

# REVENGE PORN: STATE LAWS, CONSTITUTIONAL CHALLENGES, AND THE PROGRESS OF FEDERAL LEGISLATION

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## I. INTRODUCTION

Modern smartphone technology equips users with the capability for easy-to-use high-definition photography and videography. With the addition of a data plan and text messaging, photos and videos recorded on these devices can be shared with recipients mere moments after they are taken. The sharing of explicit images is not limited to text messaging. Social media apps such as Snapchat and the private messaging functions of Facebook and Instagram create additional channels for this material to be delivered. With so many available avenues, it has never been easier for intimate material to be shared.

In a recent study of two thousand Americans and Europeans, data shows forty percent of American men and thirty-six percent of women have sent nude or semi-nude images, most often to a long-term romantic partner.<sup>1</sup> A 2018 survey shows just how normal exchanging explicit images has become, as forty percent of respondents in the age range of sixteen to twenty-four years of age indicate that “sending nudes is the new normal.”<sup>2</sup>

Just as the sharing of intimate images with a designated partner has become casual, the nonconsensual sharing of these images with the public has also emerged as a widespread issue. Because the person who shares these images is often a scorned ex-romantic partner doing so for the purpose of retribution, the nonconsensual sharing of the explicit images of another has been dubbed revenge porn.<sup>3</sup> Revenge, however, is not the sole

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<sup>1</sup> *Send Nudes: An Exploration of the Sext Generation*, ZAVA, <https://www.zavamed.com/uk/send-nudes.html> [<https://perma.cc/K9UL-RQHW>].

<sup>2</sup> *Rarely Has There Been a More Confusing Time to Be a Man*, BRITISH GQ (Oct. 31, 2018), <https://www.gq-magazine.co.uk/article/gq-state-of-man> [<https://perma.cc/ZS4N-Z92S>].

<sup>3</sup> Jennifer Gerson, *Revenge Porn is a Dangerous Form of Sexual Abuse- and Victims Often Have No Power to Fight Back*, HEALTH.COM (Apr. 8, 2020), <https://www.health.com/condition/sexual-health/revenge-porn> [<https://perma.cc/975C-J6W4>].

reason these images are shared. In some cases, explicit images are shared simply because there is an audience for it.<sup>4</sup> Be it homemade videos from the hacked account of a celebrity or a photo that was accidentally leaked, in some cases this material is shared not to harm victims, but rather for others to enjoy.<sup>5</sup> Despite the reason the material is shared, it is a problem that affects celebrity and common person alike. A 2016 report from the Data and Society Research Institute shows that one in twenty-five Americans has been a victim of either threats or the posting of nearly nude or nude images without their permission.<sup>6</sup>

As of this writing, forty-eight states, as well as Washington D.C. and Guam, all have some form of a revenge porn law.<sup>7</sup> The enactment of these laws was not without hurdles, however. Various constitutional challenges reveal the broad nature of state laws, causing legislators to scramble back to the drawing board to bring their states up to the constitutional level.<sup>8</sup> Many believe that the solution to the loopholes found in state law is the enactment of federal legislation.<sup>9</sup> Since 2016, there have been several attempts to pass such a law.<sup>10</sup> As of 2021, an amendment to the Violence Against Women Reauthorization Act passed the House, bringing the country the closest it has ever been to a federal law with the SHIELD Act.<sup>11</sup> Despite this victory, the march to federal law still has several steps to take.

This Article provides a history of revenge porn, examining the various channels through which revenge porn is shared, including social media, dedicated websites, and other online and media outlets. The Article discusses the various reasonings behind this crime as well as the mental, emotional, financial, and professional effects it has on its victims. Next, the Article analyzes the landmark state laws that have led to most of the country adopting revenge porn legislation. The Article also looks at several

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<sup>4</sup> Jonathan Bailey, *How and Why Revenge Porn is Shared*, PLAGIARISM TODAY (Mar. 18, 2015), <https://www.plagiarismtoday.com/2015/03/18/how-and-why-revenge-porn-is-shared> [https://perma.cc/K E9S-YEJJ].

<sup>5</sup> *Id.*

<sup>6</sup> AMANDA LENHART ET AL., DATA & SOC'Y RSCH. INST., NONCONSENSUAL IMAGE SHARING: ONE IN 25 AMERICANS HAS BEEN A VICTIM OF "REVENGE PORN," (Dec. 13, 2016), [https://datasociety.net/pubs/oh/Nonconsensual\\_Image\\_Sharing\\_2016.pdf](https://datasociety.net/pubs/oh/Nonconsensual_Image_Sharing_2016.pdf) [https://perma.cc/PF59-EZT2].

<sup>7</sup> *See 48 States + DC + One Territory Now Have Revenge Porn Laws*, CYBER CIV. RTS. INITIATIVE, <https://www.cybercivilrights.org/revenge-porn-laws/> [https://perma.cc/3J9A-SHK7].

<sup>8</sup> *See* James J. Wilkerson, *The Twisted Web of Revenge Porn: Despite Kentucky's Law, Problems Remain*, LOUISVILLE ECCENTRIC OBSERVER (Feb. 24, 2021), <https://www.leoweekly.com/2021/02/twisted-web-revenge-porn-despite-kentuckys-law-problems-remain/> [https://perma.cc/8JHZ-275M].

<sup>9</sup> *See* Chris Morris, *Revenge Porn Law Could Make It a Federal Crime to Post Explicit Photos Without Permission*, FORTUNE (Nov. 28, 2017, 11:05 AM), <https://fortune.com/2017/11/28/revenge-porn-law/> [https://perma.cc/58LB-WKE2].

<sup>10</sup> H.R. 5896, 114th Cong. (2016); H.R. 4472, 115th Cong. (2017).

<sup>11</sup> H.R. 2896, 116th Cong. (2019).

notable court cases and the constitutional challenges that often serve as a barrier to justice. Lastly, this Article discusses the progress of federal laws and the need for federal legislation to close legal loopholes in state laws and uniformly criminalize this form of sexual harassment.

## II. WHAT IS REVENGE PORN?

The government has defined revenge porn as “the sharing of private, sexual materials, either photos or videos, of another person without their consent and with the purpose of causing embarrassment or distress.”<sup>12</sup> Psychologists have pointed to the desire to “get back” at someone who has hurt you as the reason that people share revenge porn; it is the ultimate ability to hurt and embarrass someone.<sup>13</sup>

While “revenge porn” is the most frequently used term, it creates a narrow view as to why these images and videos are shared. While some perpetrators do seek to embarrass ex-romantic partners, many are not motivated by vengeance or personal feelings toward the victim.<sup>14</sup> When asked why she thought the man she met online shared her nude photos, Melissa stated that his actions “weren’t out of spite, but rather out of opportunity.”<sup>15</sup> Images have been used for a variety of different reasons other than revenge such as trade for the nude photos of others and ransom from the victim in the picture.<sup>16</sup> As such, the term “nonconsensual pornography” is a better description of the crime. Nonconsensual pornography is defined as the distribution of sexually graphic images of individuals without their consent, and is a term that is broad enough to capture the multiple motivations behind sharing one’s naked photos.<sup>17</sup>

Nonconsensual pornography finds its beginnings between the pages of *Hustler* magazine.<sup>18</sup> In the 1980s, the magazine featured a reader submission section entitled “Beaver Hunt” which once published a stolen nude photo, marking one of the earliest examples of revenge porn.<sup>19</sup> This

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<sup>12</sup> Kurt Smith, *What is Revenge Porn?*, PSYCHCENTRAL (Feb. 11, 2018), <https://psychcentral.com/blog/what-is-revenge-porn#1> [<https://perma.cc/39GF-4DXM>].

<sup>13</sup> See Wilkerson, *supra* note 8.

<sup>14</sup> *Id.*

<sup>15</sup> See *infra* note 66.

<sup>16</sup> Alexandra Scott, *What is Nonconsensual Pornography?*, NAT’L COUNCIL OF JUV. AND FAM. CT. JUDGES (Feb. 12, 2017), <https://www.ncjfcj.org/news/what-is-nonconsensual-pornography/> [<https://perma.cc/LL6H-UAQL>].

<sup>17</sup> Wilkerson, *supra* note 8.

<sup>18</sup> Emma Grey Ellis, *It’s Time for Facebook to Deal with the Grimy History of Revenge Porn*, WIRED (Mar. 14, 2017, 4:49 PM), <https://www.wired.com/2017/03/revenge-porn-facebook/> [<https://perma.cc/2E4Q-LTTT>].

<sup>19</sup> Amanda Levendowski, *Our Best Weapon Against Revenge Porn: Copyright Law?*, ATLANTIC

began an egregious practice that continued throughout the 1980s and led to various lawsuits filed by the victims against the magazine.<sup>20</sup> In 2000, nearly two decades later, an Italian researcher named Sergio Messina discovered how technological advances are bringing nonconsensual images into the modern day. Dubbing the genre “realcore pornography,” Messina discovered a trove of photos and videos of ex-girlfriends that had been shared on Usenet online groups.<sup>21</sup>

Websites dedicated to the sharing of nonconsensual pornography serve as a vehicle to continue the spread of this material in the digital age. A 2016 report from ABC News estimated around two thousand websites dedicated to the sharing of nonconsensual pornography.<sup>22</sup> In 2013, suburban mother Ariella Alexander was reported to be the brains behind shesahomewrecker.com: a website where scorned wives could send nude pictures of their husbands’ mistresses for posting and public ridicule.<sup>23</sup> Each post on the site contains the full name of the victim in the photos as well as where they live.<sup>24</sup> The website IsAnyoneUp.com found itself in the center of a 2012 FBI investigation.<sup>25</sup> The site, which generated nearly five million hits per month, allowed users to upload sexually explicit videos and photos of others without their permission.<sup>26</sup> The site’s creator, Hunter Moore, dubbed himself a “professional life ruin-er” and stated that he founded the site because he wanted to take full advantage of peoples’ mistakes.<sup>27</sup> Other websites such as thedirty.com and myex.com have followed suit, promoting revenge porn by creating a platform for former spouses and significant others to post explicit images without the victim’s consent.<sup>28</sup>

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(Feb. 4, 2014), <https://www.theatlantic.com/technology/archive/2014/02/our-best-weapon-against-revenge-porn-copyright-law/283564/> [https://perma.cc/DP9N-BKRJ].

<sup>20</sup> *Id.*

<sup>21</sup> Alexa Tsoulis-Reay, *A Brief History of Revenge Porn*, N.Y. MAG. (July 19, 2013), <https://nymag.com/news/features/sex/revenge-porn-2013-7> [https://perma.cc/RRU5-E7J3].

<sup>22</sup> Juju Chang et al., *Chrissy Chambers of YouTube Sensation ‘BriaAndChrissy’ Opens Up About Her Revenge Porn Legal Battle*, ABC NEWS (Apr. 1, 2016, 8:40 PM), <https://abcnews.go.com/US/chrissy-chambers-youtube-sensation-briaandchrissy-opens-revenge-porn/story?id=38087941> [https://perma.cc/F7U7-SZJC].

<sup>23</sup> Adam May, *Meet the Suburban Mom Who Runs a Revenge Porn Site*, ALJAZEERA AMERICA (Dec. 12, 2013, 9:00 PM), <http://america.aljazeera.com/watch/shows/america-tonight/america-tonight-blog/2013/12/12/meet-the-suburbanmomwhorunsarevengepornsite.html> [https://perma.cc/2TKR-EZ6R].

<sup>24</sup> Kate Dries, *This Website Exposes the Woman Your Partner Cheated on You With*, JEZEBEL (Oct. 29, 2013, 7:00 PM), <https://jezebel.com/this-website-exposes-the-woman-your-partner-cheated-on-1454128297> [https://perma.cc/6KE5-7H78].

<sup>25</sup> Neal Karlinsky et al., *FBI Investigates ‘Revenge Porn’ Website Founder*, ABC NEWS (May 22, 2012, 1:07 PM), <https://abcnews.go.com/Technology/fbi-investigates-revenge-porn-website-founder/story?id=16405425> [https://perma.cc/G3CT-FA9D].

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> Dayton 24/7 Now, *Revenge Porn Websites Growing in Popularity*, YOUTUBE (Dec. 5, 2013), <https://www.youtube.com/watch?v=44Z9ZWFZwFM> [https://perma.cc/JVK4-GLJP].

In 2006, the online image board Anon-IB was founded, and hosted thousands of anonymously posted images of women and underage girls, cataloged by the state and country where they lived.<sup>29</sup> Anon-IB would be named as “ground zero” in two of the largest nonconsensual image sharing incidents to date.<sup>30</sup> On August 31, 2014, a large collection of private images and videos of various female celebrities were posted on the 4chan imageboard site.<sup>31</sup> The images were obtained through an online phishing scheme perpetrated by Pennsylvanian Ryan Collins that tricked recipients into sharing their Apple and Google usernames and passwords, giving Collins access to their personal images.<sup>32</sup> Christened “The Fappening” (a combination of the word “fap,” a slang term for masturbation, and the word “happening”), celebrities including Jennifer Lawrence, Kate Upton, Kirsten Dunst, Rihanna, and Hope Solo found their nude images leaked to the site.<sup>33</sup> After their initial posting, the photos would be reposted to other internet message boards (such as Reddit) and a variety of websites created specifically for sharing the pictures, many of which are still active today. Actress Jennifer Lawrence would highlight the seriousness of this leak, saying: “It is not a scandal. It is a sex crime. It is a sexual violation. It’s disgusting. The law needs to be changed.”<sup>34</sup>

Anon-IB would also play a role in a large-scale incident involving a branch of the United States military.<sup>35</sup> In 2017, the United States Department of Defense investigated hundreds of Marines for their part in a secret Facebook group used to share nonconsensual pornography.<sup>36</sup> The group “Marines United” had over 30,000 followers and featured thousands

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<sup>29</sup> Justin Mason, *Teens Warned of Exploitive Photo Website*, DAILY GAZETTE (July 7, 2013), <https://dailygazette.com/2013/07/07/teens-warned-exploitive-photo-website/> [https://perma.cc/FTV4-F2TG].

<sup>30</sup> Jordan Sargent, *Is This 4chan Offshoot the Ground Zero for the Leaked Celebrity Nudes?*, GAWKER (Sept. 1, 2014, 7:37 AM), <https://gawker.com/is-this-4chan-offshoot-the-ground-zero-for-the-leaked-c-1629190208> [https://perma.cc/YRK9-N8H6].

<sup>31</sup> Shira Jeczmiel, *The Fappening: Everything You Need to Know About the Leaked Celebrity Nudes*, SCREEN SHOT (Oct. 23, 2020), <https://screenshot-media.com/visual-cultures/entertainment/what-is-the-fappening-leaked-celebrity-nudes/> [https://perma.cc/VYM5-DU5K].

<sup>32</sup> *Meet the Man Behind the Leak of Celebrity Nude Photos, Called the Fappening*, BBC (Mar. 16, 2016), <https://www.bbc.com/news/newsbeat-35820521> [https://perma.cc/E86A-BSLW].

<sup>33</sup> Roxane Gay, *The Great 2014 Celebrity Nude Photo Leak is Only the Beginning*, GUARDIAN (Sept. 30, 2014), <https://www.theguardian.com/commentisfree/2014/sep/01/celebrity-naked-photo-leak-2014-nude-women> [https://perma.cc/HVL7-9TQ5].

<sup>34</sup> David Cornell, *Jennifer Lawrence on ‘The Fappening’: ‘It’s a Sex Crime’*, INQUISITR (Aug. 23, 2017), <https://www.inquisitr.com/1524579/jennifer-lawrence-the-fappening-sex-crime/> [https://perma.cc/H8D5-67MG].

<sup>35</sup> Thomas James Brennan, *Hundreds of Marines Investigated for Sharing Photos of Naked Colleagues*, REVEAL (Mar. 4, 2017), <https://revealnews.org/blog/hundreds-of-marines-investigated-for-sharing-photos-of-naked-colleagues/> [https://perma.cc/DY8K-XAPE].

<sup>36</sup> *Id.*

of explicit images of unknowing servicewomen.<sup>37</sup> The images came complete with dossiers of the women which included their names, military branches, and rank.<sup>38</sup> Former Marine Corps corporal (and current tattoo model) Elle Audra spoke of the aftermath she faced since her pictures were shared, saying “the messages are usually something around like: ‘Where were you when I was in?’ and ‘I would’ve f\*\*\*\*d you too.’”<sup>39</sup> Audra reports receiving messages from strangers on Facebook; she even received a request for sex from a man who knew the specifics of when and where she was deployed.<sup>40</sup>

Social media serves as another avenue for nonconsensual pornography to be shared. Facebook, which also owns the popular social media application Instagram, reportedly receives half a million reports of nonconsensual pornography monthly.<sup>41</sup> As a result of the high volume of images, Facebook formed a team of twenty-five people who work full-time addressing the reports and quickly removing the images across platforms.<sup>42</sup> Facebook also makes use of advanced machine learning to detect and remove nonconsensual images faster, sometimes not even requiring a report.<sup>43</sup> Of the technology, Facebook says:

By using machine learning and artificial intelligence, we can now proactively detect near-nude images or videos that are shared without permission on Facebook and Instagram. This means we can find this content before anyone reports it, which is important for two reasons: often victims are afraid of retribution so they are reluctant to report the content themselves, or they are unaware the content has been shared.<sup>44</sup>

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<sup>37</sup> Hannah Al-Othman, *Secret Marines Facebook Group is STILL Sharing Nude Photos and Videos of Women Despite NCIS Investigation into the Scandal*, DAILY MAIL (Mar. 9, 2017, 12:11 PM), <https://www.dailymail.co.uk/news/article-4296774/Marines-Facebook-group-sharing-nude-photos-women.html> [https://perma.cc/NB8U-6PQJ].

<sup>38</sup> *Id.*

<sup>39</sup> Jeff Schogol, *I Don't Even Want to Leave My House: Victims Haunted by Marines Nude Photo Scandal*, MARINE CORPS TIMES (Mar. 6, 2017), <https://www.marinecorpstimes.com/news/pentagon-congress/2017/03/06/i-don-t-want-to-leave-my-house-victims-haunted-by-marines-nude-photo-scandal/> [https://perma.cc/96UE-5PD5].

<sup>40</sup> *Id.*

<sup>41</sup> Olivia Solon, *Inside Facebook's Efforts to Stop Revenge Porn Before it Spreads*, NBC (Nov. 18, 2019, 4:44 AM), <https://www.nbcnews.com/tech/social-media/inside-facebook-s-efforts-stop-revenge-porn-it-spreads-n1083631> [https://perma.cc/NTB7-5LQX].

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> Andrew Hutchinson, *Facebook Outlines New Machine Learning Tools to Detect and Remove 'Revenge Porn'*, SOC. MEDIA TODAY (Mar. 16, 2019), <https://www.socialmediatoday.com/news/facebook-outlines-new-machine-learning-tools-to-detect-and-remove-revenge/550631/> [https://perma.cc/UM3Z-TJ6D].

Despite the efforts of Facebook, however, other areas of the social media world still serve as channels for the sharing of nonconsensual pornography. In a 2020 article in the *New Statesman*, a teen by the name of André Serra recalled a weekend in which he opened his Snapchat account to see the profile of one of his high school classmates posting nude pictures.<sup>45</sup> Serra would discover later that his classmate's account had been hacked and the images had been shared by another classmate that the profile's owner was in an argument with.<sup>46</sup> As social media outlets continue to grow and evolve, so does the number of avenues for sharing nonconsensual pornography.

### III. REVENGE PORN'S VERY REAL EFFECT ON VICTIMS

The sharing of nonconsensual pornography can have long-term mental health implications for its victims.<sup>47</sup> Studies have shown that victims of nonconsensual pornography suffer some of the same health effects as victims of child pornography, including depression, withdrawal, low self-esteem, and feelings of worthlessness.<sup>48</sup> A study from the Cyber Civil Rights Initiative showed that ninety-three percent of victims said they have suffered significant emotional distress as a result of being victimized.<sup>49</sup> Additionally, eighty-two percent of victims reported suffering significant impairment in social, occupational, or other important areas of functioning due to being a victim.<sup>50</sup> The most alarming statistic in this study is that fifty-one percent of revenge porn survivors in the United States have had suicidal thoughts.<sup>51</sup>

This was the experience of Leah Juliett, the founder and executive director of the March Against Revenge Porn, an international nonprofit organization dedicated to eradicating revenge porn and image abuse through national protest marches, legislative action, victim support

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<sup>45</sup> Eleanor Peake, *Snapchat Streaks and Revenge Porn: What it's Like to be a Teen Online*, *NEW STATESMAN* (July 31, 2020, 6:26 AM), <https://www.newstatesman.com/science-tech/social-media/2020/07/snapchat-streaks-and-revenge-porn-what-its-be-teen-online> [<https://perma.cc/ZYF8-PP9C>].

<sup>46</sup> *Id.*

<sup>47</sup> Mudasir Kamal & William J. Newman, *Revenge Pornography: Mental Health Implications and Related Legislation*, 44(3) *J. AM. ACAD. PSYCHIATRY L.* 359–67 (2016), <http://jaapl.org/content/44/3/359> [<https://perma.cc/W5Y5-ZFB6>].

<sup>48</sup> *Id.*

<sup>49</sup> *Revenge Porn Statistics*, CYBER CIV. RTS. INITIATIVE, <https://www.cybercivilrights.org/wp-content/uploads/2014/12/RPStatistics.pdf> [<https://perma.cc/Y6SD-6T7R>].

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

services, media advocacy, and legal defense fundraising.<sup>52</sup> When Leah was a sophomore in high school, she began talking to a male classmate that would ask Leah to send him nude pictures of herself.<sup>53</sup> Leah lost interest in the boy and gradually stopped messaging him.<sup>54</sup> A month later, the boy told Leah that he was going to “ruin her life.”<sup>55</sup> Soon after, Leah was in class when a classmate showed her one of the nude photos of her he had on his phone. He informed her that almost every boy in school had a copy of the picture. The next year, Leah found that the pictures had been shared to a website which included her name and her hometown. Leah struggled to get the photos taken down only to find out they had been posted on other sites as well. For years after her pictures had been shared, Leah would experience panic attacks, depression, night terrors, anxiety, and other symptoms of PTSD.<sup>56</sup> In college, she would also suffer from alcohol abuse and thoughts of suicide.<sup>57</sup>

Italian woman Tiziana Cantone, too, suffered the tragic psychological effects of being victimized in revenge porn. Cantone would regularly participate in sexual orgies with multiple partners at the request of her boyfriend Sergio Di Palo.<sup>58</sup> Di Palo videotaped these encounters, producing at least six videos. In 2015, several of the videos were uploaded to Facebook without Cantone’s knowledge or consent. Cantone successfully petitioned to have the videos removed, but several pornographic websites posted the videos, causing them to go viral with over a million views. Cantone became the subject of continuous online ridicule and even saw a phrase uttered by her in one of the videos, “Are you filming? Bravo.”, splattered on third-party t-shirts and smartphone cases.<sup>59</sup> As a result of the jokes and abuse, as well as the mounting court costs of €20,000 she amassed in fighting for the removal of the videos, Cantone ended her life in September 2016.<sup>60</sup>

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<sup>52</sup> *Bio*, LEAHJULIETT.COM, <https://www.leahjuliett.com/menu> [<https://perma.cc/BHT2-HRW9>].

<sup>53</sup> Avital Norman Nathman, *Leah Juliett is Standing Up for Revenge Porn Victims*, TEEN VOGUE (Mar. 20, 2017), <https://www.teenvogue.com/story/leah-juliett-stands-up-for-revenge-porn-victims> [<https://perma.cc/EL9R-DHBW>].

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> Melanie Ehrenkranz, *We Need to Study the Effects of Revenge Porn on Mental Health*, GIZMODO (June 22, 2018, 2:00 PM), <https://gizmodo.com/we-need-to-study-the-effects-of-revenge-porn-on-mental-1823086576> [<https://perma.cc/D6LU-JS8F>].

<sup>57</sup> *Id.*

<sup>58</sup> Gareth Davies, *‘She Told Me He Enjoyed Watching Her Have Sex with Other Men’*, DAILY MAIL (Sept. 16, 2016), <https://www.dailymail.co.uk/news/article-3793066/He-enjoyed-watching-sex-men-Italian-woman-Tiziana-Cantone-31-killed-sending-ex-boyfriend-man-took-orgies-says-mother.html> [<https://perma.cc/ZYU7-HZMK>].

<sup>59</sup> *Four Questioned in Italy After Woman’s Suicide Over Sex Video*, BBC (Sept. 15, 2016), <https://www.bbc.com/news/world-europe-37377286> [<https://perma.cc/8PME-BH2V>].

<sup>60</sup> *Id.*

In the early 2000s, Paris Hilton was best known for being one half of the “Hilton Sisters.” Along with her younger sister Nicky, the two heirs to the Hilton Hotels Corporation estate could regularly be found attending the most exclusive and posh events in the world. In 2001, Paris was dating Rick Salomon, a producer and professional poker player, whom she states “pressured” her into recording a sexual encounter between the two in an instance Hilton would compare to being “electronically raped.”<sup>61</sup> Three years later, Salomon began distributing the video to adult film company Red Light District Video without Paris’s consent.<sup>62</sup> The video would become incredibly popular due to Hilton’s celebrity status, with numerous news sources running the story and late-night personalities making jokes about the tape at Hilton’s expense. Hilton still suffers from long-term trauma and post-traumatic stress disorder due to the ordeal.<sup>63</sup> In a 2018 interview, Hilton said:

It felt like I’d lost part of my soul and been talked about in such cruel and mean ways. I literally wanted to die at some points. I was like, “I just don’t want to live,” because I thought everything was taken away from me.<sup>64</sup>

Due to the ability to constantly save and redistribute images on the internet, some victims find themselves in a lifelong battle to preserve their dignity.<sup>65</sup> University of Louisville Brandeis School of Law graduate Melissa states that around 2016, she met a man online that she flirted with digitally for a few months.<sup>66</sup> At some point, she sent him a set of nude pictures at his request, stating it “wasn’t a big deal” and that she had eventually forgotten that she had sent them. Melissa would soon remember, however, as a few months later her phone was hit with an onslaught of messages informing her that her nude pictures had been posted online. Melissa states that she was able to contact the website to get the photos taken down, but they routinely appear on other websites. Today, Melissa and her husband continue to regularly search the internet for reposts of her photos, sending requests for removal if found.

While the mental effects of nonconsensual pornography can be damaging, there are also professional and financial consequences victims

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<sup>61</sup> Elizabeth Gulino, *In 2004, Paris Hilton Was a Victim of Revenge Porn. She’s Still Dealing with the Trauma.*, REFINERY29 (Apr. 19, 2021, 12:26 PM), <https://www.refinery29.com/en-us/2021/04/10428720/paris-hilton-sex-tape-ptsd-trauma> [https://perma.cc/KYS6-HDTW].

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> THE AMERICAN MEME (Best Marcus Productions 2018).

<sup>65</sup> Kamal & Newman, *supra* note 47, at 359–367.

<sup>66</sup> Last name withheld at the interviewee’s request. Telephone Interview with Melissa, Alumna, University of Louisville Brandeis School of Law (Jan. 20, 2021); *see also* Wilkerson, *supra* note 8.

face as well. Often times, perpetrators will threaten to share photos or images unless the victim agrees to acquiescence to whatever their demand may be. The FBI has coined the term “sextortion” to label this crime.<sup>67</sup> In addition to money, the agency also highlights the demand for more explicit material as a reason behind sextortion.<sup>68</sup>

A man going by the alias Martin would experience sextortion firsthand through the actions of his wife. Martin married his North Carolina college sweetheart Maureen within a year of their meeting.<sup>69</sup> The two bought a home together and opened a small café in Raleigh that served coffee and baked goods.<sup>70</sup> Martin reported controlling behavior from Maureen starting with “jokey” threats of her ruining his life if he did not obey her.<sup>71</sup> The behavior became more severe, however, as she hacked into his phone and isolated him from his friends and family.<sup>72</sup> Maureen eventually filed for divorce and, upon doing so, posted nude pictures of Martin on Facebook and sent the photos to members of his family, his friends, and even employees of the café.<sup>73</sup> The images ruined Martin’s reputation in their hometown and eventually turned customers away from the restaurant, resulting in a loss of finances and Martin’s professional ruin.<sup>74</sup> Maureen continued to threaten Martin with the photos, blackmailing him for the legal rights to their house as well as their shared business.<sup>75</sup>

Websites with the specific purpose of sextortion have also been created with the purpose of financial gain. The website MyEx.com was founded in 2013 for the explicit purpose of sharing nonconsensual pornography.<sup>76</sup> The site asked users to upload pictures of their ex-partners after the relationship had ended.<sup>77</sup> The website would then post the pictures along with

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<sup>67</sup> *What is Sextortion*, FBI, <https://www.fbi.gov/video-repository/newss-what-is-sextortion/view> [https://perma.cc/BPH5-8RUJ].

<sup>68</sup> *Id.*

<sup>69</sup> Sophia Ankel, ‘*The Damage She Caused Was Irreversible*’: 90% of Male Revenge Porn Victims Are Also Blackmailed, But the Police Just Don’t Care, INSIDER (Apr. 26, 2020, 5:46 AM), <https://www.insider.com/90-percent-of-male-revenge-porn-victims-blackmail-2020-4> [https://perma.cc/GJ4N-UMVU].

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> William Worrall, *The Worst Cases of Revenge Porn*, HACKED (July 10, 2020), <https://hacked.com/the-worst-cases-of-revenge-porn/> [https://perma.cc/JKD7-54WN].

<sup>77</sup> Adrian Mojica, *Operators of Revenge Porn Site MyEx.com Charged for Posting Images, Charging Victims Money*, FOX17 (Jan. 10, 2018), <https://fox17.com/news/local/operators-of-revenge-porn-site-myexcom-charged-for-posting-images-charging-victims-money> [https://perma.cc/L3W9-UGTD].

identifying information such as the victim's name, birthdate, address, telephone number, employer, and social media information.<sup>78</sup> The operators of the site would remove the posts at the request of the victims, but not before charging a fee ranging from \$499 to \$2,800.<sup>79</sup> Acting FTC Chairman Maureen K. Ohlhausen would state:

MyEx.com uses reprehensible tactics to profit off of the intimate details of individuals' private lives. People who were featured on this site suffered real harm, including the loss of money they paid to remove intimate images and personal information, loss of jobs, and being subject to threats and harassment.<sup>80</sup>

Even when sextortion is not the intended purpose, the sharing of nonconsensual pornography can still lead to professional and financial ruin. Lauren Miranda was a middle school math teacher at Bellport Middle School in Long Island, New York.<sup>81</sup> In 2016, Miranda sent a topless picture of herself to a male teacher she was dating at the time.<sup>82</sup> In 2019, Miranda received a text message from a colleague informing her that the students were claiming to have a naked photo of her.<sup>83</sup> Despite being told that there was enough proof that Miranda had done nothing wrong, on March 27, 2019, Miranda received notification that the school board had decided to terminate her.<sup>84</sup> Despite being the victim, the school board justified their termination of Miranda, stating she was no longer a "role model" for the students.<sup>85</sup>

A similar incident happened in 2014. Annie Seifullah was working in her dream job as the principal of Robert F. Wagner Jr. Secondary School for the Arts in Queens.<sup>86</sup> After Seifullah broke up with her abusive boyfriend, he retaliated by uploading pictures of Seifullah in fishnet lingerie to a Department of Education laptop and then proceeded to deliver the

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<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> Julia Jacobo, *New York Teacher Who Says She Was Fired 'Lost Everything' Over Topless Selfie*, ABC NEWS (Apr. 4, 2019, 7:20 PM), <https://abcnews.go.com/US/york-teacher-fired-lost-topless-selfie/story?id=62176028> [<https://perma.cc/F4LK-8VZC>].

<sup>82</sup> Melanie Ehrenkranz, *Teacher Says She Was Fired for Not Being a 'Role Model' After Topless Selfie Leaks*, GIZMODO (Apr. 4, 2019, 1:40 PM), <https://gizmodo.com/teacher-says-she-was-fired-for-not-being-a-role-model-a-1833776007> [<https://perma.cc/3JY4-MNJJ>].

<sup>83</sup> Jacobo, *supra* note 81.

<sup>84</sup> *Id.*

<sup>85</sup> Ehrenkranz, *supra* note 82.

<sup>86</sup> Annie Seifullah, *Revenge Porn Took My Career. The Law Couldn't Get It Back.*, JEZEBEL (July 18, 2018, 2:20 PM), <https://jezebel.com/revenge-porn-took-my-career-the-law-couldnt-get-it-bac-1827572768> [<https://perma.cc/HMF3-B9P6>].

laptop to Seifullah's superintendent and other city investigators.<sup>87</sup> Although an internal investigation showed that Seifullah was set up, Mayor Bill de Blasio's administration made the decision to demote her to the role of teacher, cut her pay in half, and send her to a reassignment center where hundreds of unwanted employees stayed until they were either fired or forgotten.<sup>88</sup> In addition to the professional and financial losses, Seifullah would also suffer from extreme post-traumatic stress and anxiety.<sup>89</sup>

Seifullah's case shows the wide scope of effects that victims of nonconsensual pornography face. From psychological damage to financial ruin, revenge porn has the power to destroy a victim's life with just a few clicks of a keyboard. Victims do, however, have paths of recourse through state legislation designed to specifically address the distribution of nonconsensual imagery.

#### IV. STATE LAWS, CONSTITUTIONAL CHALLENGES, AND FEDERAL ATTEMPTS

In 2004, New Jersey was the first state to enact a law against nonconsensual pornography.<sup>90</sup> The bill first addresses the nonconsensual viewing of sexual activity, stating:

An actor commits a crime of the fourth degree if, knowing that he is not licensed or privileged to do so, and under circumstances in which a reasonable person would know that another may expose intimate parts or may engage in sexual penetration or sexual contact, he observes another person without that person's consent and under circumstances in which a reasonable person would not expect to be observed.<sup>91</sup>

Next the bill addressed the documenting of nonconsensual pornography, stating:

An actor commits a crime of the third degree if, knowing that he is not licensed or privileged to do so, he photographs, films, videotapes, records, or otherwise reproduces in any manner, the image of another person whose intimate parts are exposed or who is engaged in an act of sexual penetration or sexual contact, without that person's consent and under

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<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> Tal Kopan, *States Criminalize 'Revenge Porn'*, POLITICO (Oct. 30, 2013, 7:20 AM), <https://www.politico.com/story/2013/10/states-criminalize-revenge-porn-099082> [<https://perma.cc/65XE-AUAN>].

<sup>91</sup> N.J. STAT. ANN. § 2C:14-9 (West 2013).

circumstances in which a reasonable person would not expect to be observed.<sup>92</sup>

Lastly, the bill addressed the distribution of nonconsensual sexual material, stating:

An actor commits a crime of the third degree if, knowing that he is not licensed or privileged to do so, he discloses any photograph, film, videotape, recording or any other reproduction of the image of another person whose intimate parts are exposed or who is engaged in an act of sexual penetration or sexual contact, unless that person has consented to such disclosure. For purposes of this subsection, “disclose” means sell, manufacture, give, provide, lend, trade, mail, deliver, transfer, publish, distribute, circulate, disseminate, present, exhibit, advertise or offer.<sup>93</sup>

In 2016, the state’s law was expanded to include the practice of secretly photographing underneath a person’s clothing, commonly known as “upskirting.”<sup>94</sup> Per the 2016 additions:

The bill specifically makes it a crime of the fourth degree for a person, knowing that he or she is not licensed or privileged to do so, to photograph, film, videotape, record, or otherwise reproduce in any manner, the image of the undergarment-clad intimate parts of another person, without that person’s consent and under circumstances in which a reasonable person would not expect to have observed his or her undergarment-clad intimate parts. A crime of the fourth degree is punishable by a term of imprisonment of up to 18 months, a fine of up to \$10,000, or both.<sup>95</sup>

One final 2016 update to New Jersey’s law saw the expansion of the definition of the word “disclose” to include “share or make available via the Internet or by any other means, whether for pecuniary gain or not.”<sup>96</sup> It also sharpened the definition of the term “intimate parts” to refer to “sexual organs, genital area, anal area, inner thigh, groin, buttock or breast of a person.”<sup>97</sup>

After the passing of New Jersey’s historic law, it would be nine years before the enactment of the next state law. In 2013, California would

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<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

become the second state to pass a revenge porn law.<sup>98</sup> Governor Jerry Brown signed Senate Bill 255 which amended California Penal Code section 647.<sup>99</sup> Pursuant to the newly amended section, it became an act of disorderly conduct for:

A person who intentionally distributes the image of the intimate body part or parts of another identifiable person, or an image of the person depicted engaged in an act of sexual intercourse, sodomy, oral copulation, sexual penetration, or an image of masturbation by the person depicted or in which the person depicted participates, under circumstances in which the persons agree or understand that the image shall remain private, the person distributing the image knows or should know that distribution of the image will cause serious emotional distress, and the person depicted suffers that distress.<sup>100</sup>

While the law was applauded upon its enactment, it was not without its criticism. Legal experts pointed out that the law did not cover photographs initially taken by the victims, and that it contributed to the “victim blaming attitude” that society has in regard to sending intimate photos.<sup>101</sup> The law was also criticized for its language stating that in order to run afoul of the law, the perpetrator must have distributed the image with intent to cause serious emotional distress, rather than treating the act of posting a sexual photo without consent as an objectively harmful invasion of privacy.<sup>102</sup>

In 2020, a new amendment to the law was proposed. AB2065 sought to toughen the existing law by making the sharing of images a felony, requiring the offender to register as a sex offender, and making the threat to distribute intimate images a misdemeanor.<sup>103</sup> The amendment would also make it a misdemeanor to distribute an intimate image, as specified, that has been digitally altered to appear to be that of another person, or to distribute an intimate image and deceptively claim that the image is of another person that is not the person actually depicted.<sup>104</sup> In late November 2020, the bill was sent to committee without further action, where it would ultimately die.<sup>105</sup>

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<sup>98</sup> Julia Dahl, “Revenge Porn” Law in California a Good First Step, But Flawed, Experts Say, CBS NEWS (Oct. 3, 2013, 11:54 AM), <https://www.cbsnews.com/news/revenge-porn-law-in-california-a-good-first-step-but-flawed-experts-say/> [https://perma.cc/X98A-P6Z3].

<sup>99</sup> *Id.*

<sup>100</sup> CAL. PENAL CODE § 647(4)(A) (West 2021).

<sup>101</sup> Dahl, *supra* note 98.

<sup>102</sup> *Id.*

<sup>103</sup> A.B. 2065, 2020 Leg. Reg. Sess. (Cal. 2020).

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

While California's law was a landmark in inspiring other states to adopt revenge porn legislation, it would be the state's law on the unauthorized use of personal identifying information of another person that would bring some of the largest purveyors of revenge porn to justice.<sup>106</sup>

In 2013, Kevin Bollaert of San Diego, California, was charged with thirty-one felony charges for his ownership and operation of the websites Ugotposted.com and Changemyreputation.com.<sup>107</sup> From 2012 to 2014, victims would see their nude images, along with identifying information, posted on the Ugotposted.com website.<sup>108</sup> Some of the pictures had been nude pictures taken by the victims while others were taken while the victims were passed out or otherwise unknowing.<sup>109</sup> The Ugotposted.com website contained a link to Changemyreputation.com which advertised a service that would remove the images for a fee.<sup>110</sup> A Department of Justice forensic auditor determined that victims paid a total of \$30,147.73, which was ultimately transferred to Bollaert.<sup>111</sup> Bollaert would be convicted of extortion and the unlawful use of personal identifying information and received a sentence of eight years of local confinement followed by ten years of mandatory supervision.<sup>112</sup> This would be a landmark case as it was the first time a person had been tried, convicted, and sent to prison for operating a revenge porn ring in the United States.<sup>113</sup>

With the precedent in *Bollaert* set, other revenge porn moguls would face justice. On January 21, 2014, Hunter Moore, the aforementioned proprietor of the revenge porn site IsAnyoneUp.com, was federally indicted on charges of conspiracy, unauthorized access to a protected computer to obtain information, and aggravated identity theft.<sup>114</sup> Moore would enter a guilty plea with the Central District of California U.S. Attorney's Office on February 18, 2015, admitting to aiding and abetting hacking, and aggravated identity theft.<sup>115</sup> He was sentenced to two and a half years in

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<sup>106</sup> Tom McKay, *Landmark California Case Sends Revenge Porn Kingpin to Prison for 18 Years*, MIC (Apr. 5, 2015), <https://www.mic.com/articles/114574/landmark-california-case-sends-revenge-porn-kingpin-to-prison-for-18-years#.8wH8YQ50C> [<https://perma.cc/Z2A2-P6R7>].

<sup>107</sup> *People v. Bollaert*, 248 Cal. App. 4th 699, 704 (Cal. App. 2016).

<sup>108</sup> *Id.* at 705.

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> *Id.* at 706.

<sup>112</sup> *Id.* at 704.

<sup>113</sup> McKay, *supra* note 106.

<sup>114</sup> Martha Neil, *'Most Hated Man on the Internet' is Charged with Email Hacking to Get Photos for Revenge Porn Site*, AM. BAR ASSOC. J. (Jan. 24, 2014, 6:40 PM), [https://www.abajournal.com/news/article/most\\_hated\\_man\\_on\\_the\\_internet\\_is\\_charged\\_with\\_email\\_hacking\\_to\\_get\\_photos/](https://www.abajournal.com/news/article/most_hated_man_on_the_internet_is_charged_with_email_hacking_to_get_photos/) [<https://perma.cc/5MHU-XMFB>].

<sup>115</sup> Danielle Citron, *Ding Dong, Revenge Porn King Hunter Moore is Going to Prison*, FORBES (Feb. 18, 2015, 8:21 PM), <https://www.forbes.com/sites/daniellecitron/2015/02/18/ding-dong-revenge-porn->

federal prison followed by three years of supervised release.<sup>116</sup> Moore would also be required to erase all the data on his seized computers under FBI supervision.<sup>117</sup> Moore's collaborator Charles Evans was also indicted.<sup>118</sup> While a good portion of the images featured on the site were submitted by other users, Moore employed Evans to gain unauthorized access to Google accounts to obtain more photos and videos for the site.<sup>119</sup> For his role in the revenge porn site, Evans pled guilty and was sentenced to twenty-five months in prison along with a \$2,000 fine.<sup>120</sup>

By the end of 2014, thirteen states had passed similar laws that specifically banned nonconsensual pornography.<sup>121</sup> New York's bill, however, gave victims a tool to get their images removed from the internet. New York's revenge porn bill was first introduced in 2013 by Assemblyman Ed Braunstien from Queens.<sup>122</sup> The bill laid dormant for six years until 2018, when it nearly passed.<sup>123</sup> However, due to last-minute lobbying from the group Internet Association on behalf of Google, the legislation was halted.<sup>124</sup> The search engine has its own method of reporting and taking down images and vehemently opposed allowing the government to tell them how to handle such issues.<sup>125</sup> Despite Google's objections, however, the bill was signed into law by Governor Andrew Cuomo in July

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king-hunter-moore-is-going-to-jail/?sh=415145c62494 [https://perma.cc/LS7A-FEVG].

<sup>116</sup> Abby Ohlheiser, *Revenge Porn Purveyor Hunter Moore is Sentenced to Prison*, WASH. POST (Dec. 3, 2015, 2:18 PM), <https://www.washingtonpost.com/news/the-intersect/wp/2015/12/03/revenge-porn-purveyor-hunter-moore-is-sentenced-to-prison/> [https://perma.cc/7WHQ-3HQ8].

<sup>117</sup> Matthew Hamilton, *'King of Revenge Porn' Pleads Guilty, Faces Up to 7 Years in Prison*, L.A. TIMES (Feb. 25, 2015, 7:45 PM), <https://www.latimes.com/local/lanow/la-me-ln-revenge-porn-king-pleads-guilty-20150225-story.html> [https://perma.cc/2Q3Y-R5YB].

<sup>118</sup> Press Release, U.S. Att'y's Off., Cent. Dist. of Cal., Man Who Operated 'Revenge Porn' Website Pleads Guilty in Hacking Scheme That Yielded Nude Photos from Google Email Accounts (Feb. 25, 2015), <https://www.justice.gov/usao-cdca/pr/man-who-operated-revenge-porn-website-pleads-guilty-hacking-scheme-yielded-nude-photos> [https://perma.cc/K8TP-8VJ8].

<sup>119</sup> *Id.*

<sup>120</sup> Ellen Brait, *Revenge Porn Website Operator Sentenced to 25 Months in Prison*, GUARDIAN (Dec. 3, 2015), <https://www.theguardian.com/us-news/2015/dec/03/revenge-pornography-website-operator-sentenced-isanyoneup-hunter-moore> [https://perma.cc/99SF-AAW6].

<sup>121</sup> See CYBER CIV. RTS. INITIATIVE, 48 States, *supra* note 7.

<sup>122</sup> Gabrielle Fonrouge & Bernadette Hogan, *Cuomo Signs Historic Bill Outlawing Revenge Porn in New York*, N.Y. POST (July 23, 2019, 11:27 AM), <https://nypost.com/2019/07/23/new-york-state-enacts-historic-bill-to-crack-down-on-revenge-porn/> [https://perma.cc/93LC-794T].

<sup>123</sup> Gabrielle Fonrouge, *Inside the Twisted Revenge Porn Site That's Ruining Women's Lives*, N.Y. POST (Sept. 27, 2017, 12:14 AM), <https://nypost.com/2017/09/22/revenge-porn-site-leaves-trail-of-innocent-victims/> [https://perma.cc/TH92-5VUR].

<sup>124</sup> Kirstan Conley & Gabrielle Fonrouge, *Google Kills Revenge Porn Bill*, N.Y. POST (Sept. 21, 2018, 2:31 AM), <https://nypost.com/2018/06/21/new-yorks-revenge-porn-bill-dies-after-11th-hour-campaign-by-google/> [https://perma.cc/7TWH-4RTK].

<sup>125</sup> *Google's 11th Hour Intervention Puts 'Revenge Porn' Bill in New York Back on Ice*, RT (June 21, 2018), <https://www.rt.com/usa/430498-new-york-revenge-porn-bill/> [https://perma.cc/QEF7-4ZE7].

2019.<sup>126</sup> New York's law is notable as it is the first state law allowing victims to seek a court-ordered injunction that would require websites to remove images posted without their consent.<sup>127</sup> Of the passing of the law, New York sexual assault, stalking, and online harassment attorney, Carrie Goldberg, stated:

The fight for revenge porn laws has proven to be a six-year gladiator match. And today the victims finally won. We outmatched not just the pervs, predators and jerks, who distribute revenge porn, we also won against all the forces that interfered with the passage of this law: civil-liberty groups, big-tech lobbyists and Internet companies like Google.<sup>128</sup>

As of 2020, forty-eight states and Washington, D.C. have enacted laws prohibiting the distribution of nonconsensual pornography.<sup>129</sup> However, these laws do not come without criticism and challenges.

#### A. Constitutional Challenges

The American Civil Liberties Union (ACLU) has been one of the largest critics of nonconsensual pornography laws nationwide, arguing that laws not limited to revenge pornography will be overbroad and will impede free speech.<sup>130</sup>

In April 2014, Arizona passed what was then thought of as the harshest revenge porn law in the country.<sup>131</sup> At the time of its passing, the law stated:

It is unlawful to intentionally disclose, display, distribute, publish, advertise, or offer a photograph, videotape, film or digital recording of another person in a state of nudity or engaged in specific sexual activities if the person knows or should have known that the depicted person has not consented to the disclosure.<sup>132</sup>

The law added a few exceptions, including:

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<sup>126</sup> N.Y. PENAL LAW § 245.15 (McKinney 2019).

<sup>127</sup> Fonrouge & Hogan, *supra* note 122.

<sup>128</sup> *Id.*

<sup>129</sup> Wilkerson, *supra* note 8; Massachusetts and South Carolina are the two states without laws that cover nonconsensual pornography.

<sup>130</sup> Daysia Tolentino, *Revenge Porn Laws Face an Unexpected Civil Rights Obstacle: The First Amendment*, MUCKROCK (Dec. 6, 2018), <https://www.muckrock.com/news/archives/2018/dec/06/first-amendment-vs-revenge-porn-laws/> [<https://perma.cc/F9ZA-H4NV>].

<sup>131</sup> Kevin Collier, *Arizona Passes the Harshest Revenge Porn Law in the U.S.*, DAILY DOT (May 1, 2014), <https://www.dailydot.com/debug/arizona-revenge-porn-non-consensual-porn-jan-brewer/> [<https://perma.cc/GTC2-DGHH>].

<sup>132</sup> ARIZ. REV. STAT. ANN. § 13-1425 (2016).

1. Lawful and common practices of law enforcement, reporting unlawful activity, or when permitted or required by law or rule in legal proceedings.
2. Lawful and common practices of medical treatment.
3. Images involving voluntary exposure in a public or commercial setting.
4. An interactive computer service, as defined in 47 United States Code § 230(f)(2), or an information service, as defined in 47 United States Code § 153, with regard to content provided by another person.<sup>133</sup>

A violation of the law was classified as a class 5 felony and a class 4 felony if the depicted person is recognizable.<sup>134</sup> Lee Roland, staff attorney for the Arizona ACLU, described the law as “extremely troubling[,]” stating, “I think the law is overbroad and covers a significant amount of fully-protected speech.”<sup>135</sup> Another ACLU attorney, Michael Bamberger, stated that the law was “probably the most egregious because it has no requirement that the images even be malicious.”<sup>136</sup>

In September of that year, the ACLU (on behalf of several bookstores, the American Association of Publishers, and the National Press Photographers Association) filed a lawsuit claiming the law was overbroad and arguing several points.<sup>137</sup> First, it argued that the law made no distinction between images that are published with malice or wrong intent and those that are not.<sup>138</sup> As an example, the ACLU pointed out that under the law, a woman who received an unsolicited picture of a man’s penis could be convicted of a felony if, being alarmed by the picture, she showed it to a friend.<sup>139</sup> It was also argued that the Act made no distinction between images in which the person or persons pictured have a reasonable expectation of privacy and those in which they do not.<sup>140</sup> As an example, a person could be convicted of a felony for sharing a photograph that no reasonable person would consider private, such as an image published in an archival copy of Life magazine containing photos of naked victims of the Holocaust.<sup>141</sup> Further, it was argued that the law made no exceptions for images related to matters of public concern, as well as artistic images,

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<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> Fonrouge, *supra* note 123.

<sup>136</sup> Joe Mullin, *Bookstores, Publishers Sue to Stop Law Against “Revenge Porn”*, ARS TECHNICA (Sept. 30, 2014, 8:35 PM), <https://arstechnica.com/tech-policy/2014/09/bookstores-publishers-sue-to-stop-law-against-revenge-porn/> [https://perma.cc/Y8M4-642T].

<sup>137</sup> Complaint for Declaratory and Injunctive Relief, *Antigone Books, L.L.C. v. Horne*, No. 2:2014-cv-02100 (D. Ariz. Sept. 23, 2014), <https://www.aclu.org/legal-document/antigone-books-v-horne-complaint> [https://perma.cc/5KVC-C8X5].

<sup>138</sup> *Id.* at 4.

<sup>139</sup> *Id.* at 20.

<sup>140</sup> *Id.* at 21.

<sup>141</sup> *Id.*

including those where consent can no longer be obtained because of the death or unavailability of the person depicted.<sup>142</sup>

After several negotiations with the ACLU, in September 2015 Arizona's Attorney General and all of Arizona's County Attorneys agreed not to enforce the law.<sup>143</sup> In 2016, the law was revised to address the issues in the 2014 version. Pursuant to the revision, the statute reads:

- A. It is unlawful for a person to intentionally disclose an image of another person who is identifiable from the image itself or from information displayed in connection with the image if all of the following apply:
1. The person in the image is depicted in a state of nudity or is engaged in specific sexual activities.
  2. The depicted person has a reasonable expectation of privacy. Evidence that a person has sent an image to another person using an electronic device does not, on its own, remove the person's reasonable expectation of privacy for that image.
  3. The image is disclosed with the intent to harm, harass, intimidate, threaten or coerce the depicted person.<sup>144</sup>

The law also revised the exceptions to include:

1. The reporting of unlawful conduct.
2. Lawful and common practices of law enforcement, criminal reporting, legal proceedings or medical treatment.
3. Images involving voluntary exposure in a public or commercial setting.
4. An interactive computer service, as defined in 47 United States Code section 230(f)(2), or an information service, as defined in 47 United States Code section 153, with regard to content wholly provided by another party.
5. Any disclosure that is made with the consent of the person who is depicted in the image.<sup>145</sup>

Lastly, the law changed the punishment for violation, stating:

- C. A violation of this section is a class 5 felony, except that a violation of this section is a:
1. Class 4 felony if the image is disclosed by electronic means.

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<sup>142</sup> *Id.* at 5.

<sup>143</sup> Joe Mullin, *Arizona Makes Deal with ACLU, Won't Enforce Bad Law on "Revenge Porn"*, ARS TECHNICA (July 12, 2015, 6:00 AM), <https://arstechnica.com/tech-policy/2015/07/arizona-makes-deal-with-aclu-wont-enforce-bad-law-on-revenge-porn/> [https://perma.cc/JYP3-F87N].

<sup>144</sup> ARIZ. REV. STAT. ANN. § 13-1425 (2016).

<sup>145</sup> *Id.*

2. Class 1 misdemeanor if a person threatens to disclose but does not disclose an image that if disclosed would be a violation of this section.<sup>146</sup>

As seen with Arizona's law, it is the broad nature of state legislation that typically leads to First Amendment challenges. Minnesota's nonconsensual pornography statute was put into effect on August 1, 2016.<sup>147</sup> Their Nonconsensual Dissemination of Private Sexual Images statute was meant to punish those who intentionally share sexual images intended to be private, without consent.<sup>148</sup> The state's law held:

It is a crime to intentionally disseminate an image of another person who is depicted in a sexual act or whose intimate parts are exposed, in whole or in part, when:

- (1) the person is identifiable:
  - (i) from the image itself, by the person depicted in the image or by another person; or
  - (ii) from personal information displayed in connection with the image;
- (2) the actor knows or reasonably should know that the person depicted in the image does not consent to the dissemination; and
- (3) the image was obtained or created under circumstances in which the actor knew or reasonably should have known the person depicted had a reasonable expectation of privacy.<sup>149</sup>

The law's penalty section stated that violation of the statute would result in a gross misdemeanor and carry a punishment of either imprisonment of no more than three years, a \$5,000 fine, or both.<sup>150</sup> Since its enactment, over three hundred people have been charged and over one hundred have been convicted under the statute.<sup>151</sup>

In 2018, Michael Anthony Casillas was convicted of felony nonconsensual dissemination of private images after he used his victim's password to access her online accounts and retrieve sexual photos and videos of her after their relationship ended.<sup>152</sup> The images would be sent to

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<sup>146</sup> *Id.*

<sup>147</sup> MINN. STAT. ANN. § 617.261 (West 2016).

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

<sup>151</sup> Mike Mosedale, *Why Can't Minnesota Prosecute "Revenge Porn" Harassment?*, MPLS ST PAUL (Apr. 20, 2020), <https://mspmag.com/arts-and-culture/minnesota-revenge-porn-harassment/> [<https://perma.cc/97DF-QHT8>].

<sup>152</sup> Steve Karnowski, *Court of Appeals Strikes Down Minnesota's Revenge Porn Law*, AP NEWS (Dec. 23, 2019), <https://apnews.com/article/210b1a8fb39718e634c42817462859a3> [<https://perma.cc/>].

forty-four people and posted online, as well.<sup>153</sup> Initially, Casillas received a twenty-three month sentence.<sup>154</sup> On appeal, however, rather than defending Casillas's actions, his attorney, John Arechigo, would attack the law itself.<sup>155</sup>

Arechigo argued that the law had been too broadly written, stating that the statute applied a "negligence mens rea" standard, which meant that prosecutors did not have to show that a defendant intended to cause harm.<sup>156</sup> While making sure to highlight that he was not advocating for the right to distribute revenge pornography, Arechigo argued that the law was unconstitutional as it "sweeps up people who don't have any criminal intent, including people who accidentally disseminate images."<sup>157</sup> And to his credit, his argument was successful.<sup>158</sup> While the Court of Appeals called Casillas's conduct "abhorrent," they vacated the conviction on the grounds that the statute was unconstitutional, effectively striking down the law.<sup>159</sup> Arechigo would later state:

The Court of Appeals thoroughly and thoughtfully analyzed the issues and arguments we raised. This case wasn't about whether people should be able to disseminate "revenge porn." It was about the law that Minnesota legislators passed three years ago. The law was poorly written. The law didn't punish an invasion of privacy, as the state argued. The law didn't even require an invasion of privacy as a basis to bring criminal charges. The Court of Appeals properly ruled the law punished speech in violation of the First Amendment. It's up to state legislators to craft better legislation if they're really trying to protect victims of "revenge porn."<sup>160</sup>

The Casillas case is important because it sets a precedent for other states. As nonconsensual pornography statutes are relatively new laws, it is no surprise that other states would look at Minnesota for guidance in their own legal challenges. The state of Indiana's unauthorized distribution of an intimate image statute passed on July 1, 2019. Per the law:

A person who knows or reasonably should know that an individual depicted in an intimate image does not consent to the distribution of the

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27ZJ-HB6D].

<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

<sup>155</sup> Mosedale, *supra* note 151.

<sup>156</sup> *Id.*

<sup>157</sup> *Id.*

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

<sup>160</sup> Crystal Bui, *Minn. Court of Appeals Strikes Down "Revenge Porn" Law*, ABC 5 (Dec. 23, 2019, 10:08 PM), <https://kstp.com/news/minn-court-of-appeals-strikes-down-quotrevenge-pornquot-law-december-23-2019-/5588385/> [<https://perma.cc/2VGJ-9SY6>].

intimate image; and distributes the intimate image commits Distribution of an Intimate Image, a Class A Misdemeanor. However, the offense is a Level 6 felony if the person has a prior unrelated conviction under this section.<sup>161</sup>

The next year, however, the statute would also be ruled unconstitutional.<sup>162</sup> In March of that year, Trine University student Conner Katz recorded a video of himself in an intimate act with another student in a campus fraternity house.<sup>163</sup> He would later show the video to others. Katz was charged with distribution of an intimate image, a Class A misdemeanor; however, the case would be dismissed in October by Magistrate Judge Randy Coffey on the grounds that Indiana's revenge porn law violated the right to freedom of speech.<sup>164</sup> Coffey stated that he used guidance from the Minnesota Court of Appeals case to rule that Indiana's law unconstitutional.<sup>165</sup> The decision would ultimately be appealed to the Indiana Supreme Court and, as of this writing, has not yet been heard.<sup>166</sup> However, County Prosecutor Jeremey Musser stated in a 2021 interview that "depending on the outcome of the appeal, it might be necessary for the Indiana Legislature to change the law, which has occurred in Texas."<sup>167</sup>

Similar to Minnesota is the overturn of Texas's nonconsensual pornography law. Enacted on September 1, 2015, Texas's unlawful disclosure or promotion of intimate material statute made it an offense if:

- (1) without the effective consent of the depicted person, the person intentionally discloses visual material depicting another person with the person's intimate parts exposed or engaged in sexual conduct;
- (2) the visual material was obtained by the person or created under circumstances in which the depicted person had a reasonable expectation that the visual material would remain private;
- (3) the disclosure of the visual material causes harm to the depicted person; and

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<sup>161</sup> BURNS IND. CODE ANN. § 35-45-4-8 (2019).

<sup>162</sup> Mike Marturello, *Indiana's Revenge Porn Law Ruled Unconstitutional in Stuben Case*, HERALD REPUBLICAN (Nov. 6, 2020), [https://www.kpcnews.com/heraldrepublican/article\\_d67bfc4b-6dec-5d62-bf53-5d8b57b63590.html](https://www.kpcnews.com/heraldrepublican/article_d67bfc4b-6dec-5d62-bf53-5d8b57b63590.html) [https://perma.cc/L7JB-WJT8].

<sup>163</sup> Sheila McCrea, *Appeal Filed for Steuben County Criminal Case that was Dismissed*, WLKI (Nov. 9, 2020), [wtki.com/news.php?article=111435](http://wtki.com/news.php?article=111435) [https://perma.cc/PR25-GR4N].

<sup>164</sup> *Id.*

<sup>165</sup> *Id.*

<sup>166</sup> *Id.*

<sup>167</sup> Mike Marturello, *Steuben Revenge Porn Case Appeal Being Heard by Indiana Supreme Court*, HERALD REPUBLICAN (May 25, 2021), [https://www.kpcnews.com/heraldrepublican/article\\_6888375c-385a-57d3-a8ff-de60328c5c4e.html](https://www.kpcnews.com/heraldrepublican/article_6888375c-385a-57d3-a8ff-de60328c5c4e.html) [https://perma.cc/2TFM-X5FH].

- (4) the disclosure of the visual material reveals the identity of the depicted person in any manner, including through:
- (A) any accompanying or subsequent information or material related to the visual material; or
  - (B) information or material provided by a third party in response to the disclosure of the visual material.<sup>168</sup>

The law covered sextortion efforts by also stating:

- (c) A person commits an offense if the person intentionally threatens to disclose, without the consent of the depicted person, visual material depicting another person with the person's intimate parts exposed or engaged in sexual conduct and the actor makes the threat to obtain a benefit:
- (1) in return for not making the disclosure; or
  - (2) in connection with the threatened disclosure.<sup>169</sup>

Lastly, the bill took revenge porn websites to task, stating:

- (d) A person commits an offense if, knowing the character and content of the visual material, the person promotes visual material described by Subsection (b) on an Internet website or other forum for publication that is owned or operated by the person.<sup>170</sup>

Under the law, a violation would be considered a class A misdemeanor, and could result in a \$4,000 fine and a sentence of one-year imprisonment.<sup>171</sup> In 2018, however, the law was ruled unconstitutional.<sup>172</sup> Texas man Jordan Bartlett Jones had been convicted by a trial court under the law, but the decision was overturned on appeal.<sup>173</sup> The appellate court ruled that the law was overly broad, as it could be used to punish anyone who shared an image online regardless of whether they knew the image was nonconsensual pornography.<sup>174</sup> In 2019, the Texas Senate sought to fix the

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<sup>168</sup> TEX. PENAL CODE ANN. § 21.16 (West 2019).

<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

<sup>171</sup> Liz Crampton, *Taking New Steps to Put an End to "Revenge Porn"*, TEX. TRIB. (Aug. 21, 2015, 6:00 AM), <https://www.texastribune.org/2015/08/21/texas-law-criminalizing-revenge-porn-goes-effect> [<https://perma.cc/5VD2-WTHY>].

<sup>172</sup> Elizabeth Nolan Brown, *Law Prohibiting 'Revenge Porn' Violates First Amendment, Says Texas Appeals Court*, REASON (Apr. 23, 2018, 2:20 PM), <https://reason.com/2018/04/23/texas-revenge-porn/> [<https://perma.cc/TT8A-QE6E>].

<sup>173</sup> *Id.*

<sup>174</sup> *Ex parte Jones*, No. 12-17-00346-CR, 2018 WL 2228888, at \*8 (Tex. App. May 16, 2018), *rev'd and remanded*, No. PD-0552-18, 2021 WL 2126172 (Tex. Crim. App. May 26, 2021).

law, voting thirty-one to zero to approve House Bill 98.<sup>175</sup> The revised bill specifies that photos and videos must be posted with the intent to harm the person depicted and the offender knew that the victim had a reasonable expectation that the material would remain private.<sup>176</sup> The bill was signed by Governor Greg Abbott and went into effect September 1, 2019, providing other states with a blueprint on how to re-write their own laws when faced with First Amendment challenges.<sup>177</sup>

### B. Federal Legislation

In 2016, Congresswoman Jackie Speier introduced H.R. 5896.<sup>178</sup> Known as the Intimate Privacy Protection Act of 2016, the bill sought to amend title 18 of the United States Code to make it unlawful to knowingly distribute a private, visual depiction of a person's intimate parts or of a person engaging in sexually explicit conduct, with reckless disregard for the person's lack of consent to the distribution, and for other purposes.<sup>179</sup> The specific language of the bill stated:

Whoever knowingly uses the mail, any interactive computer service or electronic communication service or electronic communication system of interstate commerce, or any other facility of interstate or foreign commerce to distribute a visual depiction of a person who is identifiable from the image itself or information displayed in connection with the image and who is engaging in sexually explicit conduct, or of the naked genitals or post-pubescent female nipple of the person, with reckless disregard for the person's lack of consent to the distribution, shall be fined under this title or imprisoned not more than 5 years, or both.<sup>180</sup>

The bill did allow for exceptions in the instances of law enforcement and other legal proceedings, voluntary public or commercial exposure, certain categories of visual depictions, and with telecommunications and internet service providers.<sup>181</sup> The Act was heavily supported, with the Cyber

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<sup>175</sup> Chuck Lindell, *Senate Approves Fix to 'Revenge Porn' Law*, STATESMAN (May 20, 2019, 9:43 AM), <https://www.statesman.com/news/20190519/senate-approves-fix-to-revenge-porn-law> [<https://perma.cc/7BZ6-6AL2>].

<sup>176</sup> *Id.*

<sup>177</sup> H.B. 98, 2019 Leg., 86th Sess. (Tex. 2019). Despite the revision of the law, in May of 2021, the Texas Court of Criminal Appeals reversed the 12th Court of Appeals ruling and upheld the original state law as constitutional.

<sup>178</sup> H.R. 5896, 114th Cong. (2016).

<sup>179</sup> *Id.*

<sup>180</sup> H.R. 5896, 114th Cong. § 1802(a) (2016).

<sup>181</sup> *Id.* § 1802(b)(1)–(4).

Civil Rights Institute, Facebook, Twitter, the National Organization for Women, the National Democratic Institute, the Information Technology and Innovation Foundation, Feminist Majority, and Girls, Inc, all standing behind the bill.<sup>182</sup> On August 10, 2016, the act was referred to the subcommittee on Crime, Terrorism, Homeland Security, and Investigations.<sup>183</sup>

The next effort to make nonconsensual pornography a federal offense was introduced in 2017 as Senators Kamala Harris, Richard Burr, and Amy Klobuchar introduced H.R. 4472.<sup>184</sup> Titled the ENOUGH Act (Ending Nonconsensual Online User Graphic Harassment), this bipartisan bill sought to amend the federal criminal code, making it a crime to knowingly distribute (or intentionally threaten to distribute) an intimate visual depiction of an individual with knowledge of or reckless disregard for the individual's lack of consent, reasonable expectation of privacy, and potential harm; and without a reasonable belief that such distribution touches a matter of public concern.<sup>185</sup> Congresswoman Speier stressed the need for the bill, stating:

For victims of nonconsensual pornography, technology today makes it possible to destroy a person's life with the click of a button or a tap on a cell phone. The damage caused by these attacks can crush careers, tear apart families, and, in the worst cases, has led to suicide. What makes these acts even more despicable is that many predators have gleefully acknowledged that the vast majority of their victims have no way to fight back. Even in states that have laws on the books, the average person can't afford to take on these predators in civil courts. Worse are the numerous victims who have mustered the courage and strength to pursue criminal charges, only to learn there is no law that protects them. The ENOUGH Act will fix this gaping hole in our legal system.<sup>186</sup>

The language of the bill stated:

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<sup>182</sup> Mary Anne Franks, *It's Time for Congress to Protect Intimate Privacy*, HUFFINGTON POST (July 18, 2016, 1:32 PM), [https://www.huffpost.com/entry/revenge-porn-intimate-privacy-protection-act\\_b\\_11034998](https://www.huffpost.com/entry/revenge-porn-intimate-privacy-protection-act_b_11034998) [<https://perma.cc/PFD5-G2YT>].

<sup>183</sup> H.R. 5896 – INTIMATE PRIVACY PROTECTION ACT OF 2016, U.S. CONG., <https://www.congress.gov/bill/114th-congress/house-bill/5896/text> [<https://perma.cc/7EUS-S3M3>].

<sup>184</sup> H.R. 4472, 115th Cong. (2017).

<sup>185</sup> *Id.*

<sup>186</sup> Press Release, Congresswoman Jackie Speier, Rep Speier and Sens Harris, Burr, and Klobuchar Introduce Bipartisan Bill to Address Online Exploitation of Private Images (Nov. 28, 2017), <https://speier.house.gov/2017/11/rep-speier-and-sens-harris-burr-and-klobuchar-introduce-bipartisan-bill> [<https://perma.cc/W3EL-2SSY>].

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—

(1) with knowledge of or reckless disregard for—

(A) the lack of consent of the individual to the distribution;

(B) the reasonable expectation of the individual that the depiction would remain private; and

(C) harm that the distribution could cause to the individual; and

(2) without an objectively reasonable belief that such distribution touches upon a matter of public concern.<sup>187</sup>

One area of the ENOUGH Act that set the bill apart from the Intimate Privacy Protection Act of 2016 is that it addressed threats and extortion, stating:

Any person who intentionally threatens to commit an offense under subsection (b), regardless of whether the threat is an act of extortion, shall be punished as provided in subsection (c).<sup>188</sup>

Similar to the Intimate Privacy Protection Act of 2016, the ENOUGH Act carried a maximum five-year prison term and a fine for perpetrators of the law.<sup>189</sup> The bill also received a great deal of support from organizations such as the National Association of Assistant United States Attorneys, National District Attorneys Association, National Organization for Women, Feminist Majority, as well as social media giants Facebook and Twitter.<sup>190</sup> The bill was sent to the subcommittee on Crime, Terrorism, and Homeland Security but never received any votes to move forward.<sup>191</sup>

In 2019, Congresswoman Speier and Congressman John Katko introduced H.R. 2896, otherwise known as the Stopping Harmful Image Exploitation and Limiting Distribution Act of 2019 (the SHIELD Act).<sup>192</sup> The bill sought to establish a new criminal offense related to the distribution of intimate visual depictions.<sup>193</sup> Specifically, SHIELD would make it a crime to knowingly distribute (or intentionally threaten to distribute) an intimate visual depiction of an individual (1) with knowledge

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<sup>187</sup> H.R. 4472, 115th Cong. (2017).

<sup>188</sup> *Id.* § 1802(e).

<sup>189</sup> *Id.* § 1802(c).

<sup>190</sup> Press Release, Senator Richard Burr, Sens. Burr, Harris, Klobuchar and Rep. Speier Introduce Bipartisan Bill to Protect Against Online Exploitation of Private Images (Nov. 28, 2017), <https://www.burr.senate.gov/2017/11/sens-burr-harris-klobuchar-and-rep-speier-introduce-bipartisan-bill-to-protect-against-online-exploitation-of-private-images> [<https://perma.cc/6SZ4-WBTR>].

<sup>191</sup> H.R. 4472, 115th Cong. § 1802(c) (2017).

<sup>192</sup> H.R. 2896, 116th Cong. (2019).

<sup>193</sup> *Id.*

of or reckless disregard for the individual's lack of consent and reasonable expectation of privacy, and (2) without a reasonable belief that distributing the depiction touches a matter of public concern.<sup>194</sup> The language the bill used to describe an offense under the act was identical to the language used in the ENOUGH Act, as was the criminal penalty of a fine, a prison term of up to five years, or both (though this would later be reduced to a maximum prison term of up to two years).<sup>195</sup> Also included was the ENOUGH Act's language making the mere threat of sharing nonconsensual imagery an offense.<sup>196</sup> In early 2021, the SHIELD Act passed the House, as it was added as an amendment to H.R. 1620, the Violence Against Women Reauthorization Act of 2021.<sup>197</sup> The bill will face its next challenge in the Senate on its next stop to becoming federal law.

#### V. RECOMMENDATIONS FOR THE PASSING AND UPKEEP OF THE SHIELD ACT

The SHIELD Act passing the Senate raises feelings of excitement and anticipation as it is the closest a nonconsensual pornography bill has ever come to becoming federal law. While most states have taken steps to prohibit nonconsensual pornography, a strong federal law provides one clear and concise definition of the crime. Implementing the SHIELD Act also solves issues that laws limited by state jurisdiction cannot.<sup>198</sup> Lastly, a federal law provides a path to relief for the twelve million combined citizens in the only two states that continue to refuse to pass a law addressing nonconsensual pornography: South Carolina and Massachusetts.<sup>199</sup>

Still, there is reason to be skeptical of whether the SHIELD Act will indeed provide justice to the many victims of nonconsensual pornography, or if it will stall similarly to the bills that have come before it. If the

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<sup>194</sup> *Id.*

<sup>195</sup> *Id.* § 1802(c).

<sup>196</sup> *Id.* § 1802(e).

<sup>197</sup> Press Release, Congresswoman Jackie Speier, Speier and Katko Amendment to Address Online Exploitation of Private Images Included in Violence Against Women Reauthorization Act (Mar. 17, 2021), <https://speier.house.gov/press-releases?ID=FB99CA92-BFA3-4E6A-AA97-56AE155C46E3> [<https://perma.cc/HNN8-ZP49>].

<sup>198</sup> One such issue is that created by § 230 of the Communications Decency Act. Pursuant to the Act, if a website acts only as a passive forum for third parties to post materials, then the website will not be responsible for anything its users post. Section 230, however, also states that "nothing in this section shall be construed to impair the enforcement of . . . any other Federal criminal statute." 47 U.S.C. § 230. As such, if the SHIELD Act becomes federal law, then revenge porn sites and their operators will no longer be able to hide behind the § 230 defense.

<sup>199</sup> CYBER CIV. RTS. INITIATIVE, 48 *States*, *supra* note 7.

SHIELD Act is to become law, it is important to understand why the previous attempts failed. The Intimate Privacy Protection Act of 2016 and the ENOUGH Act were not voted down.<sup>200</sup> Rather, both bills died in committee, never receiving votes in either direction.<sup>201</sup> For the SHIELD Act to avoid a similar fate, public pressure must be placed on lawmakers to prioritize action on the current bill.

The utilization of the internet and social media has greatly amplified the range and harm caused by nonconsensual pornography, allowing for intimate photos and videos to leave the audience of a few small town eyes to be viewed by an arena of millions throughout the country. Internet consumption is the very nature of this nationwide crime. As the internet facilitates the crime, it should also be used to support the solution; social media has shown its value as an activism tool. Tarana Burke's #MeToo movement was born on the social media website Myspace in 2006.<sup>202</sup> Eleven years later, a tweet from actress Alyssa Milano caused the movement to go viral, creating an international discourse on sexual assault and ultimately bringing serial predators Bill Cosby and Harvey Weinstein to justice.<sup>203</sup> In 2020, social media would be an integral tool in the racial justice movement, spurred by the killings of George Floyd and Breonna Taylor at the hands of the police in their respective cities.<sup>204</sup> Through social media, the public shared and discussed information while activists used platforms to organize and promote various protests and demonstrations. If the SHIELD Act is to become law, social media must be used in a similar way to light a fire under legislators.

First, social media giants such as Facebook, Twitter, and TikTok must step to the forefront in support of passing the bill. In addition to eloquently worded press releases and talking head interviews, social media platforms must launch informational campaigns designed to educate their users on the role social media plays in the distribution of nonconsensual images.

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<sup>200</sup> H.R. 5896, 114th Cong. (2016); H.R. 4472, 115th Cong. (2017).

<sup>201</sup> H.R. 5896, 114th Cong. (2016); H.R. 4472, 115th Cong. (2017).

<sup>202</sup> Abby Ohlheiser, *The Woman Behind 'Me Too' Knew the Power of the Phrase When She Created It — 10 Years Ago*, WASH. POST (Oct. 19, 2017, 8:38 AM), <https://www.washingtonpost.com/news/the-intersect/wp/2017/10/19/the-woman-behind-me-too-knew-the-power-of-the-phrase-when-she-created-it-10-years-ago/> [https://perma.cc/TR2U-4VF9].

<sup>203</sup> On June 30, 2021, Cosby's conviction was overturned by the Pennsylvania Supreme Court after finding that an agreement with a previous prosecutor prevented him from being charged in his case. Maryclaire Dale, *Bill Cosby freed from prison, his sex conviction overturned*, AP NEWS (June 30, 2021), <https://apnews.com/article/bill-cosby-conviction-overturned-5c073fb64bc5df4d7b99ee7faddbe5a> [https://perma.cc/FWC3-838U].

<sup>204</sup> Brooke Auxier, *Social media continues to be important political outlets for Black Americans*, PEW RSCH. CTR. (Dec. 11, 2020), <https://www.pewresearch.org/fact-tank/2020/12/11/social-media-continue-to-be-important-political-outlets-for-black-americans/> [https://perma.cc/YB8H-GG8S].

Platforms must show users how the implementation of the SHIELD Act will give them an option of recourse in the event they ever become the victims of nonconsensual pornography themselves. Social media outlets must educate users on the protections available through their sites and how those protections can work in conjunction with the SHIELD Act to create the safest online experience possible. Lastly, social media platforms must provide newly inspired users with a streamlined channel to voice their support for the SHIELD Act to their local legislators.

Social media also provides a channel to gain the support of the most socially conscious and politically active group of Americans: Generation Z. Advocates of the SHIELD Act should engage the youth, inspiring them to raise their voice and champion the Act. A viral campaign is needed amongst users on the scale of the #MeToo movement. This includes victims of revenge porn sharing their stories and the effect revenge porn has had on their lives in the same manner sexual assault victims shared during #MeToo. Social media influencers who typically use their reach to promote the latest clothing trends and the hippest restaurants, must be hired to ignite their followers, leading them to action. They must exercise the same selling power utilized to attract thousands to the fraudulent 2017 Fyre Festival in encouraging their followers to pressure their legislators to prioritize the SHIELD Act. Celebrity victims of nonconsensual pornography such as Kim Kardashian and Amber Heard are needed on the front line to share their personal stories with the masses.<sup>205</sup> For the SHIELD Act to avoid dying on the backburner like the bills before it, the law must have the backing and support of the most socially conscious and tech savvy generation.

Once the SHIELD Act becomes federal law, the legislation must be kept current. As technology is ever evolving and nonconsensual pornography is a technology-based crime, federal legislation must keep up with revenge porn's progression. For example, tech experts state that "deepfakes" are the future of revenge porn.<sup>206</sup> Deepfake technology allows users to digitally superimpose one's face onto another's and can be used to fabricate nonconsensual porn.<sup>207</sup> For example, in March 2001 Pennsylvania woman Raffaella Marie Spone was charged with three counts of cyber

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<sup>205</sup> Lolita Mang, *Revenge Porn: The Era of Leave Me and I'll Out You*, NUMERO (Feb. 12, 2020), <https://www.numero.com/en/culture/revenge-porn-sex-education-kim-kardashian-ray-j-sextape-numero-magazine> [<https://perma.cc/J8KM-MFG9>] (discussing Kim Kardashian); Georgia Aspinall, *Amber Heard Has Opened Up About Being a Victim of Revenge Porn*, GRAZIA (Apr. 11, 2019), <https://graziadaily.co.uk/celebrity/news/amber-heard-revenge-porn/> [(discussing Amber Heard)].

<sup>206</sup> Rebecca Ruiz, *Deepfakes Are About to Make Revenge Porn So Much Worse*, MASHABLE (June 24, 2018), <https://mashable.com/article/deepfakes-revenge-porn-domestic-violence> [<https://perma.cc/4FTQ-K2T8>].

<sup>207</sup> *Id.*

bullying and three counts of harassment for allegedly using deepfake technology.<sup>208</sup> Spone used the technology to create naked photos and videos of three of her high school daughter's cheerleading rivals in an effort to get them kicked off the team or convince them to kill themselves.<sup>209</sup> This serves as a prime example of how advanced technology can be weaponized to continue the devastating effects of nonconsensual pornography. As such, the SHIELD Act must advance too. Currently, Virginia is the only state to prohibit deepfake pornography as of 2019 when amendments were made to its law banning nonconsensual pornography.<sup>210</sup> Legislators must be prepared to make similar amendments to the SHIELD Act in order for it to continue to be an effective law. It is also necessary for legislators to collaborate with tech experts in order to stay abreast of developing technological threats.

Another area that the SHIELD Act must update is its lack of language regarding the removal of nonconsensual images.<sup>211</sup> As previously stated, New York's nonconsensual pornography law was groundbreaking as it equipped victims with a court order to get their images and videos removed from the internet.<sup>212</sup> The SHIELD Act makes no mention of a similar option. Given the long lasting and devastating effects of nonconsensual images, this hole in the legislation is one that needs to be quickly filled in order for victims to mitigate the damage nonconsensual pornography is capable of.

The increased number of nonconsensual pornography cases during the COVID-19 pandemic has proven that nonconsensual pornography is a crime that shows no signs of slowing down in the immediate future.<sup>213</sup> On the contrary, increased internet use and technological advances allow for the crime to happen and evolve at a more consistent pace. With all but two states adopting laws to address this issue, the time has come for a federal law to provide justice for the numerous victims of this form of sexual assault. With the right amount of public support and legislative maintenance, the SHIELD Act could very well be the desired remedy.

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<sup>208</sup> Danielle Wallace, *Pennsylvania Cheerleading Mom Created 'Deep Fake' Nudes to Harass Daughter's Rival Teammates: Prosecutors*, FOX NEWS (Mar. 21, 2021), <https://www.foxnews.com/us/pennsylvania-cheerleading-mom-deep-fake-nudes-daughter-rivals-teammates> [https://perma.cc/KSD3-9TUW].

<sup>209</sup> *Id.*

<sup>210</sup> Prajakta Pradhan, *AI Deepfakes: The Goose Is Cooked?*, U. OF ILL. L. REV. (Oct. 4, 2020), <https://www.illinoislawreview.org/blog/ai-deepfakes/> [https://perma.cc/A3BJ-EANW].

<sup>211</sup> H.R. 2896, 116th Cong. (2019).

<sup>212</sup> Fonrouge & Hogan, *supra* note 122.

<sup>213</sup> Charlie Peters, *COVID Is Creating A 'Revenge Porn' Pandemic*, AM. CONSERVATIVE (Apr. 29, 2020, 12:01 AM), <https://www.theamericanconservative.com/articles/coronavirus-is-creating-a-revenge-porn-pandemic/> [https://perma.cc/Z8EF-P685].