. 28, 2017), <https://gizmodo.com/we-need-a-national-revenge-porn-bill-but-this-one-is-f-1820809544>.

²⁰⁷ *See id.*

²⁰⁸ Aggeler, *supra* note 203.

²⁰⁹ *See* Ehrenkranz, *supra* note 206.

²¹⁰ *Id.*

serious privacy violations and ensuring that vibrant online speech is not burdened,” according to a press release on the legislation.²¹¹ Representative Speier stated that this legislation “will fix this gaping hole in our legal system.”²¹² However, it is unclear if it will actually be effective due to the need to show that there was an expectation of privacy and that the perpetrator knew there was a risk of harm when sharing.²¹³ As of August 2018, no additional progress has been made with this bill.²¹⁴ However, as stated previously, this bill is not the best solution to the problem—the intent requirement must be omitted to build stronger cases for prosecution.

IV. HOW CAN WE IMPROVE THE STATE OF THE LAW OF REVENGE PORN?: DISSOLVING THE SHAME OF THE SCARLET LETTER

Revenge porn victims have been bearing their own version of the scarlet letter since at least 1980.²¹⁵ After nearly four decades, it is time to improve the government’s response to this unethical crime and increase the criminalization. The crime of revenge pornography warrants jail time, felony status, and registration on the sex offender registry.

a. “Enough” is not Enough

As discussed, the current remedies available for revenge porn victims are ineffective and do not fully address the harms faced by victims.²¹⁶ While Congress is currently in the process of reviewing the ENOUGH act, this is not sufficient.²¹⁷ Drafting criminal federal legislation is the right direction to create a successful remedy for victims, but the ENOUGH act is not the saving grace

²¹¹ *Id.*

²¹² Aggeler, *supra* note 203.

²¹³ *See supra* Section III.b.ii (describing how the intent requirement in California has been ineffective).

²¹⁴ *See* S. 2162, 115th Cong. (2017).

²¹⁵ *See supra* Part II.

²¹⁶ *See* discussion *supra* Part III.

²¹⁷ Ehrenkranz, *supra* note 206.

for victims of NCP.²¹⁸ Most importantly, there should not be an intent or a “knowing” aspect to the bill.²¹⁹ Requiring distribution to be done “knowingly” creates an outlet for defense attorneys to find loopholes, and creates a likelihood that it will be difficult to actually prosecute these crimes.²²⁰ The requirement for distribution to be “knowing” puts the federal legislation on a similar ground to the California revenge porn statute.²²¹ There is no reason to give defendants such a significant upper hand—it is to the point where it is nearly impossible to make a case with the intent requirement.

There are several arguments a defendant can make, which a California defense attorney outlines on his firm’s website.²²² He states, “A defendant who claims he or she was uploading the images to his private cloud or for his own use and never intended to share them publicly may have a good argument for being found not guilty. Even if the defendant’s assertions are untrue.”²²³ He goes on to explain how difficult it is to prove intent in a criminal court and that any “good” criminal defense attorney would have several arguments to mitigate, if not completely eliminate, the element of intent.²²⁴ Given the similarities between California’s Revenge Porn Law and the ENOUGH Act, it is not unreasonable to predict these same defenses may be used to deny victims of non-consensual pornography meaningful remedy, making such legislation potentially flawed before it has even been passed.²²⁵

Therefore, to craft a suitable revenge porn law, the element of distribution being “knowing” or “intentionally” causing harm, must be eliminated. This element is often added to legislation to

²¹⁸ *Id.*

²¹⁹ See Lauren Evans, *Why It’s So Hard to Make Revenge Porn Laws Effective*, JEZEBEL (Nov. 16, 2017), <https://jezebel.com/why-its-so-hard-to-make-revenge-porn-laws-effective-1820442428>.

²²⁰ *See id.*

²²¹ See Citron & Franks, *supra* note 137, at 373–74.

²²² See Mitch Jackson, *California’s “Revenge Porn” Law*, JACKSON & WILSON (July 5, 2017), <https://www.jacksonandwilson.com/blog/2017/july/californias-revenge-porn-law-from-a-lawyers-pers/>.

²²³ *Id.*

²²⁴ *Id.*

²²⁵ *See id.*

make it more narrowly tailored so as not to violate the First Amendment.²²⁶ A least one scholar disagrees with this take.²²⁷ Erwin Chemerinsky, a dean at the University of California Berkeley School of Law, argued that intent was not a necessary requirement to protect the First Amendment.²²⁸ He stated:

I don't see anything in the First Amendment that says there has to be an intent to cause harm to the victim. If the material is intentionally or recklessly made publicly available, I think that is sufficient, and I don't think it should just be about intent to cause harm to the victim. Imagine that the person is putting the material online for profit or personal gain. That should be just as objectionable as to cause harm to the victim [. . .] Any time there's this dissemination of sexually explicit material without consent, that should be impermissible.²²⁹

The intent requirement seems to be a superfluous, last-ditch addition by objectors of the criminalization of revenge porn to prevent prosecution. As Mr. Chemerinsky said, there is no requirement in the First Amendment for there to be intent.²³⁰ In fact, revenge porn is covered under the obscenity exception.²³¹ As such, it is imperative that the intent requirement be eliminated from revenge porn statutes to create an effective law.

²²⁶ See Cathy Reisenwitz, *Revenge Porn is Awful, But the Law Against it is Worse*, TALKING POINTS MEMO (Oct. 16, 2013), <http://talkingpointsmemo.com/cafe/revenge-porn-is-awful-but-the-law-against-it-is-worse>.

²²⁷ See Professor Erwin Cherminsky And Expert Panelists Support Bipartisan Federal Bill Against Nonconsensual Pornography, CYBER CIVIL RIGHTS INITIATIVE (Oct. 6, 2017), <https://www.cybercivilrights.org/2017-cybercrime-symposium/>.

²²⁸ *Id.*

²²⁹ *Id.*

²³⁰ *Id.*

²³¹ See *infra* Section IV.b.ii.

b. *A New Standard*

While California's revenge porn law has many shortfalls, the standard used at their state universities for determining whether consent is given in cases of sexual assaults could prove to be helpful in drafting federal legislation for revenge porn. In September 2014, California passed Senate Bill No. 967 which requires students at the state universities in California to provide "affirmative consent" to any sexual activity, although this is not present in any criminal laws.²³² The pertinent section of the bill states that the policy requires:

An affirmative consent standard in the determination of whether consent was given by both parties to sexual activity. "Affirmative consent" means affirmative, conscious, and voluntary agreement to engage in sexual activity [. . .] The existence of a dating relationship between the persons involved, or the fact of past sexual relations between them, should never by itself be assumed to be an indicator of consent.²³³

The above language could easily be tailored to fit revenge porn. This would prevent the burden from being placed on the victim and put it back on the perpetrator.²³⁴ There would also be a similar objective served through the implementation of this standard in revenge porn cases. Kevin de León²³⁵ described sexual violence as an act that prospers in the "gray areas of the law."²³⁶ He explained that California decided to create this legislation to generate not only a legal shift, but also a paradigm shift to move away from the culture of victim blaming.²³⁷ While the affirmative

²³² S. 967, 2013-2014 Leg., Reg. Sess. (Cal. 2014) (Westlaw).

²³³ *Id.*

²³⁴ *See id.*

²³⁵ Kevin de León is the president pro tempore of the California State Senate speaker, as well as a "lead sponsor" of California high school legislation. Jennifer Medina, *Sex Ed Lesson: 'Yes Means Yes,' but It's Tricky*, N.Y. Times (Oct. 14, 2015), <https://www.nytimes.com/2015/10/15/us/california-high-schools-sexual-consent-classes.html>; *Biography*, CAL. STATE SENATE MAJORITY CAUCUS, <https://sd24.senate.ca.gov/biography> (last visited Sept. 22, 2018) (indicating that he is president pro tempore of the California State Senate).

²³⁶ Medina, *supra* note 235.

²³⁷ *Id.*

consent standard only applies on university campuses, it creates a solid basis for a future revenge porn law.

When looked at as a whole, the crimes of sexual assault and revenge porn share many similarities,²³⁸ and thus it makes sense to use the same standard of analysis. As Mary Anne Franks stated, “Revenge porn belongs to that class of activities that includes rape, domestic violence, and sexual harassment—that is, the class of activities overwhelmingly (though of course not solely) perpetrated by men and directed overwhelmingly (again, not solely) at women.”²³⁹ As such, victims of revenge porn and sexual assault often suffer the same harms, such as depression, emotional distress, embarrassment, as well as a multitude of other ill effects.²⁴⁰ Given these serious ramifications, it makes sense that someone would need to prove that affirmative consent was given for an intimate image to be posted to the internet or otherwise distributed.

i. Goals of a New Law

Some critics argue that criminalizing revenge porn is not the solution.²⁴¹ However, since there is not nearly as much of a stigma for people being sued in a civil matter as there is when someone is charged with a crime, civil remedies are not as successful of a deterrent.²⁴² Punishing NCP as a misdemeanor also proves to be

²³⁸ See Franks, *supra* note 24.

²³⁹ Bloom, *supra* note 18, at 251.

²⁴⁰ See James T. Dawkins IV, *supra* note 29, at 40; see also Franks, *supra* note 24 (“The victims of these acts [revenge porn] have lost jobs, been forced to change schools, change their names, and have been subjected to real-life stalking and harassment because of the actions of those who posted and distributed their images. Some victims have committed suicide.”); see also Gabrielle Fonrouge, *Inside the Twisted Revenge Porn Site That’s Ruining Women’s Lives*, N. Y. POST (Sept. 22, 2017), <https://nypost.com/2017/09/22/revenge-porn-site-leaves-trail-of-innocent-victims/> (detailing the ramifications of having intimate pictures or videos posted to the internet).

²⁴¹ See Sarah Jeong, *Revenge Porn is Bad. Criminalizing it is Worse*, WIRED (Oct. 28, 2013), <https://www.wired.com/2013/10/why-criminalizing-revenge-porn-is-a-bad-idea/>; see also Reisenwitz, *supra* note 226 (detailing First Amendment arguments for why criminalizing revenge porn is not the solution).

²⁴² Kitchen, *supra* note 81, at 261.

unsuccessful because prosecutors often do not feel it is worthwhile to pursue.²⁴³ Therefore, a new law would employ the affirmative consent standard, and penalize NCP as a felony to create the necessary deterrent effect.²⁴⁴

Perpetrators of revenge porn take away a victim's free will and autonomy to do what they please with their body, similar to what happens to victims of sexual assault.²⁴⁵ The Court in *Johnson v. State*, a case involving rape, described the goal of criminalizing rape as:

[P]reventing the loss of autonomy, dignity, free will, and bodily integrity that comes with non-consensual sexual penetration. We have stated that “[t]he reason [rape] is most serious is because it amounts to a desecration of the victim’s person which is a vital part of her sanctity and dignity as a human being.” The United States Supreme Court has noted that “[rape] is highly reprehensible, both in a moral sense and in its almost total contempt for the personal integrity and autonomy of the . . . victim and for the latter’s privilege of choosing those with whom intimate relationships are to be established [. . .]”²⁴⁶

This is highly analogous with revenge porn. Revenge porn advocates are fighting for victims to maintain their free will, autonomy, and bodily integrity to choose who gets to see their body and when.²⁴⁷ While there is obviously a difference, there is

²⁴³ See *supra* Section III.b (discussing prosecuting misdemeanors being a waste of resources).

²⁴⁴ See Hope Robertson, *The Criminalization of Revenge Porn*, THE CAMPBELL L. OBSERVER (July 21, 2015), <http://campbelllawobserver.com/the-criminalization-of-revenge-porn/>.

²⁴⁵ See *Johnson v. State*, 2015 328 P.3d 77, 89 (Alaska 2014) (quoting *Coker v. Georgia*, 433 U.S. 584, 597 (1977)).

²⁴⁶ *Johnson*, 328 P.3d at 89.

²⁴⁷ Talbot, *supra* note 25 (quoting Carrie Goldberg, “I think that privacy is something that has to be respected, because otherwise where’s the boundary between you and me? And I’m not saying that everybody has to have the same level of modesty, but, if you are not wanting to show your naked pictures to everybody, that seems like a choice you ought to be able to have.”).

an intimate violation and desecration involved in both sexual assault and NCP.²⁴⁸ The entire internet having the ability to view the most private parts of your body without your consent inevitably takes a hit to your sense of sanctity and dignity.²⁴⁹ It has been accepted by society that forcing someone to perform any sort of sexual act against their will is a crime.²⁵⁰ This is the case even when the perpetrator of the crime does not actually touch the victim, such as when someone is forced to “strip naked.”²⁵¹ Therefore, when two crimes share so many similarities in the harms faced and goals of criminalizing, it logically follows that they would share a similar legal standard.²⁵²

ii. Potential Arguments Against this Law

An objection to federal criminal NCP legislation is that it would be a violation of the First Amendment.²⁵³ One concern is that lowering the bar for First Amendment claims for cases of NCP would impede on the public seeing pictures that are of news-worthy importance—such as a political candidate who has had nude selfies released.²⁵⁴ A name that often arises in such arguments is Anthony Weiner, a politician who sent unsolicited sexually explicit pictures of his genitalia to various women.²⁵⁵

²⁴⁸ See Kitchen, *supra* note 81, at 249–50.

²⁴⁹ See *id.* (“Revenge porn is ‘potentially even more pernicious and long lasting than real-life harassment’ . . . Ignoring revenge porn does nothing to protect victims because the damage is not tied to how long the images are posted: the damage is the loss of relationships, jobs, opportunities, and self-esteem.”).

²⁵⁰ 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>.

²⁵¹ *Id.*

²⁵² See *id.*

²⁵³ Danielle Citron, *Debunking the First Amendment Myths Surrounding Revenge Porn Laws*, FORBES (Apr. 18, 2014), <https://www.forbes.com/sites/daniellecitron/2014/04/18/debunking-the-first-amendment-myths-surrounding-revenge-porn-laws/#53df34ba25c8>.

²⁵⁴ Reisenwitz, *supra* note 226.

²⁵⁵ *Id.*

Political commentator Amanda Marcotte raised the counter-argument that, “[k]nowing that [Anthony] Weiner’s dick pic[tur]e]s are out there but being unable to view them [yourself] seems like a fair trade for a world where men are more limited in the weapons they can use to stalk, abuse, and control women.”²⁵⁶ While this is a fair point, it might not be necessary to categorize news-worthy sexual pictures under the same umbrella as NCP.

There are certain categories of speech that do not receive First Amendment protection, including, child pornography, libel and slander, threats, speech that involves crime, threats, and obscenity.²⁵⁷ Most relevant to NCP is the obscenity exception.²⁵⁸ The Supreme Court created a three-prong standard in *Miller v. California* that outlines what is considered “obscene” and thus not protected by the First Amendment.²⁵⁹ Speech is considered obscene when:

- (a) “[T]he average person, applying contemporary community standards” would find that the work, taken as a whole, appeals to the prurient interest,
- (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law, and
- (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

It is safe to say that the “average person” would consider distribution of NCP to “appeal to the prurient interest.”²⁶⁰ Furthermore, the third prong clears up any issues regarding news-worthy pictures that warrant the public’s attention because if said picture has “political” value, it would not be covered by the obscenity exception. So, Ms. Marcotte might not need to make the

²⁵⁶ Jeong, *supra* note 241.

²⁵⁷ *What Type of Speech is Not Protected by the First Amendment?*, HG, <https://www.hg.org/article.asp?id=34258> (last visited Dec. 6, 2017).

²⁵⁸ See Tom Head, *The Miller Test—Defining Obscenity*, THOUGHTCO. (Sept. 29, 2017), <https://www.thoughtco.com/the-miller-test-721197>.

²⁵⁹ *Miller v. California*, 413 U.S. 15, 39 (1973).

²⁶⁰ *Id.*

trade—revenge porn and Anthony Weiner’s “dick pic[ture]s” are analyzed differently under the First Amendment.²⁶¹

Applying the Supreme Court’s reasoning in *United States v. Stevens*, one could argue that NCP would not be considered an unprotected class of speech.²⁶² The *Stevens* case involved criminalizing a “crush video” which is a video of a woman in stiletto heels crushing a puppy or kitten to death.²⁶³ The Court refused to consider this an unprotected class of speech, and did not want to prohibit “dissemination of truthful information,” despite it being offensive.²⁶⁴ While one can make the argument that this might apply to NCP, a crush video does not have the same effect that NCP does. As terrible as it might be, there is not the same aspect of taking away a person’s dignity and bodily autonomy.²⁶⁵ Furthermore, this ruling did not overturn *Miller* and thus it is likely that NCP could fall under the obscenity exception²⁶⁶—or as Mary Anne Franks argued, it can also fall under a variation of the child pornography exception.²⁶⁷

V. MODEL LAW

A model law would reflect all the standards and goals as were described *supra*.²⁶⁸ The ENOUGH act could be used as a basis for new legislation, with a few adjustments to make the law better at fulfilling the outlined goals.²⁶⁹ The following is a proposal for

²⁶¹ See *id.* But see Jeong, *supra* note 241 (arguing that criminalizing revenge porn would hinder the public by preventing reporters from reporting on incidents where political figures have shared sexually explicit images, such as Anthony Weiner).

²⁶² Emily Poole, Comment, *Fighting Back Against Non-Consensual Pornography*, 49 U.S.F. L. REV. 181, 208 (2015); *United States v. Stevens*, 559 U.S. 460, 478 (2010).

²⁶³ *Stevens*, 559 U.S. at 478 (2010). See also Poole, *supra* note 262 (detailing what a “crush video” is).

²⁶⁴ Poole, *supra* note 262.

²⁶⁵ See *supra* Section IV.b.i.

²⁶⁶ See *Stevens*, 559 U.S. at 478–79; *Miller v. California*, 413 U.S. 15, 39 (1973).

²⁶⁷ Franks, *supra* note 250.

²⁶⁸ See *supra* Sections III.(a)-(b).

²⁶⁹ See *supra* Section IV.a.

what would be the most effective model law in the case of revenge porn.

Distribution of a Non-consensual Intimate Visual Depiction:

To Amend title 18, United States Code, to provide that it is unlawful to distribute a private, visual depiction of an individual's intimate parts or of an individual engaging in sexually explicit conduct, unless the depicted person affirmatively consented to said distribution.²⁷⁰

(1) An affirmative consent standard in the determination of whether consent was given by both parties to distribution. "Affirmative consent" means affirmative, conscious, and voluntary agreement to engage in distribution of the sexually-explicit image or video. Lack of protest or resistance does not mean consent, nor does silence mean consent. Affirmative consent can be revoked at any time. The existence of a past consent to distribution sexually-explicit media between the parties should never by itself be assumed to be an indicator of consent.²⁷¹

²⁷⁰ H.R. 4472, 115th Cong. (2017) (modified from "To Amend title 18, United States Code, to provide that it is unlawful to *knowingly* distribute a private, visual depiction of an individual's intimate parts or of an individual engaging in sexually explicit conduct, *with reckless disregard for the individual's lack of consent to the distribution, and for other purposes*" (emphasis added)).

²⁷¹ S. 967, 2014 Leg. (Cal. 2014) (modified from "An affirmative consent standard in the determination of whether consent was given by both parties to *sexual activity*. "Affirmative consent" means affirmative, conscious, and voluntary agreement to engage in *sexual activity*. *It is the responsibility of each person involved in the sexual activity to ensure that he or she has the affirmative consent of the other or others to engage in the sexual activity*. Lack of protest or resistance does not mean consent, nor does silence mean consent. Affirmative consent *must be ongoing throughout a sexual activity and* can be revoked at any time. The existence of a *dating relationship between the persons involved, or the fact of past sexual relations between them*, should never by itself be assumed to be an indicator of consent" (emphasis added)).

(2) “The term ‘intimate visual depiction’ means any visual depiction (as that term is defined in section 2256(5))—²⁷²

a. of an individual who is reasonably identifiable from the visual depiction itself or information displayed in connection with the visual depiction;²⁷³

b. in which—²⁷⁴

i. the individual is engaging in sexually explicit conduct; or²⁷⁵

ii. the naked genitals or post-pubescent female nipple of the individual are visible;²⁷⁶

c. in which the content described in subparagraph (B) is not simulated; and

d. in original or modified format, such as with a filter or text overlay.²⁷⁷

(3) “The term ‘sexually explicit conduct’ has the meaning given that term in section 2256(2)(A).”²⁷⁸

(4) Felony Offense— “it shall be unlawful to knowingly use any means or facility of interstate or foreign commerce to distribute an intimate visual depiction of an individual”—²⁷⁹

a. Who does not affirmatively consent to such distribution.²⁸⁰

(d) Unless content is deemed to be of “serious literary, artistic, political, or scientific value,” and thus of news-worthy importance to the public.²⁸¹

²⁷² H.R. 4472, 115th Cong. (2017).

²⁷³ *Id.*

²⁷⁴ *Id.*

²⁷⁵ *Id.*

²⁷⁶ *Id.*

²⁷⁷ *Id.*

²⁷⁸ *Id.*

²⁷⁹ *Id.* (modified proposed solution).

²⁸⁰ *See id.* (serving as a basis for this proposal); *see also* S.B. 967, 2014 Leg. (Cal. 2014) (serving as a basis for this proposal).

Additionally, offenders would face jail time of over a year and a mandated registration on their states sex offender registry. This law would be more effective because a felony conviction imposes substantially more burdensome consequences compared to a misdemeanor conviction.²⁸² Further, the addition of having to register as a sex offender creates increasingly significant implications that should prove to have an even more deterrent effect.²⁸³ Without the requirement to prove intent, revenge porn victims would more frequently be able to seek justice, and with the consequences that these perpetrators would face, it would demonstrate to potential future offenders that choosing to post these intimate pictures and videos is a high stake choice.

VI. CONCLUSION

NCP is an area of law that has not been taken seriously for far too long.²⁸⁴ Most states which have criminalized NCP have done so as a misdemeanor,²⁸⁵ contributing further to law enforcement

²⁸¹ See *Miller v. California*, 413 U.S. 15, 39 (1973); see also H.R. 4472, 115th Cong. (2017) (serving as a basis for this proposal).

²⁸² *Id.*; 18 U.S.C. § 3559—Sentencing Classification of Offenses (Oct. 12, 1984). See also Paul Bergman, *Felonies, Misdemeanors, and Infractions: Classifying Crimes*, NOLO, <https://www.nolo.com/legal-encyclopedia/crimes-felonies-misdemeanors-infractions-classification-33814.html> (last visited Aug. 4, 2018) (explaining the differences between a misdemeanor and a felony).

²⁸³ See generally Erika Davis Frenzel et al., *Understanding Collateral Consequences of Registry Laws: An Examination of the Perceptions of Sex Offender Registrants*, JUST. POL'Y J., at 2 (Fall 2014), http://www.cjcj.org/uploads/cjcj/documents/frenzel_et_al_collateral_consequences_final_formatted.pdf (explaining the consequences of having someone register as a sex offender).

²⁸⁴ Derek E. Bambauer, *Exposed*, 98 MINN. L. REV. 2025, 2087 (2014) (“[A]t present the limit on criminal efforts against non-consensual distribution appears to be law enforcement interest rather than inadequate tools. Danielle Citron documents extensively the resistance from police and prosecutors to tackle infringement such as revenge porn, even when there are statutes that clearly criminalize the conduct at issue.”).

²⁸⁵ See 40 States + DC, *supra* note 84 (noting that only 12 states criminalize revenge porn as a felony, while a few others will up the charge to a felony due to other factors. For example, Delaware and Minnesota charge NCP as a misdemeanor unless there are aggravating factors. Similarly, Florida, New

disinterest and unwillingness to waste resources on a minimal charge.²⁸⁶ Existing laws are insufficient in creating a deterrent effect²⁸⁷ and civil causes of action often prove to be useless due to judgment-proof defendants, incurring more costs than it is worth, and the fact that bringing the suit garners more attention to the plaintiff, potentially causing more people to see their intimate images.²⁸⁸ Fear of First Amendment violations has led to legislators being overly-cautious in drafting new legislation by requiring victims to prove that the defendant knew there was an expectation of privacy—an element that provides many defendant with a loophole to evade justice.²⁸⁹ Requiring affirmative consent creates accountability and a greater level of deterrence in that, if a perpetrator knows that the consent is not there, he or she can be criminally charged. Further, the classification of this crime as a felony instead of a misdemeanor, as well as the use of the same standard that is used in California university sexual assault cases, will force both law enforcement and NCP perpetrators to realize the seriousness of this act. With the increased criminalization of revenge porn, the Scarlett Letter will be passed from the victim to the perpetrator, where it rightfully belongs.

Mexico, Oregon, and Pennsylvania will charge as a felony if someone is a repeat offender. South Dakota charges as a felony if the person depicted was a minor).

²⁸⁶ Pen, *supra* note 135, at 434.

²⁸⁷ Kitchen, *supra* note 81, at 250–51.

²⁸⁸ *Id.* at 251–53.

²⁸⁹ Citron & Franks, *supra* note 137, at 373–74. *See also* Jackson, *supra* note 222 (“A defendant who claims he or she was uploading the images to his private cloud or for his own use and never intended to share them publicly may have a good argument for being found not guilty. Even if the defendant’s assertions are untrue. Intent can be hard to prove in the criminal courts. Add to this the uncertainty of digital sharing and uploads and most good criminal defense attorneys will find several good arguments to mitigate or eliminate the element of intent. Also proving that the defendant intended to cause serious emotional distress or, that the victim actually experienced and suffered emotional distress will be a challenge.”).