

SLEEPING WITH THE DEVIL: HOW REVENGE PORN RUINS LIVES AND WHAT STATES CAN DO TO HELP

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ABSTRACT

In an increasingly digital world, new complications inevitably arise as a result of the relationship between technology and the law. A new phenomenon involving capturing and sharing sexually explicit photographs with significant others is one such complication. When there is consent to the capture of the image, but not to the dissemination of the image, the image is considered nonconsensual pornography, colloquially referred to as “revenge porn.” This name is often a reflection of the typical scenario in which a scorned former lover posts sexually explicit photographs online as revenge for his rejection. Thirty-eight states, in addition to the District of Columbia, currently have laws prohibiting the distribution of nonconsensual pornography. Although many of these statutes share common elements, such as consent and intent requirements, others have unique elements; some statutes expand and some limit the protections and remedies of potential revenge porn victims. Although these relatively recent laws are a step in the right direction toward victims’ protection, no law is perfect. This Note presents the potential pitfalls of current legislation aimed at preventing the proliferation of revenge porn and suggests specific provisions that can be added to existing nonconsensual pornography laws or used as a basis for states that have not yet enacted such laws.

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INTRODUCTION

In New York, a twenty-seven-year-old woman received sexually explicit Facebook messages from men she did not know.¹ When she investigated the reason behind the sudden influx of obscene messages, the mystery was solved, but a new nightmare began. She discovered a tape of herself from ten years earlier, when she was just seventeen years old, engaged in sexual intercourse with her then boyfriend.² She learned that the video had been shared 1200 times, and that it included her name and linked to her Facebook page, which enabled the strange men to contact her.³

After losing her phone, a fifty-two-year-old California woman found an online post containing almost a dozen semi-nude images of her and her husband.⁴ The post contained the woman's personal information, including links to her LinkedIn and Facebook pages, a copy of her resume, and a message imploring the viewer to "expose the whore."⁵ The post had more than 50,000 comments.⁶

Unfortunately, stories like these often end in tragedy. In Ohio, for example, high school student Jessica Logan committed suicide because of the constant torture and bullying she suffered due to explicit photographs her ex-boyfriend shared with other students at their school.⁷ Jessica's death, sadly, is not an isolated

1. Julia Marsh, *'I Haven't Stopped Crying Since': Tumblr Revenge Porn Victim*, N.Y. POST (Mar. 20, 2017, 2:11 AM), <http://nypost.com/2017/03/20/tumblr-under-fire-for-ignoring-revenge-porn-posts/>.

2. *See id.*

3. *See id.*

4. *See id.*

5. *See id.*

6. *See id.*

7. The students, mainly other girls in the school, harassed her, calling her "whore" and "slut," causing Jessica to become depressed and unable to attend school. Unwilling to continue to play the victim, Jessica went on a Cincinnati news program in May of 2008 to talk about her experience with cyberbullying and the potential consequences of sending sexually explicit photographs. Two months later, Jessica's mother, Cynthia, came home to find her daughter had hanged herself due to the constant torture of the bullying she suffered from the leaked photographs. *See* Mike Celizic, *Her Teen Committed Suicide Over 'Sexting'*, TODAY (Mar. 6, 2009, 9:26

incident.⁸ Public display of private images has harmful and, as in Jessica Logan's case, catastrophic effects. Despite this, the only state referenced in the scenarios above that criminalizes revenge porn is California;⁹ neither New York nor Ohio have any law addressing such heinous and dangerous behavior.¹⁰

Revenge porn is the distribution of an individual's sexually explicit images without her consent.¹¹ Not all actors that engage in this behavior, however, are motivated by revenge or any feeling of ill will toward the victim.¹² Revenge porn, therefore, may be more accurately described as nonconsensual pornography.¹³ Nonconsensual pornography has the potential to destroy a victim's life. According to the Cyber Civil Rights Initiative, these images can ruin educational and employment opportunities as well as interfere with or destroy a victim's intimate relationships.¹⁴ Victims of nonconsensual pornography have been "threatened with sexual assault, stalked, harassed, fired from jobs, and forced to change schools."¹⁵ As Jessica Logan's tragic

AM), <http://www.today.com/parents/her-teen-committed-suicide-over-sexting-2D80555048>.

8. Around the world, revenge pornography victims have committed suicide after the torture they experienced, including Mercy Bundi of Uganda, Julia Rebecca of Brazil, and Tiziana Cantone of Italy. See Miriam Berger, *Brazilian 17-Year-Old Commits Suicide After Revenge Porn Posted Online*, BUZZFEED (Nov. 20, 2013, 4:19 PM), [https://www.buzzfeed.com/miriamberger/brazilian-17-year-old-commits-suicide-after-revenge-pornpos?utm_term=.qvOzxAAk\]X#.idXxkrrYzb](https://www.buzzfeed.com/miriamberger/brazilian-17-year-old-commits-suicide-after-revenge-pornpos?utm_term=.qvOzxAAk]X#.idXxkrrYzb); Eric J. Lyman, *Italy Stunned by Suicide of Woman Tormented by Sex Tape*, USA TODAY (Sept. 16, 2016, 4:22 PM), <http://www.usatoday.com/story/news/world/2016/09/16/italy-suicide-sex-tape/90497402/>; Angira Zadock, *Girl Tormented by Her Facebook 'Lover' Kills Self*, DAILY NATION (Sept. 28, 2015), <http://www.nation.co.ke/news/Girl-kills-self-over-Facebook-tormentor/-/1056/2889578/-/yfe86d/-/index.html>.

9. See CAL. PENAL CODE § 647(j)(4)(A) (Deering 2017).

10. See *38 States + DC Have Revenge Porn Laws*, CYBER C.R. INITIATIVE, <https://www.cybercivilrights.org/revenge-porn-laws/> (last visited Sept. 24, 2017).

11. *Frequently Asked Questions*, CYBER C.R. INITIATIVE, <https://www.cybercivilrights.org/faqs/> (last visited Sept. 24, 2017) [hereinafter *CCRI FAQ Sheet*] (providing definitions under "What is revenge porn?"). For the purposes of this Note, the victim is referenced using female pronouns while the poster/actor is referenced using male pronouns due to the overwhelming majority of revenge porn offenses falling into this dichotomy. This is in no way meant to ignore the instances of revenge porn perpetrated by women, those that occur in same sex relationships, or by/to nonbinary individuals, etc.

12. *Id.*

13. The terms "revenge porn" and "nonconsensual pornography," although slightly distinguished here, will be used interchangeably throughout this Note. See *id.*

14. *Id.*

15. *Id.*

example demonstrates, victims of revenge porn are not immune from the threat of suicide.¹⁶

In this brave new world of technological advances, laws must keep up with the ever-changing needs of society as it adapts to those advances. Sharing explicit photos nonconsensually is a recent phenomenon, and our laws must reflect the seriousness of such privacy violations. These protections must extend to both the privacy expected between people sharing such images and the privacy expected while using electronic devices from hackers, or “virtual Peeping Toms,” who happen to stumble upon such images. As more states enact new laws, or repurpose old laws to address this problem, we must ensure that these laws are crafted in a way that protects the largest number of potential victims. Because the majority of state legislatures now view this behavior as dangerous enough to criminalize,¹⁷ the discussion necessarily moves from the merits of criminalization to the improvement of existing laws to best protect society.

This Note examines current laws fighting against nonconsensual pornography and endorses the advancement and proliferation of these laws at the state level throughout the country. Part I of this Note analyzes the legislative landscape of the states that currently have revenge porn laws. It examines both statutes specifically meant to combat nonconsensual pornography and statutes that have been amended to include nonconsensual pornography, as well as the key and unique statutory elements included in these laws. Part II discusses the potential pitfalls of current legislation and how addressing these issues could greatly increase states’ success in combating revenge porn. Part III suggests both provisions that should be included in new legislation and amendments to strengthen existing legislation. This Note concludes by proposing states draft victim-centric, general-intent statutes to protect against revenge porn. These statutes should punish both actual disclosure and the threat

16. See *supra* notes 8, 11, 12.

17. See *38 States + DC Have Revenge Porn Laws*, *supra* note 10.

thereof, mandate the destruction of nonconsensual pornographic images, and treat including personal information as an aggravating circumstance requiring harsher punishment.

I. CURRENT STATUTES CRIMINALIZING NONCONSENSUAL PORNOGRAPHY

Nonconsensual pornography is “defined as the distribution of sexually graphic images of individuals without their consent . . . includ[ing] both images originally obtained without consent (e.g. by using hidden cameras, hacking phones, or recording sexual assaults) as well as images consensually obtained within the context of an intimate relationship.”¹⁸ Thirty-eight states, in addition to the District of Columbia, criminalize nonconsensual pornography.¹⁹ The laws criminalizing nonconsensual pornography vary drastically from state to state regarding the crime’s

18. *CCRI FAQ Sheet*, *supra* note 11.

19. Because this is such a new problem, states have enacted laws quite recently. At the time this Note was drafted, only 34 states and the District of Columbia had laws criminalizing revenge porn. During the editing process, another four laws were passed to deal with this issue. These four laws are included in this final Note. *See* IDAHO CODE § 18-6609 (2017); IOWA CODE § 708.7 (2017); W. VA. CODE § 61-8-28a (2017). This number also includes South Dakota’s law that seems only to protect against situations in which the victim also did not consent to the capture of the image. *See* S.D. CODIFIED LAWS § 22-21-4 (2017). In total, 38 states and the District of Columbia have criminalized revenge pornography. These states are Alabama, ALA. CODE § 13A-6-240 (2017); Alaska, ALASKA STAT. § 11.61.120(a)(6) (2017); Arizona, ARIZ. REV. STAT. ANN. § 13-1425 (2017); Arkansas, ARK. CODE ANN. § 5-26-314 (2017); California, CAL. PENAL CODE § 647(j)(4)(A) (Deering 2017); Colorado, COLO. REV. STAT. § 18-7-107 (2017); Connecticut, CONN. GEN. STAT. § 53a-189c (2017); Delaware, DEL. CODE ANN. tit. 11, § 1335 (2017); Florida, FLA. STAT. § 784.049 (2017); Georgia, GA. CODE ANN. § 16-11-90 (2017); Hawaii, HAW. REV. STAT. § 711-1110.9 (2017); Idaho, IDAHO CODE § 18-6609 (2017); Illinois, 720 ILL. COMP. STAT. 5/11-23.5 (2015); Iowa, IOWA CODE § 708.7 (2017); Kansas, KAN. STAT. ANN. § 21-6101(a)(8) (2016); Louisiana, LA. STAT. ANN. § 14:283.2 (2017); Maine, ME. STAT. tit. 17-A, § 511-A (2017); Maryland, MD. CODE ANN., CRIM. LAW § 3-809 (LexisNexis 2017); Michigan, MICH. COMP. LAWS § 750.145e (2017); Minnesota, MINN. STAT. § 617-261 (2017); Nevada, NEV. REV. STAT. § 200.780 (2015); New Hampshire, N.H. REV. STAT. ANN. § 644:9-a (2017); New Jersey, N.J. STAT. ANN. § 2C:14-9 (West 2017); New Mexico, N.M. STAT. ANN. § 30-37A-1 (2017); North Carolina, N.C. GEN. STAT. § 14-190.5A (2017); North Dakota, N.D. CENT. CODE § 12.1-17-07.2 (2017); Oklahoma, OKLA. STAT. tit. 21, § 1040.13b (2017); Oregon, OR. REV. STAT. § 163.472 (2015) (amended by 2017 Or. LAWS Chap. 318, at 2-3); Pennsylvania, 18 PA. CONS. STAT. § 3131 (2017); South Dakota, S.D. CODIFIED LAWS § 22-21-4 (2017); Tennessee, TENN. CODE ANN. § 39-17-318 (2017); Texas, TEX. PENAL CODE ANN. § 21.16 (West 2017); Utah, UTAH CODE ANN. § 76-5b-203 (LexisNexis 2017); Vermont, VT. STAT. ANN. tit. 13, § 2606 (2017); Virginia, VA. CODE ANN. § 18.2-386.2 (2017); Washington, WASH. REV. CODE § 9A.86.010 (2017); West Virginia, W. VA. CODE § 61-8-28a (2017); and Wisconsin, WIS. STAT. § 942.09 (2017). *See also 38 States + DC Have Revenge Porn Laws*, *supra* note 10.

classification as a felony or misdemeanor, its elements, and its consequences.²⁰ Some states drafted new statutes to address revenge porn, while others amended preexisting laws to extend to revenge porn, such as those criminalizing harassment²¹ and disorderly conduct.²² Many statutes share key criminal elements, such as a lack of the victim's consent.²³ Some include a specific intent requirement, under which a perpetrator must act with a specific state of mind to be found guilty.²⁴ Some states have unique statutory provisions that either greatly expand or severely limit potential victims' rights.²⁵ Regardless of the laws' individual parts, each attempts to prevent and punish the dissemination of nonconsensual pornography.

A. Key Criminal Elements

Current state laws prohibiting nonconsensual pornography have two key elements: consent and intent.²⁶ Most revenge porn laws require that the actor who disseminated the images did so (1) without the victim's consent and (2) with the specific intent to harass or otherwise harm the victim.²⁷ When discussing revenge porn, many confuse a victim's consent to capture an image with consent to disseminate the image. The latter, consenting to someone posting or otherwise distributing the image, is the issue in revenge porn cases. The consent issue is integral to convicting violators under these laws. Intent, on the other hand, is featured in fewer of these laws. States without intent requirements have recognized the only reason to post such explicit

20. Compare CAL. PENAL CODE § 647(j)(4)(A) (charging offenders with a felony), with N.C. GEN. STAT. § 14-190.5A(b)-(c) (charging offenders with a misdemeanor).

21. See ALASKA STAT. § 11.61.120.

22. See CAL. PENAL CODE § 647(j)(4)(A).

23. See, e.g., CONN. GEN. STAT. § 53a-189c(a); LA. STAT. ANN. § 14:283.2(A)(3); MINN. STAT. § 617-261(1)(2); WASH. REV. CODE § 9A.86.010(1)(b).

24. See, e.g., ALASKA STAT. § 11.61.120(a); ARK. CODE ANN. § 5-26-314(a); N.M. STAT. ANN. § 30-37A-1(A)(1); VT. STAT. ANN. tit. 13, § 2606(b)(1).

25. See, e.g., 18 PA. CONS. STAT. § 3131(a) (2017) (requiring victim to have had an intimate relationship with poster).

26. See, e.g., COLO. REV. STAT. § 18-7-107(1)(a)(I)-(II)(A) (2017).

27. See, e.g., *id.*

photographs is to harass, intimidate, or otherwise harm the victim.²⁸

1. *Consent requirement*

Issues concerning bodily autonomy—the basic right of self-determination over our own bodies—and especially women’s bodily autonomy,²⁹ are closely tied to a society’s ideas about consent.³⁰ In the world of nonconsensual pornography, there are two “checkpoints” at which a person who wishes to post sexually explicit images (a “poster”) must obtain the photographed person’s consent: (1) consent at the time the photograph is taken and/or received and (2) consent at the time of posting.³¹ Notably, these photos are usually shared within the context of a trusted personal or intimate relationship.³² Nevertheless, some members of our society merge these two points of consent, believing that the first consent presupposes the second.³³

But does it? Some victims of revenge porn do not give consent at either of these checkpoints, such as when the victim’s electronic devices are hacked or when the victim is photographed without permission or knowledge. The majority, however, give consent only at the first checkpoint—at the time the photo is taken or shared—under the condition that the image will be

28. See FLA. STAT. § 784.049(1)(b), (e) (2017).

29. See Danielle Keats Citron & Mary Anne Franks, *Criminalizing Revenge Porn*, 49 WAKE FOREST L. REV. 345, 348 (2014).

30. *Id.*

31. See *id.* (“Critics resist the criminalization of revenge porn on the grounds that consensual sharing in one context—a trusted relationship—translates into consent in other contexts—posting to the world. That understanding of consent not only runs against widely shared intuitions about other activities but also against the insights of privacy law and scholarship.”).

32. While this is usually the case, there are still situations in which images are shared neither by the victim nor the person with whom the victim shared the images. See *infra* Section I.B.2.b. (discussing the dangerous assumption all posters are current or former sexual or intimate partners); see also Sarah Bloom, Note, *No Vengeance for ‘Revenge Porn’ Victims: Unraveling Why This Latest Female-Centric, Intimate-Partner Offense is Still Legal, and Why We Should Criminalize It*, 42 FORDHAM URB. L.J. 233, 238 (2014).

33. See Citron & Franks, *supra* note 29.

kept confidential.³⁴ But because consent is context specific, consent to share a picture with an intimate partner, or anyone for that matter,³⁵ should not be taken as the consent to share that picture with the world; “[w]hile most people today would rightly recoil at the suggestion that a woman’s consent to sleep with one man can be taken as consent to sleep with all of his friends, this is the very logic of revenge porn apologists.”³⁶

To remedy the illogical jump from the first consent checkpoint to the second, legislatures have included consent provisions in their revenge porn laws to clarify precisely which type of consent is necessary to defend against a criminal charge for revenge porn. In Oregon, “[a] person commits the crime of unlawful dissemination of an intimate image if . . . [t]he person knows or reasonably should have known that the other person *does not consent to the disclosure . . .*”³⁷ Disclosure, as defined by the statute, includes but is not limited to, “transfer, publish, distribute, exhibit, advertise and offer.”³⁸ Similarly, in Utah, “[a]n actor commits the offense of distribution of intimate images if . . . the actor knows that the depicted individual has not given consent to the actor to *distribute the intimate image . . .*”³⁹ In both statutes, the language of which is also reflected by statutes in states such as Washington,⁴⁰ Nevada,⁴¹ and New Hampshire,⁴² the legislatures specifically identified the type of consent at issue: the consent to post or otherwise distribute the image—our “second checkpoint” type of consent. It is clear from the statutes’ language that consent to create or share the photograph

34. *Id.* at 354.

35. Pennsylvania is the only state that requires the victim to have had an intimate relationship with the poster. *See* 18 PA. CONS. STAT. § 3131(a) (2017). In all other states with a law criminalizing revenge porn, anyone may be prosecuted for such a violation. *See, e.g.*, FLA. STAT. § 784.049(1)(b), (e) (2017).

36. Citron & Franks, *supra* note 29.

37. OR. REV. STAT. § 163.472(1)(b) (2015) (amended by 2017 Or. LAWS Chap. 318, at 2-3) (emphasis added).

38. *Id.* § 163.472(3)(a).

39. UTAH CODE ANN. § 76-5b-203(2)(a) (LexisNexis 2017) (emphasis added).

40. WASH. REV. CODE § 9A.86.010(1)(b) (2017).

41. NEV. REV. STAT. § 200.780(1)(a) (2015).

42. N.H. REV. STAT. ANN. § 644:9-a(II)(c) (2017).

with the poster has *no* bearing on the consent necessary for the poster to protect himself from criminal penalties; that consent—our “first checkpoint” type of consent—is irrelevant in the legality of posting such a photograph. The inquiry, therefore, is whether the person depicted in the photograph consented to the disclosure or distribution of the photograph.

Other states make this point explicitly, specifying that a victim’s consent to creating or sharing the photograph is *not* a defense to distributing that photograph.⁴³ Vermont’s statute prohibiting the disclosure of sexually explicit images without consent states, “Consent to recording of [a] visual image does not, by itself, constitute consent for disclosure of the image.”⁴⁴ Arkansas’s statute against the unlawful distribution of sexual images or recordings arguably goes further: “The fact that an image . . . was created with the knowledge or consent of the other person or that the image . . . is the property of a person charged under [the statute] is not a defense to prosecution”⁴⁵ This language dispels the myth that once a photo is received, it becomes the property of the recipient to do with whatever he chooses.⁴⁶ These provisions explicitly require our “second checkpoint” type of consent for the poster to share a photograph with others. Without this explicit secondary consent, the poster is exposed to criminal liability.

Wisconsin defines consent even more precisely in its law regarding depictions of nudity. “‘Consent’ means words or overt actions by a person who is competent to give informed consent indicating a freely given agreement to the act.”⁴⁷ In the context of the Wisconsin law, a person is “guilty of a Class A misdemeanor [if he] posts, publishes, or causes to be posted or published, a private representation if the actor knows that the person depicted does not consent to the posting or publication of

43. See ARK. CODE ANN. § 5-26-314(b) (2017); DEL. CODE ANN. tit. 11, § 1335(a)(9)(b) (2017); VT. STAT. ANN. tit 13, § 2606(b)(1) (2017).

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

45. ARK. CODE ANN. § 5-26-314(b).

46. See *id.*

47. WIS. STAT. § 942.09(1)(ae) (2017).

the private representation.”⁴⁸ Taken together, these provisions mean that unless an actor has received *words or overt actions* from the photographed person to specifically post or publish the photo, the actor has violated Wisconsin criminal law.⁴⁹

2. *Intent requirement*

Twenty-five of the thirty-nine jurisdictions with revenge porn laws have specific intent requirements.⁵⁰ Specific intent requires proof that an actor has both committed the physical act of the proscribed conduct and possessed the intent to harass the victim.⁵¹ Some statutes focus on the intent itself—“the intent to . . . [c]oerce, harass, intimidate, demean, humiliate, or cause financial loss to the depicted person”⁵²—while others focus on the harm resulting from this intent—“the intent to harm substantially the depicted person with respect to that person’s health, safety, business, calling, career, financial condition, reputation, or personal relationships.”⁵³

Many of the thirteen remaining jurisdictions include an intent provision merely as an aggravating factor.⁵⁴ An aggravating factor is “a fact or situation that increases the degree of liability or

48. *Id.* § 942.09(3m)(a)(1).

49. *See id.*

50. States with the specific intent requirement are Alaska, ALASKA STAT. § 11.61.120(a) (2017); Arizona, ARIZ. REV. STAT. ANN. § 13-1425(A)(3) (2017); Arkansas, ARK. CODE ANN. § 5-26-314(a); Colorado, COLO. REV. STAT. § 18-7-107(1)(a)(I) (2017); Georgia, GA. CODE ANN. § 16-11-90(b)(1)–(2) (2017); Hawaii, HAW. REV. STAT. § 711-1110.9(1)(b) (2017); Kansas, KAN. STAT. ANN. § 21-6101(a)(8) (2016); Louisiana, LA. STAT. ANN. § 14:283.2(A)(4) (2017); Maine, ME. STAT. tit. 17-A, § 511-A(1) (2017); Maryland, MD. CODE ANN., CRIM. LAW § 3-809(c) (LexisNexis 2017); Michigan, MICH. COMP. LAWS § 750.145e(1) (2017); Nevada, NEV. REV. STAT. § 200.780(1) (2015); New Hampshire, N.H. REV. STAT. ANN. § 644:9-a(II)(a) (2017); New Mexico, N.M. STAT. ANN. § 30-37A-1(A)(1)(a)–(e) (2017); North Carolina, N.C. GEN. STAT. § 14-190.5A(b)(1)(a)–(b) (2017); Oklahoma, OKLA. STAT. tit. 21, § 1040.13b(B)(2) (2017); Oregon, OR. REV. STAT. § 163.472(1)(a) (2015) (amended by 2017 Or. LAWS Chap. 318, at 2–3); Pennsylvania, 18 PA. CONS. STAT. § 3131(a) (2017); South Dakota, S.D. CODIFIED LAWS § 22-21-4 (2017); Tennessee, TENN. CODE ANN. § 39-17-318(a) (2017); Utah, UTAH CODE ANN. § 76-5b-203(2) (LexisNexis 2017); Vermont, VT. STAT. ANN. tit. 13, § 2606(b)(1) (2017); Virginia, VA. CODE ANN. § 18.2–386.2(a) (2017); and West Virginia, W. VA. CODE § 61-8-28a(b) (2017). The District of Columbia also has such a requirement. D.C. CODE § 22-3052(a)(3) (2017).

51. *See Intent*, BLACK’S LAW DICTIONARY (10th ed. 2014).

52. N.C. GEN. STAT. § 14-190.5A(b)(1)(a).

53. HAW. REV. STAT. § 711-1110.9(1)(b)(2017).

54. *See, e.g.*, DEL. CODE ANN. tit. 11, § 1335(a)(9)(c)(4) (2017).

culpability for a criminal act," which the court may take into account during sentencing.⁵⁵ For example, Delaware's violation of privacy statute, while not specifically enacted to address the issue of nonconsensual pornography, contains the following language:

For the purposes of this paragraph (a)(9), each of the following shall be an aggravating factor . . . :

. . . .

The actor knowingly reproduces, distributes, exhibits, publishes, transmits, or otherwise disseminates such visual depictions *with the intent to harass, annoy, or alarm the person depicted* and such conduct would cause a reasonable person to suffer significant mental anguish or distress.⁵⁶

Although this is not an intent requirement, *per se*, the fact that intent is an aggravating factor suggests both the egregious nature behind the desire to post another's explicit photographs and our need as a society to punish such heinous behavior.

B. *Unique Statutory Elements*

While many of the thirty-nine statutes share similar provisions, such as those considering the intent of the poster and the lack of the victim's consent, there are several provisions unique to individual or small groups of states.⁵⁷ Some of these provisions, such as those that criminalize the mere threat of disclosing intimate images, expand the protections of potential victims against their abusers.⁵⁸ Conversely, other unique provisions put additional burdens on the prosecution, such as those requiring proof of harm, which could make it difficult to convict an actor

55. *Circumstance*, BLACK'S LAW DICTIONARY (10th ed. 2014).

56. DEL. CODE ANN. tit. 11, § 1335(a)(9)(c)(4) (emphasis added).

57. *See, e.g.*, COLO. REV. STAT. § 18-7-107(1)(I)-(III) (2017); TEX. PENAL CODE ANN. § 21.16(c) (West 2017).

58. *See* TEX. PENAL CODE ANN. § 21.16(c).

for behavior that would be easy to punish in a state without such a requirement.⁵⁹

1. *Provisions expanding protections and remedies for potential victims*

a. Threat of disclosure as a separate crime

In 2013, McAfee, an internet security company,⁶⁰ released findings from its “Love, Relationships, and Technology” survey.⁶¹ The findings revealed one in ten participants had ex-partners that threatened to expose “risqué” photographs of them online.⁶² Additionally, these threats were carried out almost 60% of the time.⁶³ The threat of disclosure, in addition to actual disclosure, is therefore a problem that must be addressed by state legislatures. Rather than punishing merely the actual disclosure of intimate images, Texas and Arizona also criminalize the threat of disclosure itself.⁶⁴ Under Arizona law, an actor commits a class 1 misdemeanor if he “threatens to disclose but does not disclose an image that if disclosed would be a violation of [the statute].”⁶⁵ Similarly, the Texas law prohibiting revenge porn, including threat of disclosure, provides:

(c) A person commits an offense if the person intentionally threatens to disclose, without the consent of the depicted person, visual material depicting another person with the person’s intimate parts exposed or engaged in sexual

59. See, e.g., COLO. REV. STAT. § 18-7-107(1)(I)–(III).

60. MCAFEE, <https://www.mcafee.com/us/index.html> (last visited June 17, 2017).

61. *Lovers Beware: Scorned Exes May Share Intimate Data and Images Online*, MCAFEE (Feb. 4, 2013), <https://www.mcafee.com/us/about/news/2013/q1/20130204-01.aspx?clickid=Rxfwd8X3FRZ61gKVsnTXuXIJUkhxloVnkyBVys0&lqmcate=Affiliate:IR:null:74047:10078:null&sharedid=>.

62. *Id.*

63. *Id.*

64. Unfortunately, Texas and Arizona are the only two jurisdictions of the thirty-nine addressed in this Note to criminalize the threat of disclosure. See ARIZ. REV. STAT. ANN. § 13-1425(c)(2) (2017); TEX. PENAL CODE ANN. § 21.16(c) (West 2017).

65. ARIZ. REV. STAT. ANN. § 13-1425(c)(2).

conduct and the actor makes the threat to obtain a benefit:

- (1) in return for not making the disclosure; or
- (2) in connection with the threatened disclosure.⁶⁶

The fact that states have criminalized the threat of disclosure as a separate offense indicates that the threat itself causes the victim harm. Texas law, which does not differentiate between the threat of disclosure and actual disclosure, includes a fine of up to \$4000 and/or maximum imprisonment of one year.⁶⁷

b. Destruction of the image

Revenge porn laws often fail to account for what happens to the image after disclosure. Consider the following example: Jane's ex-boyfriend posts sexually explicit photographs of her online. Jane luckily lives in a state in which nonconsensual pornography is illegal. Jane's ex is prosecuted to the fullest extent of the law and goes to prison as a consequence of his actions against Jane. What happens to Jane's pictures, the true source of her victimization? The imprisonment of her ex is taken care of by state criminal law, but what about the fate of the photographs themselves?

For obvious reasons, many victims of revenge porn simply want the photographs removed.⁶⁸ In most states, the burden is

66. TEX. PENAL CODE ANN. § 21.16(c).

67. See TEX. PENAL CODE ANN. §§ 12.35(a)-(b), 21.16(b)-(c), (g). This is more stringent than Arizona law, where actual disclosure is a felony (class 4 if disclosed by electronic means and class 5 if not by electronic means) and the threat of disclosure is a class 1 misdemeanor. Thus, while actual electronic disclosure has a maximum sentence of three years imprisonment for a first time felony offender, the threat of disclosure carries a maximum of six months imprisonment. See ARIZ. REV. STAT. ANN. §§ 13-702(D), 13-707(A)(1), 13-1425(c).

68. Charlotte Adler, *'It's Like Having an Incurable Disease': Inside the Fight Against Revenge Porn*, TIME (June 13, 2017), <http://time.com/4811561/revenge-porn/> ("Many victims think the moment they see their nude photos online is the worst part of their ordeal And when these victims start trying to get the pictures taken down, they realize something even worse: this type of cyber crime can leave a lasting digital stain, one that is nearly impossible to fully erase.").

on the victim to draft and deliver a Digital Millennium Copyright Act (DMCA) Notice,⁶⁹ an example of which appears below, to the owner of each website on which her photographs or videos are found.

DMCA NOTICE

To: [revenge porn website]

1. This document is notification of the copyright infringement of my photos on the website, [www.revengepornwebsite.com].
2. I am the copyright owner of the photos posted at the following links: [Link][Link]
3. I have not assigned or otherwise granted any rights to any third party in the contents now or previously appearing on [www.revengepornwebsite.com].
4. I hold exclusive rights to the copyrighted materials infringed.
5. The infringed copyrighted work has been identified in Paragraph 2, and the information has been adequately identified to require that such material be removed or access to it be immediately disabled.
6. I have a good faith belief that the use of the copyrighted material in this manner complained of is not authorized by the law.
7. I swear, under penalty of perjury, that the information of this Notification is accurate and that I am authorized to act on behalf of the owner of an exclusive right that is allegedly infringed.

Respectfully,
[Your Name] [your email address]⁷⁰

69. *What is a DMCA Notice?*, WOMEN AGAINST REVENGE PORN, <https://www.womenagainstrevengeporn.com/dmca-notice> (last visited Aug. 13, 2017).

70. *Id.*

This process can be exceptionally time consuming, especially if the victim cannot easily access the site owner and must therefore perform research to find the appropriate recipient of the DMCA Notice.⁷¹ This burden is compounded if the victim's images are on multiple websites. As a result, some victims choose to hire an image takedown service such as DMCA Defender to do this work for them while also utilizing the service's reputation management plans to "build[] a safety net around [their] name."⁷² These services use technologically advanced tactics to "hide" the negative links associated with the victim's name and build positive links that will instead be first returned when searching for the person's name electronically.⁷³

Of the thirty-nine jurisdictions discussed in this Note, only North Carolina and Oklahoma include provisions in their revenge porn laws to solve the true problem most victims care about—destruction of their private images.⁷⁴ According to Oklahoma's "nonconsensual dissemination of sexual images" law, "[t]he court shall have the authority to order the defendant to remove the disseminated image should the court find it is in the power of the defendant to do so."⁷⁵ Although the state recognizes how difficult it may be to remove anything from the internet, it also acknowledges the source of the harm itself: the image and its effect on the victim's life. Mandating the removal of the image that is within the poster's power ends the main effect of the crime on the victim's life.

c. Allowing victims to collect civil penalties

The states disagree as to whether a victim may bring civil action against an actor convicted under a revenge porn statute.⁷⁶ For example, Colorado's statute states that a victim "may bring

71. *See id.*

72. *Victim of Revenge Porn*, DMCA DEFENDER, <http://dmcadefender.com/victim-of-revenge-porn/> (last visited Aug. 12, 2017).

73. *See id.*

74. N.C. GEN. STAT. § 14-190.5A(e) (2017); OKLA. STAT. tit. 21, § 1040.13b(G) (2017).

75. OKLA. STAT. tit. 21, § 1040.13b(G).

76. *See* COLO. REV. STAT. § 18-7-107(4) (2017); N.C. GEN. STAT. § 14-190.5A(g); WASH. REV. CODE § 9A.86.010 (2017).

a civil action against the person who caused the posting of the private images and is entitled to injunctive relief, the greater of ten thousand dollars or actual damages incurred[,] . . . exemplary damages, and reasonable attorney fees and costs.”⁷⁷ Similarly, in what could be described as a road map for a victim seeking civil penalties, North Carolina’s law against the “Disclosure of private images” provides:

(g) Civil Action.—In addition to any other remedies at law or in equity, . . . any person whose image is disclosed, or used, . . . has a civil cause of action against any person who discloses or uses the image and is entitled to recover from the other person any of the following:

(1) Actual damages, but not less than liquidated damages, to be computed at the rate of one thousand dollars (\$1,000) per day for each day of the violation or in the amount of ten thousand dollars (\$10,000), whichever is higher.

(2) Punitive damages.

(3) A reasonable attorneys’ fee and other litigation costs reasonably incurred. The civil cause of action may be brought no more than one year after the initial discovery of the disclosure, but in no event may the action be commenced more than seven years from the most recent disclosure of the private image.⁷⁸

Not only does the North Carolina statute allow for actual damages up to \$10,000, punitive damages with no monetary cap, and attorneys’ fees and costs,⁷⁹ it also gives a victim-centered timeline for the litigation, as the claim accrues begin-

77. COLO. REV. STAT. § 18-7-107(4).

78. N.C. GEN. STAT. § 14-190.5A(g).

79. *See id.* § 14-190.5A(g)(1)–(3).

ning when the victim discovered the images, not when the images were posted.⁸⁰

Similarly, Colorado's statute provides that, "in addition to any other sentence the court may impose, the court shall fine the defendant up to ten thousand dollars. The fines collected . . . shall be credited to the crime victim compensation fund."⁸¹ This both bolsters victims' protection and compensates them for financial burdens they may suffer as a result of the perpetrator's actions against them.⁸²

2. *Provisions limiting the protections and remedies of potential victims*

a. Harm requirement

Some states require proof of harm to the victim in order to constitute a crime.⁸³ Many of those states require a finding of emotional distress.⁸⁴ For example, Colorado's crime of "Posting a private image for harassment"⁸⁵ has three main elements: (1) the actor posts the image "[w]ith the intent to harass the depicted person and inflict serious emotional distress upon the depicted person;"⁸⁶ (2) the actor posts the image "[w]ithout the depicted person's consent;"⁸⁷ and (3) "[t]he conduct results in serious emotional distress of the depicted person."⁸⁸ Without proving both the intent to inflict emotional distress and the victim's actual emotional distress, which is incredibly difficult to

80. See *id.* § 14.190.5A(g).

81. COLO. REV. STAT. § 18-7-107(1)(III)(c).

82. See *CCRI FAQ Sheet*, *supra* note 11 (explaining potential economic hardships faced by victims of revenge porn).

83. These states include California, Colorado, Connecticut, Louisiana, New Mexico, North Dakota, Oregon, Tennessee, and Washington.

84. These states include California, Colorado, Louisiana, New Mexico, North Dakota, and Tennessee.

85. COLO. REV. STAT. § 18-7-107.

86. *Id.* § 18-7-107(1)(a)(I).

87. *Id.* § 18-7-107(1)(a)(II)(A).

88. *Id.* § 18-7-107(1)(a)(III).

prove,⁸⁹ the prosecution will be barred from securing a conviction against the abuser.

Such a provision places yet another burden on both the prosecutor and the victim. According to its statute against “Sexual cyberharassment,”⁹⁰ the Florida legislature recognizes that it has become common to post explicit photographs “without the depicted person’s consent, for no legitimate purpose, with the intent of causing substantial emotional distress to the depicted person,”⁹¹ and that the very existence of such photographs on the Internet causes victims “significant psychological harm.”⁹² Put another way, the very harm of the offense is the psychological aftermath of the post. From this, we can assume that the effect of revenge porn is *because of* revenge porn, so why must a prosecutor prove both the *cause* and the *effect* of the offense? If a conviction for theft required such proof of the obvious result that Colorado’s revenge porn statute requires, prosecutors would, for example, have to prove all the necessary elements of theft in addition to proving that property was actually unlawfully taken by the actor.⁹³ But this effect can be assumed from the very essence of the crime, just as the harm can be assumed from the act of revenge porn.⁹⁴

b. Current or former intimate/sexual partner requirement

Pennsylvania is the only state to have a provision that specifically defines the relationship necessary between the poster and the depicted person for the conduct to constitute a crime.⁹⁵

89. See Sarah E. Driscoll, Comment, *Revenge Porn: Chivalry Prevails as Legislation Protects Damsels in Distress over Freedom of Speech*, 21 ROGER WILLIAMS U. L. REV. 75, 112 (“Proving that the distributor of the image had the intent to cause serious emotional distress and that the victim suffered actual emotional distress are two required elements of the tort of intentional infliction of emotional distress (“IIED”) that are very difficult to prove.”).

90. FLA. STAT. § 784.049 (2017).

91. *Id.* § 784.049(1)(b).

92. *Id.* § 784.049(1)(e).

93. See, e.g., *id.* § 812.014(2)(a)–(6) (showing the price of the items stolen must be proven in order to gain a conviction for theft).

94. See *id.* § 784.049(1)(b), (e).

95. See 18 PA. CONS. STAT. § 3131(a) (2017).

[A] person commits the offense of unlawful dissemination of an intimate image if, with the intent to harass, annoy or alarm a current or former sexual or intimate partner, the person disseminates a visual depiction of *the current or former sexual or intimate partner* in a state of nudity or engaged in sexual conduct.⁹⁶

This provision excludes at least two types of potential victims. The first of these is the unsuspecting victim of hacking or of lost electronic devices.⁹⁷ For example, a celebrity sends an explicit photograph of himself to his boyfriend. His phone and computer are hacked, and the image is released to the world. The hacker who posts the image, under this Pennsylvania statute mandating that the poster has, or has had, some sort of intimate or sexual relationship with the victim, is not criminally liable because no such relationship existed.⁹⁸ The second victim excluded from protection under the Pennsylvania statute is a “potential partner,” or a partner with whom a sexual or intimate relationship has yet to begin.⁹⁹ An example of this potential victim is a woman who meets a man on a dating website or cell phone dating app.¹⁰⁰ The two arrange a date, but the man insists the woman send him an explicit picture of herself before they meet. She complies, only never to hear from him again. She later discovers the photo online. Like the hacker example above, the man who posted the woman’s photograph may not have committed a crime under Pennsylvania law because the two had no sexual or intimate relationship.

96. *Id.* (emphasis added).

97. See Marsh, *supra* note 1 (profiling the story of a woman who lost her cell phone and subsequently discovered explicit photographs of her and her husband online).

98. See 18 PA. CONS. STAT. § 3131(a).

99. See *id.*

100. Considering the proliferation of online dating over the past decade, this type of potential victim shows a tremendous hole in the Pennsylvania statute. See Aaron Smith & Monica Anderson, *5 Facts About Online Dating*, PEW RES. CTR. (Feb. 29, 2016), <http://www.pewresearch.org/fact-tank/2016/02/29/5-facts-about-online-dating/> (showing 15% of U.S. adults have used online dating sites or mobile apps).

II. POTENTIAL PITFALLS OF CURRENT LEGISLATION

Current revenge porn laws have yet to address three main issues. The first problem is the way in which to treat multiple nonconsensual pornographic images, a situation arising when a perpetrator disseminates multiple images of a victim, either concurrently or in multiple posts, over time. Should each image (image-defined) or each post/point of dissemination (occurrence-defined) constitute a separate offense? The second issue concerns how to handle images accompanied by the victim's personal information. These offenses are particularly damaging and dangerous to the victim,¹⁰¹ but statutes have yet to reflect the magnitude of that danger. The final issue is determining whether revising existing statutes not originally meant to prevent and punish revenge porn is as sufficiently victim oriented as is drafting new, revenge-porn specific criminal statutes.

A. *Multiple Images – Image-Defined or Occurrence-Defined Approach?*

No statutes discussed in this Note address whether dissemination of nonconsensual pornography is an occurrence-defined or image-defined crime. To illustrate the difference, consider the following: After a bad breakup, Cam posts fifty-five images of Julie in various stages of undress on a pornographic website without her consent. If the crime is occurrence-defined, the state could bring just one charge against Cam because he posted all fifty-five images at once. Alternatively, if the crime is image-defined, the state could bring fifty-five charges against Cam – one charge per image.

Compare the situation above with another: After a bad breakup, Cam posts one intimate image of Julie on a revenge porn website. Upon discovering the image online, Julie contacts the police. The police investigate the situation, charge Cam, and a jury convicts him under the state's revenge porn law. After paying a fine and/or serving some time for that offense, Cam

101. See Marsh, *supra* note 1.

posts fifty-five more images of Julie, all qualifying as nonconsensual pornography, on the website. Should these two scenarios carry the same penalties? Are these scenarios inherently different? If so, should they be treated differently under the law?

The first scenario, posting multiple images at one time, has yet to be addressed by state statutes. This is in contrast to statutes concerning another crime involving the distribution of sexually-explicit images—possession of child pornography. Although not completely analogous, revenge porn statutes, like child pornography statutes, should explicitly state whether each photograph is a separate violation. Under Alaska’s “Possession of Child Pornography” statute, each film or photograph possessed in violation of the statute is a separate violation of the statute.¹⁰² If states adopted this image-defined approach for their nonconsensual pornography laws, the first scenario presented in this section could result in fifty-five separate charges being brought against Cam. Alternatively, if states specifically opt not to use this approach, only one charge would result from the fifty-five-photograph post. It is unclear at this time which approach any of the thirty-nine jurisdictions with revenge porn laws would take under this scenario. It is important, however, to understand the potential that each photograph has to be shared to websites different from the one on which it was originally posted. Each photograph is its own separate and distinct opportunity for a violator of revenge porn laws to ruin a victim’s life or reputation. Because of this potential for damage from each image, revenge porn should be image-defined rather than occurrence-defined to best protect victims from the repercussions of their images “getting out.” Whichever approach state legislatures choose, the statutes must explicitly define the approach to avoid ambiguity.

Some of the current revenge porn laws partially address the second scenario between Cam and Julie. New Mexico’s “Unauthorized distribution of sensitive images” statute treats an actor’s first violation as a misdemeanor, whereas his or her second

102. See ALASKA STAT. § 11.61.127(c) (2017).

and subsequent violation is treated as a fourth-degree felony.¹⁰³ This represents a difference of between up to one year confinement in the county jail and/or a \$1000 fine (for the first conviction) and up to eighteen months imprisonment and a \$5000 fine (for the second conviction).¹⁰⁴

Interestingly, these provisions do not mention who the victim must be in order to constitute the “second or subsequent” conviction.¹⁰⁵ The more severe punishment could be triggered whether the second (or any subsequent) offense is against the same victim or a new victim. For example, if Cam is convicted for his actions against Julie, gets out of prison and/or pays his fine, and then posts an intimate image of Kevin without his consent, Cam’s actions against Kevin could merit a second conviction and would be eligible for the more severe punishment. Again, to avoid ambiguity, lawmakers should specify whether the subsequent victim’s identity is relevant in triggering a provision like New Mexico’s.

B. *Personal Information as an Aggravating Circumstance*

Revenge porn victims are not only at risk of suffering emotional harm from abusers’ actions, but also are susceptible to potential physical and economic harm if personal information accompanies their photographs. In one study of 1244 revenge porn victims, over 50% reported that their full name and at least one social networking profile accompanied their photographs.¹⁰⁶ Additionally, over 20% of the victims reported that their personal email addresses and phone numbers accompanied their photographs.¹⁰⁷ In another research study by the Cyber Civil Rights Initiative, of 1606 total respondents, about a quarter were victims of nonconsensual pornography.¹⁰⁸ Of

103. See N.M. STAT. ANN. § 30-37A-1(c) (2017).

104. Compare *id.* § 31-19-1 (misdemeanor sentencing), with *id.* § 31-18-15 (felony sentencing).

105. See, e.g., *id.* § 30-37A-1(c).

106. Citron & Franks, *supra* note 29, at 350.

107. *Id.* at 350–51.

108. Twenty-three percent of those surveyed answered that they had been victims of revenge porn. The study’s statistics come from a survey hosted on endrevengeporn.org from August 2012 until December 2013. Respondents participated on a voluntary basis and represented

those respondents who were victims, half reported that they had been “harassed or stalked online by users that [saw] their material.”¹⁰⁹ Perhaps an even more startling and disturbing statistic is that 16% of victims reported that their home address accompanied their photographs.¹¹⁰ Clearly, cyber stalking has the potential to enter into reality and result in unwanted contact or even physical harm if personal information is disseminated with an image.¹¹¹

Exposing a victim’s personal information could also lead to economic and further emotional harm because the intimate image becomes associated with a search of the person’s name or other identifying information.¹¹² At any time, the unwanted image could be discovered by an employer, a friend, or a loved one by a simple Google search.¹¹³ The discovery of these photographs has the potential to cause trouble at work or to jeopardize relationships with family, friends, or significant others.¹¹⁴ Physical, financial, and increased emotional harms caused by the personal information included with revenge porn are upsettingly common and present incredibly dangerous problems that have yet to be addressed in the overwhelming majority of jurisdictions that recognize revenge porn as a crime.¹¹⁵ The issue should be how, not whether, states recognize and differentiate between photographs with and without accompanying personal information.

Because of the additional dangers associated with posting a victim’s personal information along with her image, jurisdic-

a “female-heavy sample.” See CCRI’s 2013 *Nonconsensual Pornography (NCP) Research Results*, CYBER C.R. INITIATIVE, <https://www.cybercivilrights.org/wp-content/uploads/2016/11/NCP-2013-Study-Research-Results-1.pdf> (last visited Oct. 6, 2017).

109. Precisely 49% reported this unwanted contact. *Id.*

110. *Id.*

111. *See id.*

112. *See id.*

113. *See id.*

114. *See id.*

115. Delaware’s statute is an example of a revenge porn law that has addressed the issue of accompanying personal identifying information and has made such information an aggravating circumstance resulting in the harsher classification of the crime. *See* DEL. CODE ANN. tit. 11, § 1335(a)(9)(c) (2017).

tions should add additional penalties. In Delaware, pairing revenge porn with “personally identifiable information of the person depicted” is considered an aggravating circumstance.¹¹⁶ Without an aggravating factor, a person who disseminates non-consensual pornography under this statute could be charged with a class A misdemeanor.¹¹⁷ If the image is disseminated with personal information, however, that person could be charged with a class G felony.¹¹⁸

C. Prosecution Under Non-Revenge Porn Specific Statutes

Six jurisdictions considered in this Note punish nonconsensual pornography under laws not originally drafted to address the problem.¹¹⁹ For example, the California law prohibiting non-consensual pornography is entitled “Disorderly conduct; Punishment for violation.”¹²⁰ The description of the acts constituting nonconsensual pornography is not even mentioned until Section (j), Subsection (4).¹²¹ Similarly, the Delaware, Kansas, and New Jersey statutes address breach of privacy,¹²² while Alaska’s and Iowa’s laws were drafted to address harassment.¹²³ But is there inherent value in drafting statutes specifically and solely aimed at prohibiting nonconsensual pornography as opposed to including the offense in statutes criminalizing other behavior?

The non-specific statutes mentioned above address the issues of consent and privacy to varying degrees, but the lack of a separate and distinct statute to address nonconsensual pornogra-

116. *Id.* § 1335(a)(9)(c)(5); see *Circumstance*, BLACK’S LAW DICTIONARY (10th ed. 2014).

117. DEL. CODE ANN. tit. 11, § 1335(c).

118. *Id.*

119. See ALASKA STAT. § 11.61.120 (2017); CAL. PENAL CODE § 647 (Deering 2017); DEL. CODE ANN. tit. 11, § 1335; IOWA CODE § 708.7 (2017); KAN. STAT. ANN. § 21-6101 (2016); N.J. STAT. ANN. § 2C:14-9 (West 2017).

120. See CAL. PENAL CODE § 647.

121. See *id.* § 647(j)(4).

122. The Delaware, Kansas, and New Jersey statutes are entitled “Violation of privacy . . .,” DEL. CODE ANN. tit. 11, § 1335, “Breach of privacy,” KAN. STAT. ANN. § 21-6101, and “Invasion of privacy . . .,” N.J. STAT. ANN. § 2C:14-9.

123. See ALASKA STAT. § 11.61.120; IOWA CODE § 708.7.

phy fails to acknowledge that, at its core, nonconsensual pornography is a *sexual offense*.¹²⁴ This crime is not only about consent. For example, a woman sends a photograph of herself skiing to her boyfriend while on vacation. After the couple breaks up, the man posts the ski-vacation photograph on Facebook. There, arguably, no damage has been done to the woman. Although she did not consent to the man posting her photograph, she does not suffer any harm from the man posting a photograph of her enjoying her vacation. Similarly, revenge porn is not only about privacy concerns. Suppose the woman from the ski-vacation example did not send the photo to the man. Instead, the man hacked into the woman's computer, stole the photograph, and posted it on Facebook. Other than the security breach of the woman's computer, there still has not really been any damage done—the posting of the photograph itself would likely cause no emotional or physical harm.

If, in the examples above, the vacationing woman sent a sexually explicit photograph instead, the man's subsequent conduct would be far more reprehensible. His behavior would not be merely a breach of trust for sharing the photograph on Facebook without her consent, nor merely a breach of privacy for hacking into her computer. The factor that makes the man's conduct so despicable is that the disseminated photograph was sexual in nature. Revenge porn as an offense, therefore, turns on the sexual nature of the photos shared. Illustratively, although entitled "Crime of video voyeurism," Idaho's law is found in the "Sex Crimes" section of its criminal code.¹²⁵ Idaho therefore recognizes the fact that revenge porn, by its very nature, is a sex crime.

While violations of consent and privacy add to the heinous nature of nonconsensual pornography, the sexual nature of the photograph and its violation of the victim's bodily autonomy

124. See Samantha Bates, *Revenge Porn and Mental Health: A Qualitative Analysis of the Mental Health Effects of Revenge Porn on Female Survivors*, 12 FEMINIST CRIMINOLOGY 22, 25 (2016) (arguing that revenge porn should be classified as a sexual offense because it is similar to sexual assault, sexual harassment, and other types of sexual offenses).

125. See IDAHO CODE § 18-6609 (2017).

cause grave harm to the victim. Therefore, legislators must consider whether statutes should recognize the sexual nature of the crime and as a result should narrowly tailor statutes to the issue of revenge porn, with their titles reflecting that specificity. Maryland's statute, unlike those that are not nonconsensual pornography specific, is literally named "Revenge porn."¹²⁶ It specifically recognizes and addresses the sexual nature of the crime and provides victims with a specialized law to protect them from continued abuse.¹²⁷ Maryland's law recognizes revenge porn as a separate and distinct crime important enough to merit its own statute and penalties.¹²⁸

III. SUGGESTIONS FOR REVISIONS AND EXAMPLE OF MODEL STATUTE

The best way for states to combat nonconsensual pornography and protect potential and current victims is to draft victim-centric, general-intent statutes proscribing nonconsensual pornography, while also punishing the threat of disclosure and increasing penalties for disseminations with a victim's personal information. Some of the statutes analyzed in this Note need a complete overhaul in order to best represent victims' interests and to deter such behavior in the future. This overhaul is especially necessary for those states that have statutes that proscribe, but are not specific to, revenge porn, such as those originally intended to prevent harassment or general violations of privacy.¹²⁹ States without any current law on this issue have the opportunity to start from scratch.¹³⁰ Regardless of whether or not a law currently exists, each jurisdiction must bear in mind potential victims' interests. This victim-centric approach should permeate throughout these laws, from the elements of the crime

126. See MD. CODE ANN., CRIM. LAW § 3-809 (LexisNexis 2017).

127. See *id.* § 3-809(c).

128. See *id.* § 3-809(d).

129. See, e.g., CAL. PENAL CODE § 647 (Deering 2017) (disorderly conduct statute); DEL. CODE ANN. tit. 11, § 1335 (2017) (violation of privacy statute).

130. The states that have yet to address revenge porn at all include Indiana, Kentucky, Massachusetts, Mississippi, Missouri, Montana, Nebraska, New York, Ohio, Rhode Island, South Carolina, and Wyoming.

to potential remedies after prosecution. These laws should include certain and specific language to address the biggest potential pitfalls described in this Note. These include:

- (1) Titling the law “Nonconsensual Pornography,” both to serve as a concrete acknowledgment of the sexual nature of the crime and to avoid the association with only one type of perpetrator/victim relationship,¹³¹
- (2) mandatory destruction of the image; without such causes the continued victimization of the person depicted in the photograph,¹³²
- (3) threat of disclosure as a separate and distinct crime from posting a photograph depicting nonconsensual pornography, as the threat in itself causes harm to the victim,¹³³
- (4) distinction as an image-defined or occurrence-defined crime, allowing for separate prosecutions either per photograph or per posting/time of dissemination,¹³⁴
- (5) specificity about whether multiple convictions concerning separate occurrences under the statute are eligible for more severe punishment if the victim of the subsequent conviction is not the same as the victim from the first conviction,¹³⁵ and
- (6) personal information as an aggravating circumstance, increasing the penalties for this crime when the actor includes personal information of the victim along with the image.¹³⁶

Additionally, new or revised statutes should dispose of both the harm requirement, as harm is the natural and obvious result of nonconsensual pornography,¹³⁷ and language suggesting an intimate, sexual, or even personal relationship is required as a

131. See *supra* Section I.B.1.b. *But see* 18 PA. CONS. STAT. § 3131(a) (2017).

132. See *supra* Section I.B.2.b. and accompanying notes.

133. See *supra* Section I.B.2.a. and accompanying notes.

134. See *supra* Section II.A. and accompanying notes.

135. See *id.*

136. See *supra* Section II.B. and accompanying notes.

137. See FLA. STAT. § 784.049(1)(b), (e) (2017).

prerequisite for this crime.¹³⁸ Some victims of nonconsensual pornography are also victims of hacking or nonconsensual capture of the images or videos posted; these victims should not be excluded from protection by revenge porn laws just because they had no relationship with the perpetrator. Perhaps most importantly, effective revenge porn laws must mandate the removal of the offensive images. Although only included in two of the thirty-nine revenge porn laws analyzed in this Note, such a provision is crucial for both the wellbeing of the victim and the just punishment of the offender. Protecting the victim's dignity and interests means halting her victimization. Without the removal of the image, the victim will continue to be victimized each time another person sees the image. With the removal¹³⁹ or destruction¹⁴⁰ of the image, however, that potential for victimization ceases. This truly protects the victim's interests and provides a model for handling the after-effects of nonconsensual pornography.

With these protections and policy considerations in mind, a model state nonconsensual pornography statute would read as follows:

NONCONSENSUAL PORNOGRAPHY¹⁴¹

(a) **Definitions.**¹⁴² The following definitions apply in this section:

- (1) **Disclose.** Transfer, publish, distribute, or reproduce.
- (2) **Image.** A photograph, film, videotape, recording, digital, or other reproduction.
- (3) **Intimate parts.** Any of the following naked human parts: (i) male or female genitals, (ii) male or

138. See PA. CONS. STAT. § 3131(a) (2017).

139. See OKLA. STAT. ANN. tit. 21, § 1040.13b(G) (2017).

140. See N.C. GEN. STAT. § 14-190.5A(e) (2017).

141. This model statute is a synthesis of many revenge porn statutes currently in effect, as well as some free-written sections. Main sections and principles are taken from Colorado, Delaware, North Carolina, Oklahoma, and Texas statutes.

142. N.C. GEN. STAT. § 14-190.5A(a)(1)-(3), (6).

female pubic area, (iii) male or female anus, or (iv) the nipple of a female over the age of 12.

- (4) **Sexual conduct.** Includes any of the following:
- a. Vaginal, anal, or oral intercourse, whether actual or simulated, normal or perverted.
 - b. Masturbation, excretory functions, or lewd exhibition of uncovered genitals.
 - c. An act or condition that depicts torture, physical restraint by being fettered or bound, or flagellation of or by a nude person or a person clad in undergarments or in revealing or bizarre costume.

(b) **Offense.**¹⁴³

- (1) A person commits an offense if all of the following apply:
- a. The person knowingly discloses an image of another person without the affirmative consent of the depicted person,
 - b. the depicted person is identifiable from the disclosed image itself or information offered in connection with the image,
 - c. the depicted person's intimate parts are exposed or the depicted person is engaged in sexual conduct in the disclosed image, and
 - d. the person discloses the image under circumstances such that the person knew or should have known that the depicted person had a reasonable expectation of privacy.
- (2) A person commits an offense if the person intentionally threatens to disclose, without the consent of the depicted person, visual material depicting another person with the person's intimate parts

143. *See id.* § 14-190.5A(b)(2)-(4); TEX. PENAL CODE ANN. § 21.16(b)-(c) (West 2017).

exposed or engaged in sexual conduct and the actor makes the threat to obtain a benefit:

- a. in return for not making the disclosure; or
- b. in connection with the threatened disclosure.

(c) **Penalty.**¹⁴⁴ A violation of this section shall be punishable as follows:

- (1) For a first offense, the violation is a [highest class of misdemeanor in that state]. If paired with an aggravating factor pursuant to section (h) of this statute, the violation is a [low level felony class in that state].
- (2) For a second or subsequent offense, the violation is a [low level felony class in that state]. If paired with an aggravating factor pursuant to section (h) of this statute, the violation is a [higher level felony class in that state].
- (3) Each image disclosed shall constitute a separate violation of this statute.

(d) **Exceptions.**¹⁴⁵ This section does not apply to any of the following:

- (1) Images involving voluntary exposure in public or commercial settings.
- (2) Disclosures made in the public interest, including, but not limited to, the reporting of unlawful conduct or the lawful and common practices of law enforcement, criminal reporting, legal proceedings, medical treatment, or scientific or educational activities.
- (3) Providers of an interactive computer service for images provided by another person.

(e) **Destruction of Image.**¹⁴⁶ In addition to any penalty or other damages, the court may order the destruction or

144. See COLO. REV. STAT. § 18-7-107(1)(III)(c) (2017); DEL. CODE ANN. tit. 11, § 1335(c) (2017); N.C. GEN. STAT. § 14-190.5A(c).

145. See N.C. GEN. STAT. § 14-190.5A(d)-(e).

146. See *id.* § 14-190.5A(e); OKLA. STAT. tit. 21, § 1040.13b(G) (2017).

removal of any image made or disclosed in violation of this statute.

- (f) **Other Sanctions or Remedies Not Precluded.**¹⁴⁷ A violation of this section is an offense additional to other civil and criminal provisions and is not intended to repeal or preclude any other sanctions or remedies.
- (g) **Civil Action.**¹⁴⁸ In addition to any other remedies at law or in equity, including an order by the court to destroy any image disclosed in violation of this section, any person whose image is disclosed, or used, as described in subsection (b) of this section, has a civil cause of action against any person who discloses or uses the image and is entitled to recover from the other person any of the following:
- (1) Actual damages, but not less than liquidated damages, to be computed at the rate of one thousand dollars (\$1000) per day for each day of the violation or in the amount of ten thousand dollars (\$10,000), whichever is higher.
 - (2) Punitive damages.
 - (3) A reasonable attorneys' fee and other litigation costs reasonably incurred. The civil cause of action may be brought no more than one year after the initial discovery of the disclosure, but in no event may the action be commenced more than seven years from the most recent disclosure of the private image.
 - (4) An individual whose private intimate parts have been posted in accordance with this section shall retain a protectable right of authorship regarding the commercial use of the private image.
- (h) **Aggravating Factor.**¹⁴⁹ If the actor pairs a disclosed image with personally identifiable information of the person depicted, it shall be considered an aggravating factor

147. See N.C. GEN. STAT. § 14-190.5A(f).

148. See COLO. REV. STAT. § 18-7-107(4)(b); N.C. GEN. STAT. § 14-190.5A(g).

149. See DEL. CODE ANN. tit. 11, § 1335(a)(c)(5).

of the offense.

This model statute addresses the problems presented in Part II of this Note, including how to treat the dissemination of multiple nonconsensual pornographic images, distinguishing dissemination that includes personal information of the victim as an aggravating circumstance—therefore allowing for harsher criminal penalties—and titling the statute precisely for what it is meant to protect against: Nonconsensual Pornography.¹⁵⁰ This model statute also includes provisions expanding the protections and remedies of potential victims already in effect in certain states,¹⁵¹ such as treating the threat of disclosure as a separate and distinct crime, requiring the destruction of any images made or distributed in violation of the statute, and allowing for victims to collect civil penalties in addition to any criminal penalties brought against the perpetrator.

CONCLUSION

The battle against revenge porn will not end with a single piece of legislation. Statutes are never perfect and require continuous revision and amendments as our society's use of technology continues to grow and change. This applies specifically to the implementation of criminal laws against revenge porn. State legislators must prove their commitment to the prevention and punishment of this crime by drafting victim-centric, general-intent laws that punish the threat of disclosure, include harsher penalties for images accompanied by victims' personal information, and mandate destruction of nonconsensual pornographic images. Only after states amend their laws to address these issues will more victims feel comfortable coming forward

150. "Nonconsensual Pornography" was chosen as the title for the model statute instead of "Revenge Porn" because the latter suggests that feelings of revenge on the part of the actor against the victim are required in order to fall under the statute. As discussed in Section I.B.1.a. of this Note, a prior relationship or specific feelings of ill will should not be required to have a finding of guilt under a nonconsensual pornography law. *But see* 18 PA. CONS. STAT. § 3131(a) (2017).

151. These provisions are discussed in Section I.B.1. of this Note.

to enforce such laws against their abusers and feel fully recognized and protected by the laws of their state.