

**FEMINIST REVENGE: SEEKING JUSTICE FOR VICTIMS  
OF NONCONSENSUAL PORNOGRAPHY THROUGH  
“REVENGE PORN” REFORM**

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INTRODUCTION

The U.S. legal system fails to adequately provide redress for victims of nonconsensual pornography, also known as *revenge porn*. Before 2013, the legal system largely ignored the growing presence of nonconsensual pornography.<sup>1</sup> There were no laws specifically in place to either deter or punish individuals who distributed nonconsensual, sexually explicit material.<sup>2</sup> There was little—if any—justice available for victims of revenge porn. However, by 2020, 46 states and the District of Columbia enacted

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1. See MARY ANNE FRANKS, DRAFTING AN EFFECTIVE “REVENGE PORN” LAW: A GUIDE FOR LEGISLATORS 3 (2016), <https://www.cybercivilrights.org/wp-content/uploads/2016/09/Guide-for-Legislators-9.16.pdf> (discussing how, prior to 2013, states largely did not regulate the disclosure of nonconsensual pornography, even though they had enacted laws addressing other realms of privacy).

2. See *id.* at 3–4 (noting that three states had criminal laws potentially encompassing, but not directly addressing, nonconsensual pornography).

revenge porn laws.<sup>3</sup> But the current legal framework is incoherent and disjointed.<sup>4</sup> The growing prevalence of revenge porn victims in society reflects the law's failure to sufficiently address nonconsensual pornography.<sup>5</sup>

Pornography has been around as long as humans have been drawing pictures of each other.<sup>6</sup> It is not, in itself, a *new* thing.<sup>7</sup> Pornography has been the focal point of discussions and arguments for generations.<sup>8</sup> From a feminist perspective, pornography is the source of a long-standing debate.<sup>9</sup> It sparked what was known as the feminist “[s]ex [w]ar.”<sup>10</sup> Some argued that pornography empowered women and allowed them to express their sexuality.<sup>11</sup> Others saw pornography as a tool to perpetuate violence against women and satisfy men.<sup>12</sup> Since this debate began, however, the Internet has developed, technology has advanced, and cell phones are now ubiquitous.<sup>13</sup> Pornography has evolved alongside these technological advancements.<sup>14</sup> In

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3. 46 States + DC + One Territory Now Have Revenge Porn Laws, CYBER CIVIL RIGHTS INITIATIVE, <https://www.cybercivilrights.org/revenge-porn-laws/> (last visited May 8, 2020) [hereinafter *Revenge Porn Laws*].

4. Charlotte Alter, *Revenge Porn: How Women Are Fighting Against Revenge Photos*, TIME (June 13, 2017), <http://time.com/4811561/revenge-porn/>.

5. Danielle Citron & Mary Franks, *Criminalizing Revenge Porn*, 49 WAKE FOREST L. REV. 345, 349 (2014) (indicating that, in particular, the civil remedies available for victims of revenge porn are not effective when there is a continuing “rise in reports of victimization as well as the proliferation in revenge porn websites”).

6. John Philip Jenkins, *Pornography*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/topic/pornography> (last visited May 8, 2020).

7. *See id.* (discussing the history and evolution of pornography).

8. *See, e.g.*, Jane Coaston, *There's a Conservative Civil War Raging—Over Porn*, VOX (Dec. 12, 2019), <https://www.vox.com/policy-and-politics/2019/12/12/21003109/pornography-obscenity-barr-doj-conservatives-libertarians> (highlighting issues of pornography dating back to the Nixon administration).

9. Ann Ferguson et al., *Sex War: The Debate Between Radical and Libertarian Feminists*, 10 J. WOMEN CULTURE & SOC'Y 106, 106 (1984).

10. The feminist “[s]ex [w]ar” reflected the “increasing polarization of American feminists into two” distinct groups with clashing ideologies regarding sexuality. *See id.* (describing the development of the two opposing feminist groups). The first group, the “radical feminists,” saw heterosexual institutions and sexual practices in a male-dominated society as perpetuating violence against women. *Id.* The opposing group, the “libertarian feminists,” viewed sexuality and pleasure between consenting partners as “potentially liberating.” *Id.*

11. *Id.* at 107.

12. *Id.*

13. *See* FRANKS, *supra* note 1, at 2 (“The Internet has greatly facilitated the rise of nonconsensual pornography . . .”).

14. *See* Aaron Minc, *Revenge Porn: How to Fight Back*, MINC (Sept. 12, 2017), <https://www.minclaw.com/fighting-back-revenge-porn/> (“[W]ith the growth [of] the internet, the number of cases of revenge porn has proliferated.”); Dalisi Otero, *Confronting Nonconsensual Pornography with Federal Criminalization and a “Notice-and-Takedown” Provision*, 70 U. MIAMI L. REV. 585, 587–88 (describing the growing presence of revenge pornography with increased access to technology, availability of smartphones, and the capability to quickly share material across the Internet).

2014, a Michigan-based law firm reported that at least 3,000 websites featured revenge porn.<sup>15</sup>

Perhaps there is a legitimate debate among feminist communities concerning the potential values of pornography. Nonconsensual pornography, however, cannot fit within this conversation. The benefits trumpeted by the pro-pornography feminists do not exist here.<sup>16</sup> Revenge porn has no basis for support within feminist ideology when it offers no benefits to society.<sup>17</sup> Contrary to “anti-prude[],” “libertarian feminist[]” perspectives, revenge porn does not empower women.<sup>18</sup> Rather, it is a means to silence, shame, or harass women.<sup>19</sup> Revenge porn is a systemic, social issue that needs an effective legal framework to deter offenders and adequately protect potential victims.

This Article provides a history of the development of revenge porn laws, analyzes the criticisms surrounding existing laws, and provides a solution for combating revenge porn through these laws. Part I discusses the history and development of revenge porn laws. Part II considers the current legal framework in place to combat revenge porn. Part II also explores the criticisms surrounding the overall effectiveness of these laws. Part III analyzes relevant case law to illustrate the overall impact of the existing legal framework in the United States. In particular, Part III provides a case study through Vermont’s revenge porn law, Disclosure of Sexually Explicit Images Without Consent (“Vermont’s revenge porn statute”),<sup>20</sup> and the first case brought under this statute, *State v. VanBuren*.<sup>21</sup> In that case, the Vermont Supreme Court upheld Vermont’s revenge porn statute as constitutional, but subsequently dismissed the case on the merits.<sup>22</sup> This ruling provided a significant precedent that will have a long-standing impact on the practical application of the Vermont statute and the protections the law provides to

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15. *Revenge Porn: Misery Merchants*, ECONOMIST (July 5, 2014), <https://www.economist.com/news/international/21606307-how-should-online-publication-explicit-images-without-their-subjects-consent-be>.

16. See Laura Hilly & Kira Allman, *Revenge Porn Does Not Only Try to Shame Women—It Tries to Silence Them Too*, GUARDIAN (June 22, 2015), <https://www.theguardian.com/technology/2015/jun/22/revenge-porn-women-free-speech-abuse> (highlighting the anti-feminist implications of revenge porn).

17. See *id.* (chronicling how revenge porn is typically used “to control women, to keep them captive, [and] to keep them quiet,” which runs directly contrary to feminist ideals).

18. See Ferguson et. al, *supra* note 9, at 107 (indicating that the so-called “libertarian feminists” saw pornography as empowering for women); see also *supra* text accompanying note 8.

19. Citron & Franks, *supra* note 5, at 353; see Jessica Pollack, *Getting Even: Empowering Victims of Revenge Porn with a Civil Cause of Action*, 80 ALB. L. REV. 353, 366 (2017) (emphasizing that revenge porn is, quite literally, about revenge and humiliation).

20. VT. STAT. ANN. tit. 13, § 2606 (2018).

21. *State v. VanBuren*, 2018 VT 95, 214 A.3d 791.

22. *Id.* ¶ 106.

victims of revenge pornography. Part IV introduces a relevant feminist perspective on revenge porn cases. The feminist perspective serves as a critical element for this Article's proposal of legal reform. And finally, Part V reflects on the Vermont Supreme Court's ruling in the *VanBuren* case and, in light of the challenge to Vermont's revenge porn statute, recommends a redrafted version of the Vermont statute. In effect, this Article proposes a legal solution to nonconsensual pornography through an effective statute and comprehensive system that acknowledges the underlying need for the feminist perspective within this debate.

## I. BACKGROUND

### A. *The History of Revenge Pornography*

Revenge porn, also referred to in this Article as nonconsensual pornography, "involves the distribution of sexually graphic [content] of individuals without their consent."<sup>23</sup> The definition of "revenge porn" can include a wide array of material including—but not limited to—videos or pictures.<sup>24</sup> The material can be created without the consent or knowledge of the subject.<sup>25</sup> Or, alternatively, the material might be consensually made to begin with, but then later distributed without the consent of the subject.<sup>26</sup> In the latter situation, a common form of revenge porn, the perpetrator is typically an ex-partner intending to expose and publicly humiliate the victim.<sup>27</sup> The terms *nonconsensual pornography* and *revenge pornography* are often used interchangeably.<sup>28</sup> Both terms refer to the dissemination of explicit material without the consent of the subject. The key difference between the two terms, however, "is one of motive, not effect: revenge porn is often intended to harass the victim, while any image that is circulated without the agreement of the subject is nonconsensual porn. Both can result in public degradation, social isolation, and professional humiliation for the victims."<sup>29</sup> The distinction between nonconsensual and revenge pornography is important to keep in mind—particularly in light of this Article's

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23. Citron & Franks, *supra* note 5, at 346.

24. *Id.*

25. *Id.*

26. *Id.*

27. *Cf. id.* at 351 (describing how most perpetrators of revenge porn are past intimate partners).

28. This Article uses the two terms interchangeably while making note of any important distinctions as they become relevant within later analyses of existing nonconsensual pornography laws.

29. Alter, *supra* note 4.

subsequent discussions on the inherent problems with the current pornography laws.<sup>30</sup>

Nonconsensual and revenge pornography predate the Internet.<sup>31</sup> In 1984, LaJuan Wood sued Hustler magazine for publishing a nude photo of her in the "Beaver Hunt" section, which featured submissions by nonprofessional "models."<sup>32</sup> LaJuan Wood's husband originally took the photo with her consent.<sup>33</sup> A neighbor later stole the photo from their home and submitted it to Hustler magazine with a forged consent form and detailed a fictional story of Wood's sexual fantasies.<sup>34</sup> Wood successfully sued Hustler under Texas defamation and invasion of privacy laws and won \$150,000 in damages.<sup>35</sup>

Prior to 2012, only three states had laws applicable to nonconsensual pornographic material:<sup>36</sup> New Jersey,<sup>37</sup> Alaska,<sup>38</sup> and Texas.<sup>39</sup> Until very recently, however, the U.S. legal system did not address the *disclosure* of nonconsensual pornography or the "invasion of sexual privacy."<sup>40</sup> Rather, the prior laws were focused primarily on "voyeurism, surveillance, and computer hacking," which failed to adequately recognize the full range of issues involved with nonconsensual pornography.<sup>41</sup> In addition to the laws' failure to sufficiently deter potential perpetrators, the reach of revenge pornography has extended alongside the development of technology.<sup>42</sup> And, naturally, the rise of revenge pornography is marked by the growing prevalence of individuals who fall victim to the phenomenon.<sup>43</sup>

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30. See *infra* Parts I.B, II.B.1.

31. Minc, *supra* note 14.

32. Wood v. Hustler Magazine, Inc., 736 F.2d 1084, 1085–86 (5th Cir. 1984).

33. See *id.* at 1085 (noting that the couple treated the material as private, did not show anyone else, and hid the photos in their home).

34. *Id.* at 1085–86.

35. *Id.* at 1086.

36. FRANKS, *supra* note 1, at 4.

37. See New Jersey's invasion of privacy statute, N.J. STAT. ANN. § 2C:14-9 (West 2016) (originally enacted as Act of Jan. 8, 2004, ch. 206, § 1, 2003 N.J. Laws 206).

38. See Alaska's harassment statute, ALASKA STAT. § 11.61.120 (2019). In 2006, the Alaska legislature amended the law to include publication and distribution of sexually explicit electronic or printed materials. 2006 Alaska Sess. Laws 112.

39. See the now-invalid Texas invasive visual recording statute, TEX. PENAL CODE ANN. § 21.15 (West 2015), (originally enacted as 2001 Tex. Gen. Laws 458), *invalidated by* Long v. State, 535 S.W.3d 511 (Tex. Crim. App. 2017).

40. FRANKS, *supra* note 1, at 3.

41. *Id.*; Mary Anne Franks, *Combating Non-Consensual Pornography: A Working Paper 3* (2014), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2336537](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2336537) [hereinafter *A Working Paper*].

42. FRANKS, *supra* note 1, at 2 (stating that the "prevalence, reach, and impact" of revenge porn grows with the increased use of technology); *A Working Paper*, *supra* note 41, at 7 ("Non-consensual pornography is on the rise in part because there is little incentive for malicious actors to refrain from such behavior.").

43. See Minc, *supra* note 14 (discussing the increase in revenge porn offenses following increased Internet usage).

The Cyber Civil Rights Initiative (Initiative) is a civil rights group fighting against revenge porn and raising awareness for victims.<sup>44</sup> The group conducted a survey with 1,606 responses, 361 of whom self-reported as victims of revenge porn.<sup>45</sup> The survey found that 61% of the respondents had taken nude photos or videos and shared the material, and that 23% of respondents reported they were victims of revenge porn.<sup>46</sup> The Initiative also reported that 90% of victims were women; 57% of victims reported that an ex-boyfriend posted the material, 6% reported that an ex-girlfriend posted the material, 23% reported that the perpetrator was an ex-friend, 7% said a current friend, and 7% said a family member; 59% reported that the material included their full name; 93% of victims reported suffering from emotional distress; 82% reported a social, occupational, or other impairment due to the material; 49% reported that they were harassed or stalked online because of the material, while 30% said they were harassed or stalked outside of the Internet by online users who saw the material; 8% reported quitting a job or dropping out of school; 3% have legally changed their names; and 51% have had suicidal thoughts due to being a victim of revenge porn.<sup>47</sup>

As illustrated through these numbers, revenge porn affects victims in many ways. Victims feel the effects of revenge porn on a social level: losing a job or future potential for a job, taking on an entirely new identity to escape harassment, and losing a current or future friend or romantic partner.<sup>48</sup> Victims also experience the effects on a personal level: fearing for children or families; experiencing depression, anxiety, and PTSD; or committing suicide.<sup>49</sup> And this is not an exhaustive list. These victims—regardless of the severe emotional and physical consequences they face—had no way to seek justice against a perpetrator before 2013.<sup>50</sup> Similarly, with no criminal laws in place, perpetrators “do not fear the consequences of their actions.”<sup>51</sup> Victims of revenge porn who were minors, however, did have alternative

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44. CYBER CIVIL RIGHTS INITIATIVE, <https://www.cybercivilrights.org/welcome/> (last visited May 8, 2020).

45. FRANKS, *supra* note 1, at 11.

46. *Id.*

47. For a full list of the Cyber Civil Rights Initiative’s statistics, see FRANKS, *supra* note 1, at 11–13.

48. *See id.* at 12 (stating that 8% of victims quit their jobs or left school, 6% of victims were discharged from a job or expelled from school, 3% of victims legally changed their names, and 13% lost a significant other due to the explicit material online).

49. *See id.* at 12–13 (stating that 54% of victims worry about their children seeing the explicit material online, 42% of victims sought out professional counseling, and 51% of victims have had suicidal thoughts following the nonconsensual posting of their images).

50. *Id.* at 3 (emphasizing the lack of laws that address the distribution of explicit, non-consensual material prior to 2013).

51. *Id.* (citing to the general absence of revenge porn laws to explain the rise in revenge porn postings online).

forms of redress under federal and state laws concerning child pornography.<sup>52</sup> But, for the purposes of this Article, the focus will be on victims who are of the age of majority and, therefore, cannot use child pornography laws as a means for seeking compensation.

### B. The Development of Revenge Porn Policies and Laws

By 2013, states began enacting laws prohibiting nonconsensual pornography—with a focus on *distribution* and *disclosure*.<sup>53</sup> Some suggest this shift was in response to “growing awareness and increased pressure from victims and advocates.”<sup>54</sup> By 2020, 46 states and the District of Columbia enacted revenge porn laws.<sup>55</sup> Victims may now choose between several different methods of legal redress<sup>56</sup>: criminal charges,<sup>57</sup> protective orders or civil remedies,<sup>58</sup> administrative remedies under school or employer policies,<sup>59</sup> or directly contacting the platform (such as Facebook, Instagram, or Twitter) to request that the site remove the content and suspend the user.<sup>60</sup>

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52. Alexandra Scott, *What is Nonconsensual Pornography?*, NAT'L COUNCIL JUVENILE & FAMILY COURT JUDGES (Feb. 21, 2017), <https://www.ncjfcj.org/TDVAM-Scott>.

53. See *infra* Part II.B (analyzing the elements of the existing state revenge porn laws in greater detail). Compare *supra* notes 36–41 (discussing the state laws in place prior to 2012 that, although specifically enacted to target other conduct such as harassment, invasion of privacy, and voyeurism, were potentially applicable to revenge porn scenarios), with ALA. CODE § 13A-6-240 (2019) (criminalizing directly the *distribution* of a private image), and ARK. CODE ANN. § 5-26-314 (2019) (criminalizing directly the *distribution* of sexual images), and WASH. REV. CODE § 9A.86.010 (2016) (criminalizing directly the *disclosure* of intimate images).

54. Alter, *supra* note 4.

55. *Revenge Porn Laws*, *supra* note 3.

56. Because this Article features a case study of Vermont, the analysis also approaches the discussion of other available remedies for victims by looking specifically at Vermont laws.

57. There are no federal laws in place currently concerning revenge porn. *State Revenge Porn Policy*, ELEC. PRIVACY INFO. CTR., <https://epic.org/state-policy/revenge-porn/> (last visited May 8, 2020). Vermont, however, has criminalized revenge porn. VT. STAT. ANN. tit. 13, § 2606 (2018).

58. *E.g.*, VT. STAT. ANN. tit. 15, §§ 1101–1115 (2019) (enabling victims of harassment by household members to obtain a protective order); see, *e.g.*, *Birkenhead v. Coombs*, 143 Vt. 167, 174–75, 465 A.2d 244, 247 (1983) (citing *Sheltra v. Smith*, 136 Vt. 472, 476, 392 A.2d 431, 433 (1978)) (discussing the requirements for common law intentional infliction of emotional distress tort claims); see *infra* Part II (discussing the current legal options available for victims in greater detail).

59. *E.g.*, VT. STAT. ANN. tit. 21, § 495h (2019) (requiring Vermont employers to prohibit sexual harassment and adopt workplace policies in accordance with statute). Alternatively, on the federal level, victims may bring a claim under Title VII of the Civil Rights Act of 1964, which prohibits sex-based employment discrimination. 42 U.S.C. §§ 2000e–2000e-17. See *infra* Part II (explaining the inherent problems with these alternative forms of legal redress in further detail).

60. Scott, *supra* note 52. See also Erica Souza, “For His Eyes Only”: *Why Federal Legislation Is Needed to Combat Revenge Porn*, 23 UCLA WOMEN’S L.J. 101, 114 (explaining “takedown services” as twofold: (1) websites that offer removal services of images from the Internet but pointedly advertise next to revenge porn images, charge high rates to victims and, in fact, operate under the very same

Although effective legal remedies are the most important tools a victim can have, non-legal remedies can be helpful, too. The response of social media platforms adopting new policies demonstrates efforts to combat nonconsensual pornography outside of the legal system. Sites such as Facebook are social hubs where disseminating explicit, nonconsensual material can take place easily and at an alarming rate.<sup>61</sup> Facebook's new system allows users to report material by flagging it, while the platform would then review the material, remove it if necessary, and prohibit any further sharing of the content.<sup>62</sup> In January 2017, Facebook received 51,000 reports of nonconsensual posts of explicit material and, as a result, disabled approximately 14,000 accounts.<sup>63</sup> The adoption of new social media policies appears promising and continues to develop, but this progress alone will not provide the final answer to eradicating revenge pornography. Victims, police officers, and lawyers need comprehensive legal resources to fight effectively against revenge pornography.

Perhaps one of the biggest difficulties of combatting revenge pornography is the problem of removal.<sup>64</sup> Users may employ Facebook's takedown policy to remove one, or perhaps several, tagged photos.<sup>65</sup> Yet, even if the material is "scrubbed from one site, there's no way to guarantee it hasn't been copied, screenshotted, or stored on a cache somewhere."<sup>66</sup> With this in mind, Facebook rolled out another new system that allows users to proactively upload their *own* explicit material to a private catalogue where the material will be preemptively flagged and blocked from any further uploads.<sup>67</sup> This system, although seemingly counterintuitive, aims to block

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businesses that posted the image to begin with; and (2) the social media platforms that are developing more lucrative user-based systems to report, flag, and remove the nonconsensual images).

61. Alter, *supra* note 4.

62. *Id.*; see also Olivia Solon, *Facebook Asks Users for Nude Photos in Project to Combat "Revenge Porn"*, GUARDIAN (Nov. 7, 2017), <https://www.theguardian.com/technology/2017/nov/07/facebook-revenge-porn-nude-photos> (describing the user-based reporting tool that flags explicit photos for the platform's "specially trained representatives" to review, remove, and apply photo-matching technology to block users from re-uploading the image onto the site).

63. Alter, *supra* note 4.

64. See Souza, *supra* note 60, at 107 (describing the "downstream distribution" process of revenge porn: although the original image may eventually be removed, third parties are able to capture the image prior to its removal and subsequently repost the image, thus "making it virtually impossible for a victim to completely eradicate the images from the Internet once and for all"); Otero, *supra* note 14, at 592 (emphasizing the difficulties in removing revenge porn from the Internet).

65. *Community Standards: Sexual Exploitation of Adults*, FACEBOOK, [https://www.facebook.com/communitystandards/sexual\\_exploitation\\_adults](https://www.facebook.com/communitystandards/sexual_exploitation_adults) (last visited May 8, 2020) ("To protect victims and survivors, we also remove . . . intimate images shared without permission from the people pictured.").

66. Alter, *supra* note 4.

67. Solon, *supra* note 62 ("[T]he company converts the image into a unique digital fingerprint that can be used to identify and block any attempts to re-upload that same image.").



the nonconsensual material from ever entering the public stream of the platform and is a novel “attempt to give some control back to victims of this type of abuse.”<sup>68</sup> Social media platforms fuel the rate and speed at which nonconsensual material is shared.<sup>69</sup> But regardless, “revenge porn inflicts damage the first time it’s shared, so removing something after it’s already been posted is a second-best solution.”<sup>70</sup> Facebook’s pilot program aims to address just that. Outside of social media platforms, there are also websites dedicated solely to hosting revenge pornography.<sup>71</sup> When these websites are shut down for legal reasons, the content “often just migrates to other sites.”<sup>72</sup> Users on these websites are typically anonymous, thus making it harder to hold individuals accountable for their posts or even to track down the identity of the original revenge porn posting.<sup>73</sup>

The rise in the number of state laws addressing nonconsensual pornography reflects significant progress for state legislatures since 2013, but there are still major issues with current laws and policy.<sup>74</sup> For instance, these laws are “riddled with blind spots” and not always effective.<sup>75</sup> The various state laws addressing revenge porn are inconsistent.<sup>76</sup> Many disagree as to whether a perpetrator’s motive for posting the explicit material is relevant to whether he or she is guilty under a state’s revenge porn law.<sup>77</sup> Some of these state laws require a showing of an *intent to harass* by the perpetrator.<sup>78</sup> However, this requirement of intent poses a problem when the individual distributes the explicit material in secret, never intending for the victim to

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68. *Id.*

69. Alter, *supra* note 4.

70. Emma Grey Ellis, *Facebook’s New Plan May Curb Revenge Porn, But Won’t Kill It*, WIRED (Apr. 6, 2017), <https://www.wired.com/2017/04/facebook-revenge-porn/>.

71. Rachel Budde Patton, *Taking the Sting Out of Revenge Porn: Using Criminal Statutes to Safeguard Sexual Autonomy in the Digital Age*, 16 GEO. J. GENDER & L. 407, 409 & n.18 (2015) (citing several websites, such as “MyEx.com” and “ExGFPics.com/blog/,” that cater to ex-partners who want to “get revenge” through the submission of explicit photos).

72. Minc, *supra* note 14.

73. *Id.*

74. See Scott, *supra* note 52 (stating that, although “efforts to stop nonconsensual pornography are gaining traction,” the recently enacted laws are not perfect and “many acts of nonconsensual porn may slip through the cracks”).

75. Alter, *supra* note 4.

76. *Id.*; see Pollack, *supra* note 19, at 356–57 (describing the inconsistent state laws criminalizing revenge porn as particularly problematic when the “lack of continuity” from state to state holds individuals to different standards).

77. Alter, *supra* note 4.

78. ALA. CODE § 13A-6-240 (2019); ARIZ. REV. STAT. ANN. § 13-1425 (2016); ARK. CODE ANN. § 5-26-314 (2019); COLO. REV. STAT. § 18-7-107 (2019); GA. CODE ANN. § 16-11-90 (2019); MINN. STAT. § 617.261 (2019); N.H. REV. STAT. ANN. § 644:9-a (2016); N.M. STAT. ANN. § 30-37A-1 (2019); N.C. GEN. STAT. § 14-190.5A (2019); OR. REV. STAT. § 161.005 (2019); S.D. CODIFIED LAWS § 22-21-4 (2019); VA. CODE ANN. § 18.2-386.2 (2019).

find out. One example is the 2017 U.S. Marines scandal involving a “secret” Facebook group, where approximately 30,000 servicemen circulated explicit material of current or former women service members.<sup>79</sup> The group in this case was private and not visible to the public.<sup>80</sup> Arguably, the men who shared material on the private Facebook group never intended to directly harass the women who they exposed. However, these women suffered real harm as a result of the posting and use of these images,<sup>81</sup> and it is inconceivable that there is little justice available for victims under circumstances like these, merely because the law requires a showing of an intent to harass.

The discrepancies between state laws reflect the multitude of problems surrounding revenge pornography.<sup>82</sup> Images taken while in a “consensual, private relationship” are meant to maintain that assumption of privacy.<sup>83</sup> However, when these images are later publicly posted, “[t]he context in which they were shared change[s] their meaning. That trumps their original intention.”<sup>84</sup> In other words, many find that “[t]he intent of the perpetrator is irrelevant”<sup>85</sup> and should not be included in state statutes addressing revenge porn.<sup>86</sup> A law requiring intent would typically only include the quintessential revenge porn cases involving vengeful ex-partners.<sup>87</sup> And, therefore, when a law requires this specific intent, it fails to address those cases of revenge porn where the main motivation is financial gain, humiliation, sexual gratification, or entertainment.<sup>88</sup>

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79. Ellis, *supra* note 70; see Alter, *supra* note 4 (outlining the beginning of the 2017 Marine scandal and resulting investigations).

80. Alter, *supra* note 4.

81. See, e.g., Jeff Schogol, “I Don’t 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/> (describing the negative impacts suffered by victims of the 2017 U.S. Marines scandal).

82. E.g., MD. CODE ANN., CRIM. LAW § 3-809 (LexisNexis 2020) (requiring the offender to intentionally cause serious emotional distress, economic damages, or physical injury); D.C. CODE § 22-3052 (2020) (defining “[u]nlawful disclosure” as disclosure of a “sexual image with the intent to harm the person depicted or to receive financial gain”); VA CODE ANN. § 18.2-386.2(A) (2019) (requiring an “intent to coerce, harass or intimidate” the victim or the intent to “maliciously disseminate[] or sell[]” the material). See *infra* Part II (analyzing the discrepancies between state laws in greater detail).

83. Alter, *supra* note 4.

84. *Id.*

85. *Id.*

86. See FRANKS, *supra* note 1, at 5–7 (emphasizing the importance of a revenge porn law that encompasses a wider scope of conduct, regardless of the intent behind posting the explicit material).

87. See *id.* at 2, 7 (suggesting that the term “revenge porn” in itself is misleading because a perpetrator’s motivation is not always “revenge”).

88. *Id.*

For instance, consider cases concerning revenge porn website owners, who are generally motivated by financial gain.<sup>89</sup> Under these circumstances, whether the website owner was acting with the intent to harm is irrelevant, and furthermore, not applicable.<sup>90</sup> Consider also a case where a website owner obtains explicit materials illegally and, in turn, exploits the victim by threatening to post the material unless the victim pays a hefty price.<sup>91</sup> In three recent cases, two owners of large-scale revenge porn websites were successfully charged with extortion and another with federal hacking.<sup>92</sup> Notably, these website owners were not charged under California's revenge porn law, but instead under federal and state laws, such as: 18 U.S.C. § 371: Conspiracy; 18 U.S.C. § 1030: Unauthorized Access to a Protected Computer to Gain Information; 18 U.S.C. § 1028A: Aggravated Identity Theft; CAL. PENAL CODE § 182: Conspiracy; CAL. PENAL CODE § 530.5(a): Identity Theft; and CAL. PENAL CODE § 520: Extortion.<sup>93</sup> This is in part because California's revenge porn law requires an *intent to cause harm*.<sup>94</sup> Additionally, the California revenge porn law does not apply in cases where a hacker steals a victim's information from the victim's computer and then shares the material.<sup>95</sup> And lastly, victim protection is thwarted because

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89. See Allie Conti, *Will Giving Kevin Bollaert 18 Years in Prison Finally End Revenge Porn?*, VICE (Apr. 6, 2015), [https://www.vice.com/en\\_us/article/dpwaek/is-giving-kevin-bollaert-18-years-enough-to-finally-end-revenge-porn-406/](https://www.vice.com/en_us/article/dpwaek/is-giving-kevin-bollaert-18-years-enough-to-finally-end-revenge-porn-406/) (describing the three cases: *People v. Bollaert*, *United States v. Hunter Moore*, and the *Meyering* case).

90. It is also of note that federal law grants website operators immunity under § 230 of the Communications Decency Act, which protects websites from "tort liability related to a third party's content." Citron & Franks, *supra* note 5, at 359; 47 U.S.C. § 230(c)(1) (2012) ("No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.").

91. See "Revenge Porn" Site Owner Faces Lengthy Jail Term, BBC NEWS (Apr. 6, 2015), <http://www.bbc.com/news/technology-32194196> (stating that the owner of revenge porn website, "UGotPosted.com," was convicted of extortion for charging victims upwards of \$350 to remove images from his website).

92. Conti, *supra* note 89 (chronicling how, in California, three men engaging in these acts were charged with crimes under multiple state laws).

93. See *id.* (discussing some of the charges that the three men faced). Casey E. Meyering was charged with five counts of extortion under California law. *Id.* Kevin Bollaert was charged with 27 counts of identity theft and extortion under California law. *Id.* Hunter Moore was indicted on federal hacking charges. *Id.* See also Complaint at 1–9, *People v. Bollaert*, No. 252338 (Cal. Super. Ct. San Diego Cty. 2013) (charging Kevin Bollaert with identity theft and extortion); Grand Jury Indictment at 1, 11–12, *United States v. Moore*, No. 13-cr-917 (C.D. Cal. Dec. 20, 2013) (charging Hunter Moore).

94. Afigo Fadahunsi, *The Communications Decency Act May Disappoint*, LAW360 (March 9, 2015), <https://www.law360.com/articles/626552/the-communications-decency-act-may-disappoint>.

95. *Id.*

website owners operate with a presumption of immunity pursuant to § 230 of the federal Communications Decency Act.<sup>96</sup>

From a feminist perspective, revenge porn laws epitomize the fundamental problems that women, as victims of crime, face in the legal system.<sup>97</sup> The legal system, when characterized as a male-dominated, patriarchal structure, fails to adequately redress women who are victims of sexual crimes because “structural patriarchy is reflected in existing policy dealing with nonconsensual pornography.”<sup>98</sup> Society’s immediate response to victims of revenge porn further emphasizes this problem.<sup>99</sup> The public consistently shames victims, particularly when a victim consensually shares the material privately at first, only for the material to be later released publicly without consent.<sup>100</sup> Or, in the *VanBuren* case, the Court explained that a victim’s reasonable expectation of privacy can hinge both on her relationship with the receiver of the photo and the manner in which the victim shares the photo.<sup>101</sup> This explanation goes to the underlying issue of constitutionality. But the explanation also implicitly raises additional concerns regarding victim’s rights—particularly when a majority of those victims are women.<sup>102</sup>

A victim of nonconsensual pornography is no different than a victim who consensually creates explicit material but does not consent to the public distribution of that same material. The law should apply regardless. But then why do we, as a society, continue to blame the women who find themselves in the latter situation, especially when we would allow a commercial pornography business to effectively sue for protection of the same material

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96. *Infra* note 128 and accompanying text; *see also* Souza, *supra* note 60, at 113–14 (discussing how revenge porn website hosts serve as forums for the posts of third parties and, therefore, receive immunity under § 230 of the Communications Decency Act).

97. Cynthia J. Najdowski, *Legal Responses to Nonconsensual Pornography: Current Policy in the United States and Future Directions for Research*, 23 PSYCHOL. PUB. POL’Y & L. 154, 155 (2017).

98. *Id.*

99. *Id.*

100. Patton, *supra* note 71, at 420 (describing “the sexual double standard” of the general reaction to revenge porn when we “endorse the behavior of the perpetrator, while allowing both the blame for and the consequences of his action to lay with the female victim, whom we feel should never have taken the picture(s) in the first place”).

101. *State v. VanBuren*, 2018 VT 95, ¶¶ 98, 105, 214 A.3d 791, 821, 823. The Court emphasized, however, that it did not “precisely define here where and when a person may have a reasonable expectation of privacy for purposes of § 2606(d)(1), except to note that it generally connotes a reasonable expectation of privacy within a person’s most intimate spheres.” *Id.* ¶ 105.

102. *See* Najdowski, *supra* note 97, at 161 (“How patriarchal beliefs manifest in existing statutes is evident in judgments about just how sexually explicit a recording must be to constitute a violation of privacy, whether the victim must be identifiable, and the level of harm that must be generated by nonconsensual pornography.”).

under intellectual property laws?<sup>103</sup> Why does the law differentiate or sometimes protect only those women in the former situation as deserving of protection under the law? Society's response to revenge pornography victims is only part of the problem. The solution to revenge pornography starts with an effective legal tool with which victims may seek the justice they deserve.

## II. THE CURRENT LEGAL FRAMEWORK ADDRESSING REVENGE PORN

### A. Civil Claims

Although victims of revenge porn have several legal options available, the legal resources are neither sufficient remedies for victims nor effective in holding offenders accountable.<sup>104</sup> Aside from bringing criminal charges, victims may pursue a case under sexual harassment laws, copyright laws, and specific tort laws. Part II.A of this Article analyzes each in turn and emphasizes the inherent problems within this generally ineffective legal framework that fails to properly compensate victims of revenge porn.

#### 1. Sexual Harassment Laws

The disclosure of nonconsensual sexually explicit materials is a form of sexual harassment.<sup>105</sup> And, in fact, there are both state and federal sexual harassment laws in place in the United States.<sup>106</sup> In Vermont, for instance, every employer is required to have a sexual harassment policy in place.<sup>107</sup> While a victim of revenge porn could bring a sexual harassment complaint against a perpetrator, the perpetrator would likely need to be a co-worker who

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103. See, e.g., Susan Decker & Christopher Yasejko, *Porn Purveyors' Use of Copyright Laws Has Judges Seeing Red*, BLOOMBERG NEWS (Aug. 5, 2019), <https://www.bloomberg.com/news/articles/2019-08-05/porn-purveyors-use-of-copyright-lawsuits-has-judges-seeing-red> (describing how two pornography companies were behind nearly half of all copyright claims in the United States in 2019).

104. See Citron & Franks, *supra* note 5, at 349 (discussing how current civil and criminal laws applicable to revenge pornography are insufficient, an "ineffective deterrent," and fail to "effectively address the issue [of revenge porn]").

105. See 29 C.F.R. § 1604.11(a) (2015) (defining sexual harassment as "[u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature"); see also FRANKS, *supra* note 1, at 3 (footnote omitted) ("Nonconsensual pornography often plays a role in intimate partner violence, with abusers using the threat of disclosure to keep their partners from leaving or reporting their abuse to law enforcement.").

106. E.g., VT. STAT. ANN. tit. 21, § 495h (2019) (prohibiting sexual harassment in Vermont workplaces); Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e–2000e-17 (prohibiting, *inter alia*, sex-based employment discrimination).

107. Tit. 21, § 495h; GOVERNOR'S COMMISSION ON WOMEN, SEXUAL HARASSMENT AND THE WORKPLACE: A GUIDE FOR EMPLOYEES AND EMPLOYERS 6 (2000).

engaged in the conduct within the scope of employment.<sup>108</sup> Thus, sexual harassment laws apply in very limited contexts.<sup>109</sup> The laws are inapplicable when the conduct occurs outside of the scope of the workplace, so sexual harassment laws are of little use for most victims of revenge porn.<sup>110</sup>

Some states, like Vermont, also have legal systems in place to mitigate the impact of domestic violence.<sup>111</sup> Some scholars argue that revenge porn is a form of domestic violence.<sup>112</sup> A victim of domestic abuse may file a request for relief with the court in order to obtain an abuse prevention order.<sup>113</sup> These orders aim to prevent further abuse to a victim by restricting contact between the victim and the abuser, and may also include an order to redress harm following a perpetrator's dissemination of the victim's nonconsensual pornography.<sup>114</sup> However, Vermont's abuse prevention statute requires the parties to be "family or household members," thus limiting who may apply for protection under title 15, section 1101 of the Vermont Code.<sup>115</sup> Albeit, the statute's definition of a "household member" is actually quite broad, as it includes individuals who have lived together in the past, have had past sexual relations, or have just dated.<sup>116</sup>

This method of redress could apply in the context of revenge porn because the relevant statute defines stalking as an applicable form of domestic abuse.<sup>117</sup> In turn, the Vermont stalking statute includes, but is not limited to, "two or more acts over a period of time" that cause emotional

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108. Tit. 21 § 495h (declaring that all employees have the right to employment that is free from sexual harassment); *see also* *Perry v. Ethan Allen, Inc.*, 115 F.3d 143, 149 (2d Cir. 1997) (discussing hostile environment sexual harassment claim requirements under Title VII and the Vermont Fair Employment Practices Act); 29 C.F.R. § 1604.11(a) (2015) (defining hostile environment sexual harassment claims as "such conduct [that] has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment").

109. *See* Emily Poole, *Fighting Back Against Non-Consensual Pornography*, 49 U.S.F. L. REV. 181, 204 (2015) (noting that sexual harassment laws could be of use for a victim who is unfairly discharged by an employer *because of* revenge porn); Citron & Franks, *supra* note 5, at 360–61 (describing both the limited application of sexual harassment claims and the narrow protections that these laws provide).

110. Citron & Franks, *supra* note 5, at 360–61.

111. VT. STAT. ANN. tit. 15, § 1101 (2019).

112. *See* Citron & Franks, *supra* note 5, at 351 (characterizing explicit images in this context as a tool for abusers to coerce their partners).

113. Tit. 15, § 1103.

114. *Id.* (indicating that a court may impose a restriction on all contact between parties "whether directly, indirectly, or through a third party . . . including in writing or by telephone, e-mail, or other electronic communication").

115. *Id.* § 1101(1).

116. *Id.* § 1101(2) (emphasis added) ("[P]ersons who, for any period of time, are living or *have lived together*, are sharing or have shared occupancy of a dwelling, are engaged in or *have engaged in a sexual relationship*, or minors or adults who are dating or *who have dated*. 'Dating' means a social relationship of a romantic nature.").

117. *Id.*

distress, the loss of a job, or other significant impacts on the victim's life.<sup>118</sup> These are all very real consequences of revenge porn, as evidenced through the Initiative's survey.<sup>119</sup>

Similar to harassment and stalking laws, however, the abuse prevention statute applies only in narrow circumstances, and therefore does not apply to most revenge porn victims.<sup>120</sup> For a victim to successfully obtain a protective order, the perpetrator would need to be a household member.<sup>121</sup> Regardless of how broadly the statute defines "household members," this restriction creates problems for victims, especially when most perpetrators post the explicit materials anonymously.<sup>122</sup> And, based on the Initiative's survey of revenge porn victims, there were a significant number of victims in the sample whose perpetrator would not qualify as a household member under the statute.<sup>123</sup> Furthermore, there would need to be more than one incident of harassment for the Vermont stalking statute, in particular, to apply.<sup>124</sup> This is not the case for all victims of revenge porn—even a *single post* of revenge porn can be a harmful and emotionally taxing experience for a victim.<sup>125</sup>

The civil methods of legal redress, like those discussed above, pose practical challenges. But moreover, they fail to address a fundamental element driving revenge porn victims: damages. Protective orders and other harassment laws do not remove the explicit material from the Internet, nor would they allow for much—if any—recovery of monetary damages.<sup>126</sup> Simply put, these methods only allow for a court-ordered restriction on any further contact between the parties.<sup>127</sup> This could be of use for a particularly desperate victim who needs the court's intervention for immediate protection, but, in general, sexual harassment laws fail to provide victims of

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118. Tit. 12, § 5131(1)(A).

119. See *supra* Part I.A (discussing the number of surveyed victims in the Initiative's survey who feel emotional distress, seek professional counseling, and have lost their jobs or fear for the loss of a future job opportunity).

120. Tit. 15, § 1103(a).

121. *Id.*

122. *Id.*; Souza, *supra* note 60, at 113 (describing the anonymity involved with most revenge porn cases).

123. See *supra* Part I.A (discussing the small percentage of revenge porn victims whose perpetrator was a boyfriend, girlfriend, or family member in the Initiative's survey that would actually qualify as a household member under Vermont's abuse prevention statute).

124. See tit. 12, § 5131(1)(A) (2017) (requiring "two or more acts").

125. Citron & Franks, *supra* note 5, at 366.

126. See *id.* at 358–59 (suggesting that civil actions do not result in image removal, which is a goal for many victims in these types of cases).

127. In Vermont, the stalking statute expressly extends the definition of contact to include nonphysical contact that could, in fact, apply to future acts of revenge porn. Tit. 12, § 5131(3) (2017) ("Nonphysical contact" includes telephone calls, mail, e-mail, social media commentary or comment, or other electronic communication, fax, and written notes.").

revenge porn with an adequate form of monetary compensation or legal redress.

## 2. Intellectual Property and Copyright Laws

Another legal remedy for victims of revenge porn are copyright laws. Copyright laws are particularly of note because § 230 of the Communications Decency Act does not protect website hosts from these types of claims, and thus reflects a possible way around the immunity typically granted to these providers under § 230.<sup>128</sup> However, as with other potential civil actions available, bringing an intellectual property suit in a revenge porn case poses other practical issues. In order to obtain a copyright, a victim must have created the work—that is, the explicit material.<sup>129</sup> Because of this, copyright laws can appropriately apply to “selfies,”<sup>130</sup> which is important in the revenge porn context.<sup>131</sup> Nonetheless, in order to register a copyright, a victim would need to further distribute their own images and, in turn, allow the image to appear in the public catalogue of the Library of Congress.<sup>132</sup> This would only further the victim’s public humiliation and exposure of the explicit images.<sup>133</sup> In conclusion, some scholars suggest that the use of intellectual property law as the legal response to nonconsensual pornography would be to “mischaracterize[] the harm as one of property rights,” when, in fact, “the harm involved in nonconsensual pornography cannot be reduced to a property claim.”<sup>134</sup> Copyright law is not a sufficient remedy for victims of revenge pornography.<sup>135</sup>

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128. Citron & Franks, *supra* note 5, at 359. The relevant provision under § 230 states: “Nothing in this section shall be construed to limit or expand any law pertaining to intellectual property.” *Id.* at n.87 (quoting 47 U.S.C. § 230(e)(2) (2012)).

129. 17 U.S.C. § 201(a). *Cf.* Citron & Franks, *supra* note 5, at 360 (“If a victim did not take the sexually explicit photo herself, she does not own the copyright—it belongs to the photographer.”).

130. *See* 17 U.S.C. § 201(a) (“Copyright in a work protected under this title vests initially in the author or authors of the work.”); *see also* Alexis Fung Chen Pen, *Striking Back: A Practical Solution to Criminalizing Revenge Porn*, 37 T. JEFFERSON L. REV. 405, 416 (2014) (describing that a successful action for copyright over explicit material would allow a victim to claim ownership, prohibit any reproduction without the victim’s permission, and “demand that [the material] be removed from the internet”).

131. Compare to the now-amended language of the California statute that historically did not extend protection to “selfies.” *See* CAL. PENAL CODE § 647(j)(4)(A) (West 2013) (“Any person who photographs or records by any means the image of the intimate body part or parts of another . . . and the person subsequently distributes the image taken . . .”).

132. Souza, *supra* note 60, at 116.

133. *See, e.g.,* Erika Fink, *To Fight Revenge Porn, I Had to Copyright My Breasts*, CNN (Apr. 27, 2015), <https://money.cnn.com/2015/04/26/technology/copyright-boobs-revenge-porn/index.html?iid=EL> (describing the process for registering a copyright of images as a means to fight against revenge porn).

134. Citron & Franks, *supra* note 5, at 360.

135. *Id.*



### 3. Tort Claims

Tort law, although ostensibly applicable in the context of revenge porn, also fails to fully address the wide range of issues for victims.<sup>136</sup> For instance, a victim could bring an intentional infliction of emotional distress (IIED) tort claim. In Vermont, common law IIED claims require four elements: “[1] outrageous conduct, [2] done intentionally or with reckless disregard of the probability of causing emotional distress, [3] resulting in the suffering of extreme emotional distress, [4] actually or proximately caused by the outrageous conduct.”<sup>137</sup> Thus, under Vermont common law, the conduct must satisfy the high standard of *outrageous conduct* that directly results in or causes the emotional distress.<sup>138</sup> Returning to the Initiative’s survey, 93% of victims reported experiencing “significant emotional distress” following the revenge porn incident, indicating that IIED claims are an ostensibly appropriate legal tool for victims of revenge porn.<sup>139</sup> Additionally, *outrageous conduct* is defined as conduct that “goes beyond the bounds of human decency such that it would be regarded as intolerable in a civilized community.”<sup>140</sup> But, even in light of this seemingly fitting application, legal scholars still debate whether IIED claims offer victims of revenge porn sufficient justice, in part because of the generally problematic nature of civil actions, as well as the practical challenges of proving *outrageousness*—a subjective and high standard to overcome.<sup>141</sup>

Civil actions offer little in the way of compensating victims of revenge porn.<sup>142</sup> While bringing a civil lawsuit can be a useful tool for some victims,

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136. See *id.* at 357–59 (emphasizing that, while tort law theoretically applies to nonconsensual disclosure claims, difficulties arise in practice).

137. *Birkenhead v. Coombs*, 143 Vt. 167, 174–75, 465 A.2d 244, 247 (1983) (quoting *Sheltra v. Smith*, 136 Vt. 472, 476, 392 A.2d 431, 433 (1978)).

138. *Id.*

139. FRANKS, *supra* note 1, at 11.

140. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL AND EMOTIONAL HARM § 46(d) (AM. LAW. INST. 2012).

141. See, e.g., Sarah Bloom, *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, 258 (2014) (characterizing the standard for victims to meet in such IIED cases as a “high burden[] for the victim to overcome”); Fung Chen Pen, *supra* note 130, at 428 (suggesting that IIED laws “fail[] to address problems of proof” in the revenge porn context); Pollack, *supra* note 19, at 369–70 (articulating that the outrageous conduct originally intended to qualify under IIED claims cannot extend to the conduct of revenge-porn-posting); Poole, *supra* note 109, at 200–01 (conveying that “[a]t first glance, tort law seems the most applicable avenue for [revenge porn] victims,” but clarifying that a victim has a significant burden to meet when attempting to successfully bring an IIED claim in the context of revenge porn).

142. See Brief for Appellant State of Vermont at 23, *State v. VanBuren*, 2018 VT 95, 214 A.3d 791 (No. 2016–253), 2016 WL 6851279 (discussing how civil remedies in revenge porn cases are generally ineffective).

civil remedies are not nearly as effective as criminal laws for several reasons.<sup>143</sup> First, bringing a civil suit is expensive and time-consuming.<sup>144</sup> Many victims cannot afford the cost of litigation.<sup>145</sup> Second, in order to bring a civil suit, a victim must determine who exactly to sue—which, in many cases, may prove to be a very difficult task.<sup>146</sup> In particular, this would be difficult when the victim does not know who posted the material, if it was posted by a third-party website, or if it has circulated beyond the original post.<sup>147</sup> Third, civil actions typically draw more unwanted attention to the explicit materials and the victims themselves.<sup>148</sup> Although courts have been reluctant to allow civil claims to proceed anonymously, California has recently passed legislation allowing victims to bring claims under pseudonyms.<sup>149</sup> In light of California’s recent enactment, there is hope for a new trend that will allow for victims to maintain a greater level of privacy when faced with the difficult decision of whether to seek justice through civil actions.

Regardless, even if a victim were to commence a suit, there is no guarantee that he or she will be able to obtain damages, particularly when many offenders are judgment-proof.<sup>150</sup> And finally, civil actions rarely result in the removal of an explicit image—which is arguably a victim’s number-one priority.<sup>151</sup> A victim could, through a successful claim, obtain damages or injunctive relief after considerable litigation; however, the image would still remain online and could continue to circulate throughout the Internet.<sup>152</sup>

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143. See Citron & Franks, *supra* note 5, at 349 (arguing for the direct criminalization of revenge porn when civil law fails to adequately deter the posting and spreading of revenge porn materials on the Internet).

144. Poole, *supra* note 109, at 200; see also Citron & Franks, *supra* note 5, at 349 (suggesting that most victims of revenge porn do not have “the time or money to bring [civil] claims, and litigation may make little sense even for those who can afford to sue if perpetrators have few assets”).

145. Citron & Franks, *supra* note 5, at 358.

146. See Bloom, *supra* note 141, at 246 (articulating the problematic “veil of anonymity” involved with online harassment, which allows for easier targeting of victims and the inability to identify or track down perpetrators).

147. *Id.*; see also Souza, *supra* note 60, at 113 (describing the challenge of identifying the perpetrator, and therefore bringing a suit, when many posts on the Internet are anonymous).

148. See Citron & Franks, *supra* note 5, at 358 (indicating that civil actions require plaintiffs to file under their real names, thus further discouraging victims from bringing a suit).

149. 2017 CAL. STAT. 233 (codified as amended at CAL. CIV. CODE § 1708.85(f)(1) (West 2019)) (“A plaintiff in a civil proceeding . . . may proceed using a pseudonym, either John Doe, Jane Doe, or Doe . . . .”).

150. Citron & Franks, *supra* note 5, at 358. An individual is “judgment-proof” when they are unable to pay on a court judgment because they lack sufficient financial means. *Wex Legal Dictionary*, CORNELL LAW SCH., <https://www.law.cornell.edu/wex/judgment-proof> (last visited May 8, 2020).

151. Citron & Franks *supra* note 5, at 358–59; Otero, *supra* note 14, at 595.

152. Citron & Franks *supra* note 5, at 358–59.

The law would better serve victims of revenge porn if it were proactive and effectively deterred individuals from posting nonconsensual material in the first place, particularly when removing this type of material from the Internet is an overwhelming challenge.<sup>153</sup> But, where the law fails to deter a perpetrator from posting nonconsensual pornography, there must also be a legal framework in place. The law must criminalize offensive behavior, penalize the offender, remove the explicit material from the public eye, and satisfy the overall needs of each individual victim of revenge porn.

### B. Criminal Laws

Alternatively, victims of revenge porn may also pursue their cases under applicable criminal laws. Although criminal laws—as opposed to civil methods of redress—appear to provide better legal tools for victims, these laws are still ineffective against revenge porn.<sup>154</sup>

As this Article has emphasized, civil laws concerning sexual harassment in the workplace are not practical when applied in the context of revenge porn.<sup>155</sup> There are also *criminal* harassment and stalking laws.<sup>156</sup> These criminal laws<sup>157</sup> echo many of the same problems for victims that surface in civil actions, such as sexual harassment lawsuits or obtaining an abuse prevention order.<sup>158</sup> For example, criminal harassment laws require that an offender repeatedly harass the victim, when, in fact, revenge porn may consist of only one singular incident.<sup>159</sup> Harassment laws also only concern conduct where a perpetrator directly communicates with the victim, whereas revenge porn is typically circulated on a wider scale to the general public by way of the Internet.<sup>160</sup>

Overall, these particular criminal laws as applied to revenge porn cases are ineffective.<sup>161</sup> It is doubtful that lawmakers had revenge porn in mind when drafting these harassment statutes. And, in effect, these laws do not

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153. See also *supra* Part I.B (explaining how revenge porn is inherently complicated because, on account of its presence on the Internet, it can be anonymous, shared quickly, and almost impossible to remove).

154. See Citron & Franks, *supra* note 5, at 361–62 (arguing that criminal laws serve as a better deterrent than civil laws for those who post revenge porn).

155. *Supra* Part II.A.1.

156. Citron & Franks, *supra* note 5, at 365–66.

157. See, e.g., 18 U.S.C. § 2261A (2012) (prohibiting stalking).

158. *Supra* Part II.A.1

159. See Citron & Franks, *supra* note 5, at 365–66 (citing 18 U.S.C. § 2261A) (discussing the federal cyber stalking statute's requirement of a "harassing 'course of conduct'").

160. See *id.* (highlighting the differences between criminal harassment laws and revenge porn offenses).

161. Citron & Franks, *supra* note 5, at 365.

apply as needed in most of the typical revenge porn situations.<sup>162</sup> Therefore, in order to effectively combat revenge porn and adequately protect victims, the legislature must tailor the legal framework to address the wide range of issues involved with nonconsensual pornography.<sup>163</sup>

### 1. Statutes Directly Addressing Revenge Porn

Since 2012, numerous states have, in fact, enacted laws that directly criminalize nonconsensual pornography.<sup>164</sup> These state laws, while ostensibly intended to eradicate revenge porn entirely, reflect an incoherent legal framework that is problematic for a number of reasons.

First, state laws impose various different punishments for posting similar types of content.<sup>165</sup> The offense, depending on the state where the incident occurs, can be either a misdemeanor or a felony.<sup>166</sup> In effect, offenders are held to an inconsistent standard that does not always appropriately penalize clearly criminal behavior.<sup>167</sup> The disclosure or distribution of nonconsensual pornography is a felony in the following states: Arizona,<sup>168</sup> Hawaii,<sup>169</sup> Idaho,<sup>170</sup> Illinois,<sup>171</sup> Nevada,<sup>172</sup> and New Jersey.<sup>173</sup> And, in several other states, the crime may also be a felony if the perpetrator has a specific intent

162. See Poole, *supra* note 109, at 184–85 (describing the gaps in existing revenge porn statutes).

163. See Citron & Franks, *supra* note 5, at 349 (arguing for criminal laws that directly address nonconsensual pornography).

164. FRANKS, *supra* note 1, at 4; *Revenge Porn Laws*, *supra* note 3.

165. Souza, *supra* note 60, at 124.

166. Compare ARIZ. REV. STAT. ANN. §§ 13-1425(C)(1), 13-702(D), 13-801(A), 13-3821(C) (2016) (classifying the disclosure of nonconsensual, explicit material as a class 4 felony, punishable with up to one and a half years in prison, a \$150,000 fine, and registration as a sex offender), with ALASKA STAT. §§ 11.61.120(b), 12.55.035(b)(6), 12.55.135(b) (2019) (classifying the distribution of those same types of images as a class B misdemeanor, with a punishment of up to 90 days in jail and a \$2,000 fine).

167. See Souza, *supra* note 60, at 124 (arguing that, based on the offensiveness of revenge porn posting and the lighter sentences typically associated with misdemeanors, the offense should be classified as a felony).

168. ARIZ. REV. STAT. ANN. §§ 13-1425(C)(1), 13-702(D), 13-801(A), 13-821(C) (2016) (defining the offense as a class 4 felony with one and a half year's imprisonment, a \$150,000 fine, and possible sex offender registration).

169. HAW. REV. STAT. §§ 711-1110.9(2), 706-640(1)(c), 706-660(1)(b) (2019) (defining the offense as a Class C felony with up to five years in prison and a \$10,000 fine).

170. IDAHO CODE § 18-6609(f) (2019) (defining the offense as a felony).

171. 720 ILL. COMP. STAT. 5/11-23.5(f), 730 ILL. COMP. STAT. 5/5-4.5-45(a), 5/5-4.5-50(b) (2012) (defining the offense as a Class 4 felony with one to three years' imprisonment and a \$25,000 maximum fine).

172. NEV. REV. STAT. §§ 193.130(2)(d), 200.780(2) (2019) (defining the offense as a category D felony with punishment of one to four years' imprisonment and a \$5,000 fine).

173. N.J. STAT. ANN. §§ 2C:14-9(c), 2C:43-6(a)(3) (West 2016) (defining the offense as a third-degree crime with three to five years' imprisonment and a maximum \$30,000 fine).

or is a repeat offender.<sup>174</sup> The remaining states characterize the distribution of nonconsensual pornography as a misdemeanor crime and impose a much lighter sentence, typically in the form of a fine.<sup>175</sup>

Second, the laws differ as to what types of explicit material are protected.<sup>176</sup> California's revenge porn law, for instance, requires the explicit material to arise under "circumstances in which the persons agree or understand that the image shall remain private."<sup>177</sup> This privacy right is problematic for a number of reasons, but also notably emphasizes a reoccurring issue for revenge porn cases: do individuals really maintain a right to privacy in our cyber society that revolves around social media platforms, online communication, and texting or messaging?<sup>178</sup> Regardless, California's specific requirement opens the door to disputes over whether there was, in fact, an assumption of privacy for the explicit material to begin with, thus further complicating any case brought under that law.<sup>179</sup>

Third, the framework inconsistently imposes requirements of intent in order to hold an individual who distributes nonconsensual pornography accountable.<sup>180</sup> Some revenge porn laws, such as New Jersey's law, impose no intent requirement, whereas other state statutes expressly require an *intent to harm, harass, or threaten* the victim.<sup>181</sup> Additionally, other revenge porn laws, such as Virginia's law, require the offender to have malicious intent

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174. FRANKS, *supra* note 1, at 4. *See, e.g.*, MINN. STAT. § 617.261(2) (2019) (defining the offense as a misdemeanor unless there is an intent to profit or harass, in which case the law classifies the offense a felony).

175. FRANKS, *supra* note 1, at 4.

176. *Compare* ALASKA STAT. § 11.61.120(a)(6) (2019) (requiring that the explicit material, in order to qualify under the statute, "show the genitals, anus, or female breast of the other person or show that person engaged in a sexual act"), *and* CAL. PENAL CODE § 647(j)(4)(A) (West 2020) (requiring that the subject of the explicit material is an "identifiable person"), *with supra* note 131 (discussing the original language of the now-amended California revenge porn statute, which covered only "[a]ny person who photographs or records by any means the image of the intimate body part or parts of another identifiable person," and therefore, did not apply to any images taken by the subject, also known as "selfies").

177. CAL. PENAL CODE § 647(j)(4)(A). *See also* Bloom, *supra* note 141, at 268 (stating that Virginia and Utah passed statutes similar to the problematic California statute).

178. *See, e.g.*, *People v. Austin*, 2019 IL 123910, ¶¶ 17–22 (discussing relationships between social media, revenge porn, and the right to privacy).

179. Bloom, *supra* note 141, at 268.

180. *See Otero, supra* note 14, at 602 (describing one of the problems with existing nonconsensual pornography laws as "fail[ing] to provide adequate protection for victims because [the laws] are constitutionally constrained and limited by intent requirements").

181. *Compare* N.J. STAT. ANN. § 2C:14-9 (West 2016) (imposing no intent requirement), *and* MD. CODE ANN., CRIM. LAW § 3-809(c) (LexisNexis 2020) (requiring the offender to either intentionally cause or recklessly disregard harm in the form of physical injury, economic damages, or serious emotional distress), *with* OR. REV. STAT. ANN. § 163.472(a) (2019) (requiring "intent to harass, humiliate or injure another person" through the disclosure of the explicit material).

when distributing the images.<sup>182</sup> Some scholars argue that the most effective revenge porn laws are those without intent requirements, such as New Jersey's law.<sup>183</sup> While potentially more effective, these broadly drafted revenge porn laws also run a higher risk of First Amendment challenges.<sup>184</sup> Furthermore, an intent to harm, harass, or threaten would only apply in limited situations involving vengeful ex-partners.<sup>185</sup> A law requiring that the perpetrator have a malicious or vengeful intent potentially ignores cases where a perpetrator's motivation is financial gain, humiliation, or sexual gratification.<sup>186</sup> Notably, the District of Columbia aims to mitigate some of these issues by listing "financial gain" under the applicable types of intent included within the law.<sup>187</sup>

A revenge porn statute that requires *intent to cause emotional harm* poses yet another obstacle for victims to overcome.<sup>188</sup> For instance, California's revenge porn law requires that the perpetrator "knows or should know that distribution of the image will *cause serious emotional distress*, and the person depicted *suffers that distress*."<sup>189</sup> The statute's requirements are significant because, in effect, the prosecutor must prove: (1) the perpetrator knew the image would cause emotional harm and (2) that the victim, in fact, suffered that harm.<sup>190</sup> Tort law, particularly IIED claims, sets out similar requirements for proof of emotional damages.<sup>191</sup> But requiring victims to prove emotional distress or damages would mean that the victim would likely have to testify and face further public exposure.<sup>192</sup> On the other hand, as evidenced through the Initiative's survey, victims of nonconsensual pornography face a multitude of emotional, physical, and economic harms.<sup>193</sup>

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182. *E.g.*, VA. CODE ANN. § 18.2-386.2(a) (2019) (requiring both an "intent to coerce, harass or intimidate" a victim and "malicious[] disseminat[ion of]" explicit, nonconsensual material).

183. *See* Bloom, *supra* note 141, at 264 (describing the major advantages of New Jersey's law, including the absence of an intent requirement).

184. *See id.* (arguing that, because of the New Jersey law's broad application and content-based distinction, there is a higher potential for free speech or overbreadth constitutional challenges).

185. *Cf.* FRANKS, *supra* note 1, at 2 (emphasizing that, in the context of nonconsensual pornography, perpetrators' motivations can be "profit, notoriety, or entertainment").

186. *See* Citron & Franks, *supra* note 5, at 387 (arguing that the California law goes beyond what is reasonable by requiring such a level of malicious intent). *Cf. supra* Part I.B (discussing the 2017 U.S. Marines scandal and revenge porn website operators).

187. D.C. CODE § 22-3052(a)(3) (2020).

188. *See* Bloom, *supra* note 141, at 266-68 (chronicling the shortcomings involved with heightened intent requirements).

189. CAL. PENAL CODE § 647(j)(4)(A) (West 2020) (emphasis added).

190. *Id.*; *see also* Bloom, *supra* note 141, at 267 (describing problems with California's revenge porn law requirements).

191. *See supra* Part II.A.3 (discussing the difficulties for victims of revenge porn in bringing IIED claims).

192. Bloom, *supra* note 141, at 267.

193. *Supra* notes 44-49 and accompanying text.

But within California's statute, it is unclear what types of harms are applicable, thus emphasizing this standard's subjective nature.<sup>194</sup>

The lack of consistency among state laws highlights the disparate treatment for victims of nonconsensual pornography.<sup>195</sup> The New Jersey law punishes the distribution of explicit material without permission, whereas the California law requires its victim *not only* to meet that same burden, *but also* to show actual damages.<sup>196</sup> In effect, California "punish[es] the same action only when it has negative results."<sup>197</sup>

This Article's proposal for a remodeled revenge porn law takes into account the various legal issues and practical challenges raised in this Part.<sup>198</sup> The redrafted revenge porn statute will not only serve as a comprehensive legal tool for victims, but will also aim to mitigate some of the obstacles victims face under the current legal framework addressing nonconsensual pornography.

## 2. The Elements of a Successful Revenge Porn Statute

Within the existing legal framework, the Illinois revenge porn law<sup>199</sup> (Illinois Statute) represents one of the more effective laws against revenge porn.<sup>200</sup> Because of the strengths of the Illinois Statute, the drafters hoped that it would serve as a model for future federal law addressing nonconsensual pornography.<sup>201</sup> As such, the statute is useful in demonstrating the aspects of a successful legal tool for victims of revenge

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194. See Citron & Franks, *supra* note 5, at 388 (arguing for lawmakers to expressly "extend coverage to other types of serious harms . . . such as economic injuries, physical harm, or stalking" if the state is required to prove emotional harm).

195. Pollack, *supra* note 19, at 356–57 (describing the lack of "continuity" between these state laws as playing a significant role in the overall problem of revenge porn).

196. Compare N.J. STAT. ANN § 2C:14-9(c) (West 2016), with CAL. PENAL CODE § 647(j)(4)(A) (West 2020); Bloom, *supra* note 141, at 268.

197. Bloom, *supra* note 141, at 268.

198. See *infra* Part V.

199. 720 ILL. COMP. STAT. 5/11-23.5 (2012).

200. E.g., Carrie Goldberg, *Seven Reasons Illinois Is Leading the Fight Against Revenge Porn*, CYBER CIVIL RIGHTS INITIATIVE (Dec. 31, 2014), <https://www.cybercivilrights.org/seven-reasons-illinois-leading-fight-revenge-porn/> (explaining why, as of 2014, Illinois had the most promising revenge porn legislation); *Illinois Passes Aggressive Revenge Porn Law*, ANDREW CORES FAMILY LAW GRP., <http://www.coresdivorcelawyers.com/wheaton-divorce-lawyer/illinois-revenge-porn-law/> (last visited May 8, 2020) [hereinafter *Illinois Passes*] (describing and evaluating the main features of the Illinois revenge porn law).

201. Kim Bellware, *Illinois Passes New "Revenge Porn" Law That Includes Harsh Penalties*, HUFFPOST (Dec. 31, 2014), [https://www.huffingtonpost.com/2014/12/30/illinois-revenge-porn\\_n\\_6396436.html](https://www.huffingtonpost.com/2014/12/30/illinois-revenge-porn_n_6396436.html).

porn. The effective elements of the Illinois Statute will carry through to this Article's proposal for revenge porn law reform in Vermont.<sup>202</sup>

The Illinois Statute criminalizes the “[n]on-consensual dissemination of private sexual images.”<sup>203</sup> The law defines the criminal conduct as follows: (1) the intentional dissemination of an image of another person “who is identifiable from the image itself or information displayed in connection with the image” and “who is engaged in a sexual act or whose intimate parts are exposed, in whole or in part;” (2) the perpetrator “obtains the image under circumstances in which a reasonable person would know or understand that the image was to remain private;” and (3) the perpetrator “knows or should have known that the person in the image has not consented to the dissemination.”<sup>204</sup> The Illinois Statute defines this criminal conduct as a class 4 felony, with one to three years in prison and up to a \$25,000 fine.<sup>205</sup> The law appropriately classifies dissemination of nonconsensual pornography as a felony with sufficiently harsh penalties to match the offensiveness of the crime.<sup>206</sup>

The Illinois Statute is also effective because it can apply to and protect a wide range of explicit materials.<sup>207</sup> The law is not limited to only explicit materials that feature nudity, as “an image can be sexually explicit without containing nudity.”<sup>208</sup> But, on the other hand, the law's broad application does not, in effect, mistakenly criminalize innocent behavior.<sup>209</sup> The law does not only cover the classic cases of revenge porn, but also extends to those

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202. See *infra* Part V.

203. 720 ILL. COMP. STAT. 5/11-23.5.

204. *Id.*

205. 730 ILL. COMP. STAT. 5/5-4.5-45(a), 5/5-4.5-50(b).

206. See Goldberg, *supra* note 200 (discussing the severity of the Illinois Statute's punishments, as the law requires perpetrators to pay restitution to victims, imposes hefty fines, and requires a forfeiture of any profits derived from the explicit material's distribution).

207. See *supra* note 131 and accompanying text (noting how California's now-amended statute did not originally protect explicit materials such as selfies). *But see* ALASKA STAT. § 11.61.120 (2019) (requiring that the explicit material show nudity or sexual acts); CAL. PENAL CODE § 647(j)(4)(A) (West 2020) (requiring individuals “agree or understand that the image shall remain private”).

208. FRANKS, *supra* note 1, at 9. See also 720 ILL. COMP. STAT. ANN. 5/11-23.5(a)(2) (emphasis added) (defining “sexual activity” as, *inter alia*, “any transfer or transmission of semen upon any part of the clothed or *un clothed body of the victim*”); Goldberg, *supra* note 200 (describing how Illinois law effectively “recognizes that not all intimate sexual acts involve nudity. For instance, the Illinois law would apply when a victim is depicted performing oral sex or has been ejaculated upon, regardless of whether the victim is nude”).

209. See 720 ILL. COMP. STAT. 5/11-23.5(c) (exempting certain types of disclosures from criminal penalties); FRANKS, *supra* note 1, at 9 (emphasizing that an overly-broad definition of nudity or explicit imagery might mistakenly criminalize nude drawings, such as “female nipples visible through gauzy or wet fabric” or “parents who share innocuous pictures of their infants”).



cases where the perpetrator is not a former partner.<sup>210</sup> The law appropriately protects explicit material the subject creates (i.e., selfies) and material another party creates.<sup>211</sup> Thus, the Illinois Statute serves as a comprehensive legal tool with the potential to apply in a wide variety of revenge porn cases.

The Illinois Statute also includes a required mens rea for each element of the crime.<sup>212</sup> Here, the requisite mens rea for the law is *intentional* dissemination, as well as objective and subjective *knowledge* elements.<sup>213</sup> In other words, the law would not punish inadvertent disclosures.<sup>214</sup> While the Illinois Statute appropriately includes a mens rea requirement, the law does not include additional requirements regarding *motive* or emotional distress.<sup>215</sup> It is important that a revenge porn law not “confuse mens rea with motive.”<sup>216</sup> A revenge porn statute that requires an intent to harass or harm ignores cases where the perpetrator has other motivations, such as financial gain or sexual gratification.<sup>217</sup> Additionally, the Illinois Statute does not rely on a showing of the victim’s emotional distress.<sup>218</sup> In effect, courts are not required to subjectively evaluate a victim’s emotional pains, physical suffering, or economic hardship.<sup>219</sup>

Furthermore, the Illinois Statute strategically uses an objective, reasonable person standard.<sup>220</sup> Thus, the law holds the perpetrator

210. See 720 ILL. COMP. STAT. 5/11-23.5(b)(1) (defining a perpetrator as “[a] person” who “intentionally disseminates an image of another person”); FRANKS, *supra* note 1, at 10 (explaining that when a revenge porn law applies only to the conduct of a significant other, the law explicitly “allow[s] friends, co-workers, and strangers to engage in this destructive conduct with no consequence”).

211. See Goldberg, *supra* note 200 (indicating that “[t]he vast majority of intimate images (83% originate as selfies”). *But see* CAL. PENAL CODE § 647(j)(4)(A) (West 2013) (“Any person who photographs or records by any means the image of the intimate body part or parts of another . . . and the person subsequently distributes the image taken . . .”).

212. 720 ILL. COMP. STAT. 5/11-23.5(b). See FRANKS, *supra* note 1, at 7 (“[T]he requisite mens rea for each element of a criminal law should be clearly stated . . .”).

213. 720 ILL. COMP. STAT. 5/11-23.5(b)(1).

214. FRANKS, *supra* note 1, at 5.

215. See *id.* at 8 (explaining how a revenge porn statute requiring motive is ineffective and “arbitrarily distinguish[es] between perpetrators motivated by personal desire to harm and those motivated by other reasons”).

216. *Id.* at 7.

217. See *supra* Part I.B (describing the revenge porn incidents of the 2017 U.S. Marines scandal, the website operators, and the “take down” services that can help when a perpetrator would not otherwise have the requisite intent for legal culpability); Goldberg, *supra* note 200 (listing some of the many other possible motives for posting nonconsensual pornography, one of which is “for no particular reason at all” and just “for entertainment”).

218. Cf. CAL. PENAL CODE § 647(j)(4)(A) (West 2020) (requiring the “distribution of the image [to] cause serious emotional distress, and the person depicted suffers that distress”).

219. See *supra* Part II.B.1 (explaining the inherent problems with, and subjective nature of, a statute requiring a showing of emotional harm).

220. See 720 ILL. COMP. STAT. 5/11-23.5(b)(2) (2012) (“[A] reasonable person would know or understand that the image was to remain private . . . [and] knows or should have known that the person in

accountable for originally posting the explicit material, while also holding individuals on the Internet accountable for further “sharing” material that appears, to a reasonable person, to be nonconsensual.<sup>221</sup> This is perhaps an effective method to deter any *downstream distribution* and curb the public exposure of the explicit material.<sup>222</sup> The law’s standard also eliminates any disputes concerning privacy, thus avoiding “he said/she said” arguments between parties.<sup>223</sup> By imposing a reasonable person standard, explicit images maintain the presumption of privacy, even after a relationship has ended. The Illinois Statute’s reasonable person provision is a proactive solution to the inherent complexities arising from Internet harassment.<sup>224</sup>

Additionally, the Illinois Statute protects victims against *doxxing*.<sup>225</sup> Doxxing, in the context of revenge porn, occurs when a perpetrator posts a victim’s personal information alongside the explicit material.<sup>226</sup> This information can take the form of a victim’s name, address, email, or school.<sup>227</sup> While posting a victim’s nonconsensual image is in itself harassment, doxxing allows for other users to actively participate in the harassment as well.<sup>228</sup> For instance, if a perpetrator posted a victim’s

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the image has not consented to the dissemination.”); FRANKS, *supra* note 1, at 9 n.51 (describing the effectiveness of the objective standard in a revenge porn statute); Goldberg, *supra* note 200 (explaining how the statute efficiently uses a reasonable person standard to protect victims and the explicit material from further distribution).

221. See Goldberg, *supra* note 200 (describing how this provision may mitigate images from going “viral” on the Internet).

222. See *id.* (suggesting that the statute will alleviate issues of downstream distributors, or third parties who further share the nonconsensual images).

223. See 720 ILL. COMP. STAT. 5/11-23.5(b)(2) (“[A] reasonable person would know or understand that the image was to remain private . . . .”); cf. Teri Karobnik, *Who Does California’s New Revenge Porn Law Actually Protect?*, NEW MEDIA RIGHTS (Oct. 29, 2013) (emphasis omitted), [https://www.newmediarights.org/who\\_does\\_california’s\\_new\\_revenge\\_porn\\_law\\_actually\\_protect](https://www.newmediarights.org/who_does_california’s_new_revenge_porn_law_actually_protect) (discussing the ineffectiveness of California’s revenge porn law when it requires individuals to “prove that [they] agreed or understood that the photos would remain private,” thus potentially opening the door to “he said/she said” disputes).

224. See *supra* notes 64–73 and accompanying text (describing the issues with removing images from the Internet when downstream distributors have further shared the image across the web); see also *supra* Part I.B (explaining how revenge porn is inherently complicated because, on account of its presence on the Internet, it can be anonymous, shared quickly, and almost impossible to remove).

225. Doxxing is a form of online harassment. It “is the practice of revealing personally identifying information (such as names, addresses, places of employment, relatives, etc.) of people who use the Internet” in order to publicize the victim and allow for others to partake in the harassment. *Doxxing*, RATIONALWIKI, <https://rationalwiki.org/wiki/Doxxing> (last visited May 8, 2020). Doxxing, in the context of revenge porn, occurs when an individual posts explicit material and the victim’s personal information identifying the victim. Goldberg, *supra* note 200; Souza, *supra* note 60, at 122.

226. See Goldberg, *supra* note 200 (explaining that 59% of revenge porn victims have personal information posted along with the explicit images).

227. *Id.*

228. *Id.*

nonconsensual image with links to the victim's Facebook account, other users could then continue to contact and harass the victim through Facebook.

The Internet's capacities allow for the possibility of cyber harassment such as doxxing and revenge porn.<sup>229</sup> A revenge porn law that does not directly address doxxing, a common element for many revenge porn cases, fails to adequately protect victims.<sup>230</sup> A law that actively deters this type of behavior is necessary, especially when doxxing "jeopardizes victims' employment, employability, relationships, reputation, and safety."<sup>231</sup> The Illinois Statute effectively recognizes issues of doxxing by including a relevant provision on the victim's personal information.<sup>232</sup>

Finally, the last element of an effective revenge porn law concerns constitutionality, as a law has no use—and provides no justice—for a victim if the court invalidates the statute.<sup>233</sup> Some scholars argue that revenge porn laws directly infringe on First Amendment rights, including the right to free speech, because the laws are "content-based speech restrictions" and "criminaliz[e] protected expression."<sup>234</sup> The overbreadth doctrine also indicates that a court may strike down an overly broad law because of the law's potential to restrict First Amendment rights.<sup>235</sup> An overreaching law can unintentionally criminalize innocent conduct.<sup>236</sup> Laws that are not carefully drafted will be vulnerable to such constitutional challenges in court.

Therefore, in order to avoid these types of challenges, a revenge porn law must be narrowly tailored.<sup>237</sup> At minimum, the law must provide exceptions for explicit material that is voluntarily exposed, commercial in

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229. See FRANKS, *supra* note 1, at 2 ("The Internet has greatly facilitated the rise of nonconsensual pornography.").

230. See Goldberg, *supra* note 200 ("Revenge porn consumers often interpret victims' contact information as an invitation to stalk and threaten them, and the material often dominates victims' online presence.").

231. *Id.*

232. See 720 ILL. COMP. STAT. ANN. 5/11-23.5(b)(1)(B) (2012) (providing that the victim may be "identifiable from the image itself or information displayed in connection with the image").

233. See *infra* Part III (discussing the lack of justice available for a victim where a court, finding a statute unconstitutional, dismisses the case).

234. Anne Harrison, *Revenge Porn: Protected by the Constitution?*, J. GENDER RACE & JUST.: BLOG, <https://jgrj.law.uiowa.edu/article/revenge-porn-protected-constitution> (last visited Apr. 13, 2020). See also *Illinois Passes*, *supra* note 200 (describing concerns over revenge porn laws limiting First Amendment freedoms, such as free expression or free press).

235. 16A AM. JUR. 2D *Const. Law* § 428 (2020) ("The doctrine of overbreadth derives from the recognition that an unconstitutional restriction of expression may deter protected speech by parties not before the court and thereby escape judicial review.").

236. Citron & Franks, *supra* note 5, at 386.

237. See Goldberg, *supra* note 200 (explaining that a law's narrow composition is essential "so as not to sweep up expressive conduct vital to a free society").

nature, or disclosed for the purpose of public interest.<sup>238</sup> In other words, the law should not mistakenly criminalize Internet users who share commercial pornography or individuals who disclose images in their reporting of unlawful behavior.<sup>239</sup> The Illinois Statute includes these essential elements when it provides several exceptions, such as: disclosures during “criminal investigation[s],” distribution with the “purpose of, or in connection with, the reporting of unlawful conduct,” disclosures of images taken in “commercial settings,” or an intentional distribution for a “lawful public purpose.”<sup>240</sup> The careful drafting of the Illinois Statute suggests that the law would survive a constitutional challenge and, in effect, serves as a comprehensive legal tool for victims of nonconsensual pornography.

### III. CASE STUDY: VERMONT

The first case brought under the Vermont revenge porn statute, *State v. VanBuren*, emphasizes some of the previously discussed problems inherent in the existing legal framework addressing nonconsensual pornography.<sup>241</sup> Often, it is the victim who ultimately bears the burden of these problems, as illustrated in *VanBuren*, when the Vermont Supreme Court affirmed the trial court’s dismissal of the case.<sup>242</sup> The Court’s dismissal hinged on the fact that the victim in *VanBuren* willingly sent her photos to Anthony Coon, an individual with whom she did not have a relationship at the time she sent the photos.<sup>243</sup> The Court’s interpretation of the revenge porn statute emphasized the victim’s own conduct, suggesting that one who uses social media and exchanges nude photos willingly lacks the requisite reasonable expectation of privacy to obtain protection under the Vermont revenge porn statute.<sup>244</sup> Indeed, the victim there was left with no compensation, redress, or justice—and seemingly it was her own conduct that was to blame.<sup>245</sup> And although, in

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238. FRANKS, *supra* note 1, at 6 (noting that a revenge porn law should make exceptions for commercial pornography or the reporting and recording of unlawful behavior such as flashing, etc.); Bellware, *supra* note 201 (emphasizing that the Illinois law exceptions, including one allowing for the disclosure of images for a public purpose, mitigate constitutional concerns).

239. FRANKS, *supra* note 1, at 6–7; *see also* Goldberg, *supra* note 200 (describing how the exceptions in the Illinois law would protect journalists from prosecution, while reporting and explaining that “no porn enthusiast [would need] to worry about going to jail for forwarding links to his favorite commercial hardcore sites”).

240. 720 ILL. COMP. STAT. 5/11-23.5(c)(1) (2012).

241. *See generally* *State v. VanBuren*, 2018 VT 95, 214 A.3d 791 (holding, in a landmark decision, the Vermont revenge porn statute to be constitutional).

242. *Id.* ¶ 97.

243. *Id.* ¶ 90.

244. *Id.* ¶ 106.

245. *See id.* ¶ 81 (Skogland, J., dissenting) (emphasis added) (“[W]hile the majority finds a compelling state interest in preventing the nonconsensual disclosure of nude or sexual images of a person

a surprising move, the Court upheld the Vermont revenge porn law as constitutional, the subsequent dismissal of the *VanBuren* case and the implications behind the Court's reasoning remain a concern for both women and men in Vermont.<sup>246</sup>

On the morning of October 8, 2015, a Vermont woman discovered that she was tagged in nude photos that had been publicly posted on the Facebook account of another individual, Coon.<sup>247</sup> The day before, the woman had shared these photos privately with Coon on Facebook's messaging system.<sup>248</sup> After learning about the photos, the woman initially attempted to un-tag herself from them, but ultimately deleted her Facebook account altogether.<sup>249</sup> Notably, this action alone did not delete the photos, so the woman called Coon and left a telephone message requesting that he remove the photos from his Facebook.<sup>250</sup>

Shortly thereafter, she received a telephone call from Coon's number.<sup>251</sup> It was Rebekah VanBuren, an individual who claimed to be in a relationship with Coon.<sup>252</sup> Coon had previously denied any relationship with VanBuren.<sup>253</sup> Despite this fact, VanBuren had seemingly accessed Coon's Facebook account without permission after the password was inadvertently saved on her phone.<sup>254</sup> VanBuren was outraged when she saw the private photos on Coon's account and, in turn, publicly posted them to Coon's Facebook.<sup>255</sup> VanBuren publicly shared the nude images on Coon's Facebook and "tagged" the depicted woman in order to identify who was in the photos and further humiliate the woman.<sup>256</sup>

In the telephone call with the woman, VanBuren told her she was a "moraleless pig."<sup>257</sup> Refusing to take down the photos, VanBuren also threatened to "ruin" the woman and "get revenge" by informing the woman's

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obtained in the context of a confidential relationship, I cannot agree that, in this day and age of the internet, the State can reasonably assume a role in protecting people *from their own folly* . . .").

246. *Id.* ¶¶ 69, 106. See also Iris Lewis, *First Test of Revenge Porn Law Results in High Court Dismissal*, VT DIGGER (June 11, 2019), <https://vtdigger.org/2019/06/11/first-test-revenge-porn-law-results-high-court-dismissal/> (quoting Vermont Defender General, Matthew Valerio, as describing the court's ruling as "frankly a shocking response").

247. *VanBuren*, 2018 VT 95, ¶ 87.

248. *Id.*

249. *Id.*

250. *Id.*

251. *Id.*

252. *Id.*

253. *Id.* ¶ 88.

254. Brief for Appellant State of Vermont at 4, *State v. VanBuren*, 2018 VT 95, 214 A.3d 791 (No. 2016-253), 2016 WL 6851279.

255. *VanBuren*, 2018 VT 95, ¶ 89.

256. *Id.* ¶ 9.

257. *Id.*

employer, a daycare, about the photos.<sup>258</sup> The woman subsequently contacted the police.<sup>259</sup> VanBuren was charged under Vermont's revenge porn statute.<sup>260</sup> Although VanBuren took responsibility for posting the photos when speaking to the police, she also voiced her concern about whether the victim had "learned her lesson."<sup>261</sup> This statement indicated VanBuren's reason for posting the photos—revenge.<sup>262</sup>

Even though the impropriety of VanBuren's actions is clear to many, at trial, VanBuren challenged the constitutionality of the Vermont statute.<sup>263</sup> Before the Vermont superior court, VanBuren filed a motion to dismiss on the grounds that the Vermont statute was unconstitutionally vague because "it is an overbroad restraint on a protected form of speech or expression and not tailored to a compelling or important governmental purpose."<sup>264</sup> VanBuren also argued that the victim had no reasonable right to privacy over the nude photographs, because she took the photos by choice and subsequently shared them with another individual.<sup>265</sup> The court granted VanBuren's motion to dismiss.<sup>266</sup>

In making this determination, the lower court first addressed whether revenge pornography constitutes obscenity, one of several categories that do not receive full First Amendment protection.<sup>267</sup> The court stated that "merely 'nude' photographs cannot be considered obscene" and, in effect, required strict scrutiny review of Vermont's revenge porn statute.<sup>268</sup> In applying strict scrutiny, the court next found that the State failed to show that there were no

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258. *Id.* ¶ 87.

259. *Id.*

260. VT. STAT. ANN. tit. 13, § 2606 (2017).

261. *VanBuren*, 2018 VT 95, ¶ 89.

262. Decision on Motion to Dismiss at 1–2, *State v. VanBuren*, No. 1144-12-15Bncr (Vt. Super. Ct. Bennington Unit July 1, 2016) (describing the defendant's admission that she posted the photos "to exact revenge or to get back at the complainant for the prior relationship with Mr. Coon" and the defendant also desired to "harm [the complainant's] reputation in her work and did it for revenge").

263. *Id.* at 2.

264. *Id.*

265. *Id.*

266. *Id.* at 5. Notably, the lower court's decision only considered the constitutional arguments and failed to address the issue of the victim's reasonable expectation of privacy in her nude photographs. *VanBuren*, 2018 VT 95, ¶ 16.

267. Decision on Motion to Dismiss at 2–3, *State v. VanBuren*, No. 1144-12-15Bncr (Vt. Super. Ct. Bennington Unit July 1, 2016); Brief for Appellant State of Vermont at 11–12, *State v. VanBuren*, 2018 VT 95, 214 A.3d 791 (No. 2016-253), 2016 WL 6851279 ("Certain narrow and well-defined classes of expression are seen to carry so little social value that the State can prohibit and punish such expression.") (quoting *State v. Tracy*, 2015 VT 111, ¶ 17, 200 Vt. 216, 226, 130 A.3d 196, 201).

268. Decision on Motion to Dismiss at 3, *State v. VanBuren*, No. 1144-12-15Bncr (Vt. Super. Ct. Bennington Unit July 1, 2016) (emphasizing that the Vermont statute is a content-based restriction of speech "since the statute does not apply to all images disclosed with the required intent, but only to nude images as defined or ones depicting sexual conduct").

less restrictive means of meeting the State's goal.<sup>269</sup> In other words, the court questioned why civil penalties, such as injunctions or a private cause of action, were insufficient to meet the State's goal of protecting its citizens and punishing offenders.<sup>270</sup> Finally, the court raised an issue on the facts of the case and the potential overbreadth of Vermont's revenge porn statute.<sup>271</sup> In doing so, the court emphasized that this case was relatively unique for several reasons: "[c]omplainant sent the photographs to a person with whom she had a past relationship, but was not presently in a relationship with[;]" the materials were unsolicited and the complainant "would not have known who might have access to [Coon's] Facebook account;" and that it was a third-party who ultimately disclosed the explicit materials.<sup>272</sup> And finally, the court, in describing the potential for section 2606 to criminalize numerous situations, noted the overbreadth of the Vermont statute.<sup>273</sup>

Following the lower court's dismissal, the *VanBuren* case proceeded on appeal to the Vermont Supreme Court. The Court weighed in on two key aspects of the *VanBuren* case: whether the Vermont revenge porn statute, as written, was constitutional and, if so, whether VanBuren's conduct fell within the purview of the statute.<sup>274</sup> Surprisingly, the Court found that the Vermont revenge porn statute was constitutional, which left the remaining question of whether VanBuren's conduct was indeed criminal under the law.<sup>275</sup> The Court's ultimate ruling not only dismissed the case against VanBuren, but also set a significant precedent that will have long-standing implications for Vermont residents and victims of revenge pornography alike.<sup>276</sup>

Before the Vermont Supreme Court, VanBuren argued that the revenge porn statute criminalized speech based on content and, in turn, failed strict scrutiny review.<sup>277</sup> This argument further emphasized that the State had not provided adequate evidence to support the law's proposed purpose.<sup>278</sup>

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269. *Id.* at 3–4.

270. *Id.* at 4.

271. *Id.* at 4–5.

272. *Id.*

273. *See id.* at 5 (suggesting that the statute would criminalize a person's disclosure of explicit materials "who never had any relationship with complainant and who received such unsolicited sexual photographs and decided to disclose them to convince complainant not to send any more or out of anger for being the recipient" and the statute "would appear to criminalize that person's spouse who might find such unsolicited images and forward them out of anger and disgust").

274. *VanBuren*, 2018 VT 95, ¶¶ 1, 70.

275. *Id.* at ¶¶ 69, 70. *See also* Lewis, *supra* note 246 (quoting the Vermont Defender General describing the court's ruling as "shocking").

276. *VanBuren*, 2018 VT 95, ¶ 86.

277. Brief of Appellee at 9, *State v. VanBuren*, 2018 VT 95, 214 A.3d 791 (No. 2016-253), 2017 WL 872500.

278. *Id.* at 19.

VanBuren also argued that the existing legal framework in Vermont sufficiently addressed the needs of revenge porn victims, thus indicating that there were less restrictive means available for the State to reach its goal.<sup>279</sup> Indeed, VanBuren's arguments echoed many of the previously discussed problems inherent in the existing legal framework addressing nonconsensual pornography.

However, the Court ultimately disagreed with VanBuren, upholding the Vermont revenge porn statute as constitutional.<sup>280</sup> Notably, the Court declined to remove all First Amendment safeguards for revenge porn.<sup>281</sup> In doing so, the Court refused to extend the categorical exception for First Amendment protections to include revenge porn.<sup>282</sup> Similarly, citing recent U.S. Supreme Court decisions, the Court also refused to identify a new categorical exception for First Amendment protections.<sup>283</sup> Thus, the Court explained that revenge porn was indeed subject to First Amendment protections.<sup>284</sup> But despite this conclusion, the Court determined that the Vermont revenge porn statute, which restricts content-based speech, was constitutional nonetheless because the law survives strict scrutiny analysis—meaning that the law is narrowly tailored to serve a compelling state interest.<sup>285</sup>

The Court determined that the Vermont revenge porn statute served a sufficiently compelling state interest to overcome constitutional challenges.<sup>286</sup> Indeed, the Court emphasized, “[t]he government’s interest in preventing any intrusions on individual privacy is substantial; it’s at its highest when the invasion of privacy takes the form of nonconsensual pornography.”<sup>287</sup> The Court further acknowledged that speech pertaining to purely private matters receives less constitutional protections and, considering what the Vermont revenge porn statute seeks to proscribe, that

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279. *See id.* at 18–20 (describing other Vermont laws, such as criminal stalking or disorderly conduct, that could apply in a revenge porn case).

280. *VanBuren*, 2018 VT 95, ¶ 1.

281. *Id.* ¶ 22.

282. *See id.* ¶¶ 22, 28 (“Given the ill fit between nonconsensual pornography and obscenity, and the Supreme Court’s reluctance to expand the contours of the category of obscenity, we conclude that the speech restricted by Vermont’s statute cannot be fairly categorized as constitutionally unprotected obscenity.”).

283. *See id.* ¶¶ 44–46 (declining to exclude nonconsensual pornography from First Amendment protections under a new basis of the “[e]xtreme [i]nvasion of [p]rivacy”).

284. *See id.* ¶ 22 (discussing how the Vermont revenge porn statute fell subject to strict scrutiny review, which is a constitutional analysis of a statute).

285. *Id.* ¶¶ 47, 67.

286. *Id.* ¶ 48.

287. *Id.* ¶ 57.



speech clearly has no relation to matters of public concern.<sup>288</sup> The Court also found that the statute was sufficiently narrowly tailored to survive constitutional challenge.<sup>289</sup> The Court cited to the statute's limitation "to a confined class of content," as well as the "rigorous intent element" and the important exceptions for "images warranting greater constitutional protection."<sup>290</sup>

Furthermore, as the first case brought under the Vermont revenge porn statute, *VanBuren* also provided an interpretation that placed a significant emphasis on a victim's reasonable expectation of privacy.<sup>291</sup> In other words, there must be a showing of a victim's reasonable expectation of privacy regarding the explicit materials in question.<sup>292</sup> The Court further demonstrated this point by offering a narrower construction of the statute, clarifying that an individual would have no reasonable expectation of privacy for an image recorded in private but later voluntarily disclosed in a public setting.<sup>293</sup> Thus, the Court's reading of the law makes clear that a victim's expectation of privacy is a decisive factor in determining whether or not the Vermont revenge porn statute applies.

Indeed, in 2019, when the Court issued its decision on the merits, the implications of the Court's constitutional interpretation of the statute became abundantly clear. The Court affirmed the lower court's dismissal of the charges against VanBuren, citing the fact that the victim lacked a reasonable expectation of privacy over the nude photographs.<sup>294</sup> As such, VanBuren's nonconsensual disclosure of the victim's nude photos did not constitute revenge pornography under the Court's interpretation of the statute. Undeniably, the Court's decision turned on whether or not the victim in *VanBuren* had a reasonable expectation of privacy over nude photographs she voluntarily took and willingly sent to another individual over Facebook's private messenger.<sup>295</sup> But, most notably, the Court's ultimate dismissal of the case hinged on the fact that "[the victim] and Mr. Coon were not in a relationship at the time [the victim] sent Mr. Coon the photo, and there [was] no evidence in the record showing they had any kind of relationship engendering a reasonable expectation of privacy."<sup>296</sup> Thus, the Court placed

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288. *See id.* ¶ 55 (emphasizing that the statute requires that images must feature nudity, sexual content, and cannot relate to a matter of public concern by definition).

289. *Id.* ¶ 60.

290. *Id.*

291. *Id.* ¶ 65.

292. *Id.* ¶¶ 65–66, 98.

293. *Id.* ¶ 66.

294. *Id.* ¶ 97.

295. *Id.* ¶ 101.

296. *Id.* ¶ 97.

considerable importance on the victim's own conduct—her initial disclosure of the photos on private messenger—with an individual who she was not in a relationship with at the time. The Court essentially found that the victim's conduct was analogous to a voluntary, public disclosure of the nude images, which she could not have a reasonable expectation of privacy over and therefore did not qualify as revenge pornography under the Vermont revenge porn statute.

The Vermont revenge porn statute, as applied to the specific facts of the *VanBuren* case, is problematic. In part, some of the legal issues arise because of the unique circumstances involved in the *VanBuren* case.<sup>297</sup> The specific facts of the *VanBuren* case raise issues pertaining to cyber harassment, social media platforms, and ultimately expectations of privacy. If nothing else, the *VanBuren* case makes one point exceedingly clear: those who utilize the Internet and social media maintain few expectations of privacy under the law.

The facts of the *VanBuren* case also raise an important question regarding whether or not a third party should be punished under a revenge porn law.<sup>298</sup> In the *VanBuren* case, the Court determined that the victim forfeited her right to privacy when she voluntarily shared an image on a social media platform.<sup>299</sup> She did so, however, in a private message to a specific person.<sup>300</sup> A third party, arguably without permission, accessed these same images and subsequently posted them publicly.<sup>301</sup> On its face, *VanBuren* is a case where a perpetrator unlawfully accessed and disclosed images without permission, which is exactly what an effective revenge porn law *should* cover and *needs* to protect against. But from a feminist perspective, victims in these cases are denied a right to privacy merely because of their socially questionable conduct. The *VanBuren* case emphasizes that the most successful revenge porn law will address any nonconsensual disclosure of

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297. See *supra* text accompanying notes 269–74 (discussing the lower court's analysis of why *VanBuren* was not a typical revenge porn case).

298. In fact, the California revenge porn statute, as originally written, would only extend protection to material disclosed by the person who originally created that same material. Thus, the statute would not have covered “selfies” or third-party postings like those present in *VanBuren*. Cf. CAL. PENAL CODE § 647(j)(4)(A) (West 2015) (“Any person who photographs or records by any means the image of the intimate body part or parts of another . . . and the person subsequently distributes the image taken . . .”). Notably, the *VanBuren* Court did not address the issue of a third-party disclosure because the victim's conduct (her initial disclosure of the photo) forfeited any reasonable expectation of privacy over the photo to begin with, thus making the issue of the later disclosure (by a third party and unintended recipient) moot.

299. See *VanBuren*, 2018 VT 95, ¶ 98 (emphasis in original) (explaining that a reasonable expectation of privacy can only exist when “the person depicted had not *distributed* the images in a way that would undermine their reasonable expectation of privacy”).

300. *Id.* ¶ 87.

301. *Id.*

explicit materials—regardless of whether it is the original recipient of the materials or a third party making the disclosure.

The *VanBuren* case also raises the issue of whether the availability of civil actions makes Vermont's revenge porn statute overly restrictive and thus not narrowly tailored.<sup>302</sup> As discussed at length in this Article, civil actions in the context of nonconsensual pornography are inadequate forms of legal redress for victims.<sup>303</sup> In *VanBuren*, the State argued that Vermont's revenge porn statute criminalizes conduct that falls within the category of obscenity and adequately furthers the State's goal of protecting the privacy, sexual consent, and reputation of Vermonters.<sup>304</sup> And while *VanBuren* argued that civil penalties provided a less restrictive alternative, the Vermont Supreme Court rejected that argument, noting that civil and criminal penalties "do not stand in a clear hierarchy from the perspective of" a constitutional challenge.<sup>305</sup> Thus, the Court concluded that the statute, featuring both criminal and civil penalties, was both permissible under the Constitution and an effective approach to deter potential offenders.<sup>306</sup>

The lower court was concerned about the overbreadth of the Vermont revenge porn statute.<sup>307</sup> The court suggested that the law could apply in a vast number of situations where an individual, upon receiving explicit materials, discloses the material without the permission of the subject.<sup>308</sup> However, as the Vermont Supreme Court notes, the language of Vermont's revenge porn statute expressly limits the scope of the law.<sup>309</sup> The Vermont revenge porn statute has a mens rea requirement that a perpetrator must knowingly disclose the explicit materials,<sup>310</sup> thus excluding individuals who accidentally or unintentionally distribute the material or are unaware the material is nonconsensual.<sup>311</sup> Moreover, the law is even further limited in its scope

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302. See Brief of Appellee at 16–20, *State v. VanBuren*, 2018 VT 95, 214 A.3d 791 (No. 2016-253), 2017 WL 872500 (arguing that civil remedies can provide appropriate redress).

303. See *supra* Part II.A (describing the inadequacies of civil actions in the context of revenge porn cases).

304. Reply Brief for Appellant State of Vermont at 1–2, *State v. VanBuren*, 2018 VT 95, 214 A.3d 791 (No. 2016-253), 2017 WL 1233343.

305. *VanBuren*, 2018 VT 95, ¶ 68.

306. See *id.* ¶ 67 (noting how Vermont's revenge porn statute is both narrowly tailored to serve a compelling interest and also how the statute itself is limited in nature and application).

307. Decision on Motion to Dismiss at 5, *State v. VanBuren*, No. 1144-12-15Bncr (Vt. Super. Ct. Bennington Unit July 1, 2016).

308. *Id.*

309. *VanBuren*, 2018 VT 95, ¶¶ 62–65.

310. VT. STAT. ANN. tit. 13, § 2606(b)(1).

311. See Citron & Franks, *supra* note 5, at 387 (describing an effective revenge porn law as punishing only "intentional privacy invaders").

because it includes an intent requirement.<sup>312</sup> And, most importantly, the law expressly states circumstances under which the law will not apply; thus the law supplies genuine exceptions for disclosures of voluntary or commercial nudity, “[d]isclosures made in the public interest,” disclosures for the matters of public concern, and reporting of unlawful activity or criminal investigations.<sup>313</sup> The exceptions provided under the Vermont revenge porn statute are essentially twofold: first, the exceptions create a narrowly tailored law that does not inadvertently criminalize innocent behavior, and, second, the exceptions allow for conduct that has real social value—completely unlike the disclosure of nonconsensual pornography in circumstances such as the *VanBuren* case.<sup>314</sup>

As made clear throughout this Article, an effective law addressing nonconsensual pornography will necessarily provide comprehensive coverage to any number of situations, and not just those quintessential cases where a vengeful ex-partner has disclosed nonconsensual, explicit images. However, when this fact is considered alongside the Vermont Supreme Court’s interpretation of the statute, one will see the resounding implications of the Court’s narrow reading of the law. Under *VanBuren*, when a victim voluntarily shares a nude photograph (which is then later publicly reproduced without consent), the law only protects those victims who initially shared the image with a current partner and maintained an expectation of privacy over the photograph. Thus, similar to the victim in *VanBuren*, the law would only protect a victim who shares an explicit photo with a partner but would not protect that same victim if the photo were shared after the relationship had ended. Furthermore, individuals who engage in a flirtatious exchange of explicit photographs would find no protections under the Vermont revenge porn statute if they themselves become victims of nonconsensual pornography merely because they are not in a relationship. Indeed, the justification behind this seemingly inconsistent application of the law is that a victim who willingly shares an explicit photo with an individual who they are not in a relationship with effectively forfeits their reasonable expectation of privacy over the image under the law.

Although the careful drafting of the Vermont revenge porn statute is a step in the right direction, the Vermont law requires reform in order to adequately address all aspects of nonconsensual pornography, including the needs of revenge porn victims. Thus, in the context of nonconsensual

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312. Tit. 13, § 2606(b)(1) (requiring “intent to harm, harass, intimidate, threaten, or coerce the person depicted”).

313. *Id.* § 2606(d).

314. *See generally supra* notes 214–16 and accompanying text (explaining how an effective and constitutional revenge porn statute will include various social policy exceptions).

pornography, the court must find a balance between fundamental issues involving the rights to privacy and free speech. On the one hand, both sides of the argument raise valid and important issues. On the other hand, and particularly in our technology-based society, an individual's privacy is invaded on a daily basis.<sup>315</sup> So, where do we draw the line? Some consider revenge porn as a simple problem with an exceedingly simple answer,<sup>316</sup> but this type of blasé perspective downplays the reality of nonconsensual pornography. Nonconsensual pornography, as illustrated through the *VanBuren* case, boils down to a complex issue involving constitutional rights and the impact of revenge porn on victims, women, and society at large. This Article should serve as a call to action for lawmakers, advocates, and communities to acknowledge what is really at stake within the debate concerning nonconsensual pornography.

#### IV. A FEMINIST PERSPECTIVE

Nonconsensual pornography is a type of gendered violence primarily affecting women.<sup>317</sup> One can also characterize nonconsensual pornography as a form of sexual harassment that is derived from a culture that normalizes the sexual abuse of women, aims to control women and their bodies, and blames female victims.<sup>318</sup> Nonconsensual pornography is a tool used to

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315. See generally *The Privacy Project*, N.Y. TIMES, <https://www.nytimes.com/interactive/2019/opinion/internet-privacy-project.html?mtrref=undefined&gwh=358A53E98B65931254784A866B348D39&gwt=pay&assetType=REGIWALL> (last visited May 8, 2020) (documenting how technology has enabled daily invasion of privacy).

316. Following the nonconsensual, public disclosure of several female celebrities' nude photos, many users took to Twitter to blame the women, with an argument along the lines of "don't take nude photos in the first place." Kayleigh Dray, "Why Did They Have Naked Photos Anyway?": *Why Victim-Blaming Comments Like This HAVE to Stop*, CLOSER (Sept. 22, 2014), <https://closeronline.co.uk/real-life/news/naked-photos-anyway-victim-blaming-comments-like-stop-opinion/>. In response, many feminist advocates likened this argument to the highly problematic—but extremely typical—victim-blaming that occurs for victims of sexual assault. See *id.* (equating the argument of "not taking the explicit photos in the first place" with the attitude that correlates a sexual assault to a woman's revealing clothing).

317. See FRANKS, *supra* note 1, at 11 (relying on the Initiative's study that showed 90% of the victims surveyed were female). See *supra* Part I.A for further discussion of the Initiative's study.

318. See Bloom, *supra* note 141, at 278–80 (arguing that revenge porn should be considered as sexual misconduct under the law); Sam Finch, *6 Reasons Why Revenge Porn is Really F\*cked Up (And How One Woman is Pushing Back)*, EVERYDAY FEMINISM (June 16, 2015), <https://everydayfeminism.com/2015/06/6-reasons-why-revenge-porn-is-actually-really-fcked-up-and-how-one-woman-is-pushing-back/> (contending that revenge porn is a type of sexual violence stemming from rape culture); FRANKS, *supra* note 1, at 3 ("Nonconsensual pornography often plays a role in intimate partner violence, with abusers using the threat of disclosure to keep their partners from leaving or reporting their abuse to law enforcement."); Amy Lai, *Revenge Porn as Sexual Harassment: Legislation, Advocacies, and Implication*, 19 J. GENDER RACE & JUST. 251, 251–53 (2016) (explaining how revenge porn, used to harass and humiliate, should be classified within sexual harassment laws).

silence, shame, and harass women.<sup>319</sup> From the perspective of a feminist advocate, revenge porn has no socially redeeming qualities and contributes nothing positive to our society.

While revenge porn features a host of predominantly female victims, there are some cases where the victim is male.<sup>320</sup> Cases featuring male victims, in particular, reveal gender bias, by showing how male victims receive different treatment under the law in the context of nonconsensual pornography cases. For instance, the infamous case where a Florida court awarded a \$140 million verdict in favor of Terry Bollea—more popularly known as “Hulk Hogan”—when Gawker Media, an online news outlet, reported on and posted portions of a sex tape featuring Bollea’s extramarital affair to the company’s website.<sup>321</sup> Bollea filed suit against Gawker Media, claiming invasion of privacy, publication of private facts, violation of the right of publicity, and infliction of emotional distress.<sup>322</sup> In the *Gawker* case, Bollea’s claim hinged on the fact that Gawker’s disclosure of the sex tape violated Bollea’s privacy, even in the face of opposing counsel’s argument on behalf of Gawker for the right of freedom of the press.<sup>323</sup>

The significant emphasis on Bollea’s right to privacy presents a stark contrast to cases like *VanBuren*, where the Vermont Supreme Court questioned that very same right when faced with a female victim who voluntarily disclosed her own explicit images in a seemingly private fashion.<sup>324</sup> As illustrated through the *Gawker* case, a court may give the legal claim different weight when the victim is male. In an interlocutory appeal, a Florida court explained that while Bollea is a public figure who shared much of his life with the public, “we do not suggest that every aspect of his private life is a subject of public concern.”<sup>325</sup> Back at trial, Bollea successfully convinced the jury that, despite his public persona as Hulk Hogan, he

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319. Citron & Franks, *supra* note 5, at 353; Pollack, *supra* note 19, at 366.

320. See *Revenge Porn Takes Toll on Millions, Study Shows*, PHYS.ORG (Dec. 13, 2016), <https://phys.org/news/2016-12-revenge-porn-toll-victims.html> (noting the presence of male victims in the context of nonconsensual pornography); FRANKS, *supra* note 1, at 11 (inferring that 10% of the victims of nonconsensual pornography in the Initiative’s study were male).

321. *Gawker Media, LLC v. Bollea*, 129 So. 3d 1196, 1198 (Fla. Dist. Ct. App. 2014). See Final Judgment, *Bollea v. Gawker Media LLC*, No. 12012447-CI (Fla. Cir. Ct. June 18, 2016), 2016 WL 4073660 (entering the jury’s verdict).

322. *Gawker Media*, 129 So. 3d at 1198.

323. See Eriq Gardner, *Judge Upholds Hulk Hogan’s \$140 Million Trial Victory Against Gawker* (May 25, 2016), <https://www.hollywoodreporter.com/thr-esq/judge-upholds-hulk-hogans-140-897301> (describing how Bollea’s attorney placed significant emphasis on the importance of Hulk Hogan’s privacy throughout the case).

324. *VanBuren*, 2018 VT 95, ¶¶ 66, 97.

325. *Gawker Media*, 129 So. 3d at 1201. The court also acknowledged that Bollea, as “Hulk Hogan,” shared much of his personal, private life, including information pertaining to his affair, to the public through media outlets and on his reality television show. *Id.* at 1200–01.

maintained a reasonable expectation of privacy in his private life as Terry Bollea, and Gawker violated that privacy by publishing his sex tape.<sup>326</sup> In fact, the *Gawker* jury awarded an extremely large verdict to Bollea and, in effect, ascribed social value to a male victim's right to privacy—even after the appellate court said that “[w]e are hard-pressed to believe that Mr. Bollea truly desired the affair and Sex Tape to remain private.”<sup>327</sup>

In the *VanBuren* case, however, the Court found that the victim forfeited her right to privacy by voluntarily sending a nude image through a private message on Facebook to another individual, essentially deeming this act to be analogous with a public disclosure.<sup>328</sup> The Court's argument relied heavily on the fact that the female victim could not have maintained an expectation of privacy over the explicit photo when she sent it to an individual with whom she did not have a current relationship.<sup>329</sup> From the Court's perspective, even when the female victim created the image in private, the victim maintained no expectation of privacy when someone else disclosed it in this so-called “public fashion.”<sup>330</sup> This focal point of the Court's analysis is significant when compared to the *Gawker* case. In that case, Bollea filmed an explicit video that featured an extramarital affair.<sup>331</sup> Bollea frequently discussed the affair on national television to media outlets and during his reality TV show.<sup>332</sup> Yet, contrary to the victim in *VanBuren*, the jury upheld Bollea's right to privacy—even in light of his own conduct.

Albeit, the facts in the *Gawker* and *VanBuren* cases play some role in the overall disparities between the two outcomes, but both parties fell victim to the same crime—nonconsensual disclosure of sexually explicit materials. And, in this context, the law should recognize and protect the right to privacy regardless of the victim's gender. Certainly, Terry Bollea's status as a celebrity also allowed for a more publicized and successful lawsuit, but all victims—and not just high-profile, celebrities—deserve justice. For the victim in the *VanBuren* case, the legal system failed to sufficiently compensate her for her suffering. It was even suggested that the victim in *VanBuren*, despite her embarrassment, pain, and shame, should have been

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326. See Wayne Cohen & Nicole Schneider, *How Celebrities May Wrestle Media After Hulk Hogan Case*, LAW360 (Sept. 9, 2015), <https://www.law360.com/articles/836561/how-celebrities-may-wrestle-media-after-hulk-hogan-case> (explaining Bollea's dual personality privacy argument).

327. *Gawker Media*, 129 So. 3d at 1201 n.5.

328. *VanBuren*, 2018 VT 95, ¶ 97.

329. *Id.*

330. See *id.* ¶ 66 (discussing the limitations of Vermont's revenge porn statute, one of them being instances where a victim takes a photo privately and distributes it in such a way that it undermines any right to privacy).

331. *Gawker Media*, 129 So. 3d at 1198.

332. *Id.* at 1200–01.

satisfied by the mere fact that the images in question were eventually removed from Facebook.<sup>333</sup> The ultimate dismissal of the *VanBuren* case demonstrates a clear lack of justice for the victim. Thus, there is an interesting comparison to be made between Bollea's \$140 million verdict and a female-victim case, like *VanBuren*, that significantly emphasizes the victim's own conduct—or indiscretions—rather than the victim's ultimate right to privacy and overall need for protection from the disclosure of nonconsensual pornography.<sup>334</sup>

#### V. PROPOSAL FOR REVENGE PORN LAW REFORM

As illustrated through the *VanBuren* case, the law as currently written raises serious doubts and concerns for many because of its potential for constitutional challenges.<sup>335</sup> However, the Vermont Supreme Court's ruling, upholding Vermont's revenge porn statute as constitutional, provided groundbreaking precedent.<sup>336</sup> In effect, this outcome upholds Vermont's nonconsensual pornography law.<sup>337</sup> But while, importantly, the Court's ruling keeps the Vermont law as currently written intact and in force, it is the Court's dismissal of the criminal case against *VanBuren* that stands as a stark reminder of the troubles still facing victims of nonconsensual pornography. Without a doubt, the Vermont Supreme Court's opinion in *VanBuren* is still a landmark ruling that could provide lawmakers with sufficient motivation or pressure to consider reform of Vermont's current revenge porn law. But, in light of the Court's subsequent interpretation of the Vermont porn statute requiring victims to have an expectation of privacy to fall within the law's reach,<sup>338</sup> it is clear that the law's practical application (particularly in our technology-based society) will be a challenge moving forward. Indeed, *VanBuren* is yet another example where nonconsensual pornography, and the

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333. Brief of Appellee at 20, *State v. VanBuren*, 2018 VT 95, 214 A.3d 791 (No. 2016-253), 2017 WL 872500.

334. See generally Final Judgment, *Bollea v. Gawker Media LLC.*, No. 12012447-CI (Fla. Cir. Ct. June 18, 2016), 2016 WL 4073660 (setting forth the jury's award in damages). This type of victim blaming runs parallel to the criticisms of female victims of sexual assault. Gabrielle Jackson, *Revenge Porn and the Morality Police: Stop Blaming Women For Being Alive*, THE GUARDIAN (Feb. 19, 2016), <https://www.theguardian.com/commentisfree/2016/feb/19/revenge-porn-and-the-morality-police-stop-blaming-women-for-being-alive> ("Telling people to stop taking photos of themselves if they don't want to [be victims of revenge porn] . . . is the equivalent of telling women not to dress slutty if they don't want to [] get [victimized].").

335. See *VanBuren*, 2018 VT 95, ¶ 83 (Skogland, J., dissenting) ("My primary war with the statute is simply this. The State has at its disposal less restrictive means to protect Vermonters against invasion of their privacy than subjecting a violator to a criminal penalty.").

336. *Id.* ¶ 1.

337. *Id.*

338. *Id.* ¶ 66.



clearly offensive behavior involved, goes unpunished, leaving not only a victim with little compensation and no justice, but also other community members, particularly women, vulnerable to similar types of harassment.

The Vermont revenge porn statute, like many other state laws addressing nonconsensual pornography, does not serve as a comprehensive legal tool for victims. The law is an inadequate deterrent for offenders and fails to sufficiently provide justice for victims of revenge porn. This Article urges reform of Vermont's revenge porn statute, particularly in light of the recent *VanBuren* case—which highlights some of the law's current inadequacies. This Article proposes that Vermont should, for the purpose of creating a stronger, more aggressive law, redraft its current revenge porn statute. This Article's proposal tailors the redrafted law to address not only feminist issues and victims' rights, but also the intricacies involved with nonconsensual pornography as a form of cyber harassment.

Victims will not have an effective legal tool against revenge porn unless there is a comprehensive system in place to address the full range of complexities involved with nonconsensual pornography. This Article also proposes that the State should create additional systems alongside the reformed Vermont statute in hopes of mitigating issues beyond the law's reach, including proactively limiting nonconsensual image uploads and sharing, increasing social awareness by educating individuals about the significant consequences of revenge porn, and perhaps deconstructing the gender bias and public perception of female victims of nonconsensual pornography.

VERMONT MODEL STATUTE: DISCLOSURE OF NONCONSENSUAL,  
SEXUALLY EXPLICIT MATERIALS

(a) A person violates this section if:

(1) he or she knowingly intentionally discloses<sup>339</sup> the nonconsensual, sexually explicit images<sup>340</sup> of another person:

(A) who is identifiable from the image or identified through information displayed along with the image; and

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339. The term *discloses* includes any distribution, sharing, publishing, transfer, or reproduction of the image in question.

340. The term *images* includes photographs, videos, or any digital reproduction of these forms of visual images.

(B) who is partially or fully nude<sup>341</sup> or engaged in sexual conduct;<sup>342</sup>  
and  
(C) who has not expressly consented to the public disclosure of the image; and  
~~(–) with the intent to harm, harass, intimidate, threaten, or coerce the person depicted, and the disclosure would cause a reasonable person to suffer harm~~

(2) a reasonable person would know or understand that the image was to remain private; and

(3) the person knows or recklessly disregards the risk that the person in the image has not consented to the disclosure or would not consent to the further dissemination of the image.

(b) This provision does not apply to disclosures made in the public interest, including but not limited to:

(1) in connection with reporting unlawful behavior, or in the context of legal proceedings, medical treatments, or criminal investigations.

(c) This provision does not apply to disclosures of images featuring voluntary nudity in a public or commercial setting.

(d) The violation of section (a) of this provision is a misdemeanor offense, resulting in imprisonment for not more than two years or fined not more than \$2,000.00, or both and subsequent violations resulting in a felony offense with the penalties listed under section (e) of this provision.

(e) A person who violates section (a) of this provision with the intent to harm, harass, threaten, coerce, cause emotional distress, or with the intent of gaining financial profit from the disclosure shall be guilty of a felony offense, with imprisonment of one to three years, fines up to \$25,000, or both.

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341. The term *nude* includes: “the fully unclothed, partially unclothed or transparently clothed genitals, pubic area, anus, or if the person is female, a partially or fully exposed nipple, including exposure through transparent clothing.” 720 ILL. COMP. STAT. ANN. 5/11-23.5(a) (2012).

342. See VT. STAT. ANN. tit. 13, § 2821 (2018), for the activities included within the term “sexual conduct.”

Revenge porn laws are not limited to the United States, and we can learn from positive examples abroad.<sup>343</sup> Scotland's recently enacted Abusive Behavior and Sexual Harms Act (Scotland Act) demonstrates another nation's approach to criminalizing revenge porn.<sup>344</sup> In light of the projected success of the Scotland Act,<sup>345</sup> lawmakers and advocates here could learn from global efforts to combat nonconsensual pornography and incorporate these ideas into our own strategies. The Scotland Act has the potential to be effective because it imposes consistent standards across the board.<sup>346</sup> Additionally, beyond the law's harsh penalties, Scotland has developed a public campaign focused on educating individuals about the consequences of nonconsensual pornography.<sup>347</sup> The campaign, called "Not Yours to Share," has an interactive website and a help hotline available for victims of nonconsensual pornography.<sup>348</sup> Short of enacting federal legislation to criminalize nonconsensual pornography, local communities and state officials could learn from Scotland's hands-on approach of public outreach, education, and prevention programs.

The proposed system should also aim to effectively eliminate nonconsensual pornography altogether. Although there is no perfected method for this as of 2020, there have been steps in the right direction that could provide useful fodder for developing a comprehensive system. For instance, consider Facebook's new program.<sup>349</sup> It seems utterly counterintuitive, but perhaps is an effective starting point when we, as a society, cannot control the speed at which material spreads across the

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343. See Shradha Nigam, *Revenge Porn Laws Across the World*, CTR. FOR INTERNET & SOC'Y (Apr. 25, 2018), <https://cis-india.org/internet-governance/blog/revenge-porn-laws-across-the-world> (listing revenge porn laws by country).

344. Abusive Behaviour and Sexual Harm (Scotland) Act 2016, (ASP 22) § 2.

345. See Rachael Revesz, *Scotland to Punish Revenge Porn Crimes More Harshly than England with 5 Year Maximum Sentence*, INDEPENDENT (July 3, 2017), <https://www.independent.co.uk/news/uk/home-news/revenge-porn-law-scotland-maximum-sentence-5-years-sharing-naked-photos-a7821856.html> (describing the Scotland Act as "'milestone' legislation").

346. *But see supra* Part II.B.1 (discussing the legal issues involved with state laws addressing nonconsensual pornography that impose inconsistent standards between states).

347. The Scotland Act imposes a maximum imprisonment of five years. *Sharing Images Without Consent*, SCOTTISH GOVERNMENT (July 3, 2017), <https://beta.gov.scot/news/sharing-images-without-consent/>. *See id.* (describing the collaborative effort between various agencies, including the "Scottish Women's Aid, Rape Crisis Scotland, Zero Tolerance, Police Scotland and the Crown Office," as engaging in public outreach).

348. See generally NOTYOURSTOSHARE, <http://notyourstoshare.scot> (last visited May 8, 2020), for Scotland's interactive anti-revenge porn website.

349. *See supra* Part I.B (describing Facebook's new system, where users proactively submit their own explicit photos in order for the platform to screen for and appropriately block any following uploads of the same explicit image from other users).

Internet.<sup>350</sup> In other words, the *sharing* aspect and speed of the sharing constitute just one hurdle to overcome when dealing with cybercrimes.<sup>351</sup> But sharing is the type of issue that is also necessary to consider within revenge porn law reform. With the Facebook method in mind, the comprehensive system might include a preventative measure that aims to proactively monitor Internet uploads by providing alerts to victims or blocking user uploads of pre-registered nonconsensual pornography.

Lawmakers must take all the elements of revenge porn into consideration when developing an effective legal tool. A comprehensive system will, indeed, include a law that effectively deters perpetrators and punishes criminal behavior. But the system also needs to address the more complex aspects of revenge porn if society ever hopes to fully eradicate nonconsensual pornography.

#### CONCLUSION

Although the careful drafting of the Vermont revenge porn statute is a step in the right direction, the Vermont law requires reform in order to adequately address all aspects of nonconsensual pornography. Vermont lawmakers should tailor the law to address the needs of victims, while also respecting the constitutional rights of Vermonters. And, as illustrated through the *VanBuren* case, the law as currently written and interpreted by the Vermont Supreme Court raises serious doubts about its practical application and ability to effectively protect victims of revenge pornography in Vermont.

But, the issues raised concerning nonconsensual pornography also extend to a much larger demographic than just Vermonters. Nonconsensual pornography is a systemic, social issue that remains relevant to women, men, and lawmakers alike. Nonconsensual pornography is an issue that impacts and concerns *all citizens* and it will take a collective, comprehensive response to effectively begin to combat the devastating social presence of revenge porn.

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350. *See supra* Part I.B (explaining that, because of its online presence and the nature of downstream distribution, nonconsensual pornography is exceedingly difficult to remove once an individual initially publishes the material).

351. *See supra* notes 64–73 and accompanying text (articulating the practical issues involved with downstream distribution in the context of nonconsensual pornography).