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## *Reflections On Revenge Porn: Illustrating Why The Legal System Should Adopt A Comprehensive Response To Nonconsensual Pornography In The U.S.*

Chance Carter

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**REFLECTIONS ON REVENGE PORN: ILLUSTRATING WHY THE LEGAL SYSTEM SHOULD ADOPT A COMPREHENSIVE RESPONSE TO NONCONSENSUAL PORNOGRAPHY IN THE U.S.**

**Chance Carter\***

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## I. INTRODUCTION

The issue of nonconsensual pornography, including revenge porn, changes from victim to victim and affects each person differently. In the situation below, what started as an intimate moment between two consenting people ended with excruciating harm to one individual.

Katie Hill is a former United States Congresswoman who was forced to resign because her ex-husband leaked explicit pictures of her online without her permission.<sup>1</sup> Hill suffered physical, sexual, verbal, emotional, and psychological abuse at the hands of her ex-husband.<sup>2</sup> Throughout their relationship, Hill's ex-husband posted nude photographs of Hill on dating websites, without her consent or knowledge, and threatened to commit suicide if she ever left him.<sup>3</sup> Hill lived in constant fear that if she left the marriage, her ex-husband would kill her.<sup>4</sup> After Hill was elected to Congress and moved to Washington, D.C., she divorced her ex-husband.<sup>5</sup> In response, Hill's ex-husband enlisted other right-wing journalists to attack her using a "scorched earth" policy designed to force Hill to resign.<sup>6</sup> Hill's ex-husband provided his allies with over 700 intimate photos and texts that he had exclusive access to.<sup>7</sup> They intended to slowly release these photos bit by bit until Hill resigned from Congress.<sup>8</sup> After two weeks of steady photo releases, it worked.<sup>9</sup> Hill resigned from Congress.<sup>10</sup> Even after resigning, Hill continued to experience extreme violence and receive threats from strangers who had viewed the photos.<sup>11</sup> Hill eventually received a temporary restraining order against her ex-husband, but Daily Mail journalists continued to hound her for articles and publish intimate photos of her.<sup>12</sup> Even though Hill's ex-husband allegedly violated the California statute criminalizing nonconsensual pornography, the court ultimately found that due to the photos' "newsworthiness," they should be considered a matter of public concern and therefore exempt from the statute.<sup>13</sup> Hill's ex-husband and his allies were not held liable, and Hill's complaint was struck.<sup>14</sup> Hill was ultimately ordered to pay the Daily Mail over \$100,000 dollars in attorney's fees and costs as a result of losing the lawsuit.<sup>15</sup>

1. Sarah Jarvis, *Former Rep. Katie Hill Sues Media Orgs Over Graphic Photos*, LAW 360 (Dec. 23, 2020, 9:13 PM EST), <https://perma.cc/YT93-6MNY>.

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

11. Complaint for Damages ¶ 5, *Hill v. Heslep*, No. 20STCV48797 (Cal. Super. Ct. Dec. 21, 2020).

12. Jarvis, *supra* note 1.

13. Craig Clough, *Daily Mail Escapes Ex-Rep. Katie Hill's Revenge Porn Suit*, LAW 360 (Apr. 7, 2021, 5:23 PM EDT), <https://perma.cc/8D7W-T8AB>.

14. *Id.*

15. Dave Simpson, *Ex-Rep. Owes Daily Mail Atty Fees From Revenge Porn Suit*, LAW 360 (June 2, 2021, 10:52 PM EDT), <https://perma.cc/Q7DY-MDB4>.

Matthew Herrick met his ex-boyfriend on the popular gay dating app Grindr.<sup>16</sup> Once the two became exclusive, Herrick deactivated his account.<sup>17</sup> After the two broke up, Herrick's ex-boyfriend created a fake account on Grindr where he posed as Herrick and used Herrick's photos to communicate with other men.<sup>18</sup> Using this fake account featuring Herrick's semi-nude photographs, Herrick's ex-boyfriend would elicit sex from men, telling them he was interested in serious kinks, like unprotected sex and being raped.<sup>19</sup> These men were instructed by Herrick's ex-boyfriend that Herrick would resist the men's sexual advances, but they should continue to pursue him because it was only role play and was all part of the fantasy. Herrick's ex-boyfriend then gave these men Herrick's home or work address.<sup>20</sup> Over ten months, approximately 1,400 men, as many as 23 random men a day, showed up at Herrick's home or office attempting to engage in sexual activities believing they were acting at the direction of Herrick himself.<sup>21</sup> Herrick reported the fake account to Grindr over 100 times, requesting it be removed in line with Grindr's user policy.<sup>22</sup> Grindr never responded to the complaints.<sup>23</sup> Ultimately, Herrick sued Grindr for their negligence, but Grindr was found not liable because 47 U.S.C. § 230 immunizes social content sites from the third party content published on their platforms.<sup>24</sup>

Erin Andrews is a popular sportscaster who was traveling to Nashville for work.<sup>25</sup> A stalker followed Andrews to Nashville, booked the hotel room next to her, and rigged a peephole in her door from which he could record Andrews.<sup>26</sup> When Andrews's stalker heard her showering, he started filming her through the peephole and ultimately recorded her naked in her hotel room.<sup>27</sup> The video spread online, and as of 2016, there were over 300 million searches for the video.<sup>28</sup> Even though Andrews was able to obtain copyright to the video in 2010, one year after she discovered its existence,

16. *Herrick v. Grindr*, 306 F. Supp. 3d 579, 584–85 (S.D.N.Y. 2018).

17. *Id.*

18. *Id.* at 585.

19. *Id.* at 585; see also Carrie Goldberg, *Herrick v. Grindr: Why Section 230 of the Communications Decency Act Must be Fixed*, LAWFARE (Aug. 14, 2019), <https://perma.cc/S5RT-SA4P>.

20. *Herrick*, 306 F. Supp. at 585.

21. Goldberg, *supra* note 19.

22. *Herrick*, 306 F. Supp. at 585.

23. *Id.*

24. *Id.* at 584.

25. Sarah Kaplan, *The ordeal of sportscaster Erin Andrews: 'Oh my God . . . I was naked all over the Internet'*, WASH. POST (Mar. 1, 2016, 3:30 AM MST), <https://perma.cc/7GUZ-FC8M>.

26. *Id.*

27. *Id.*

28. Ahiza Garcia, *Why is the Erin Andrews nude video still online?*, CNN BUSINESS (Mar. 6, 2016, 8:30 PM EST), <https://perma.cc/8HQD-7SG4>.

she will likely never gain full control of the video.<sup>29</sup> Andrews's lawyers will likely never be able to remove it from the internet entirely because of the video's popularity.<sup>30</sup>

Rehtaeh Parsons was a 15-year-old high school student. One night she attended a house party and had several alcoholic drinks.<sup>31</sup> Eventually, Parsons became sick and bent out a window to vomit.<sup>32</sup> While bent over the window, a fellow student sexually penetrated her from behind and proceeded to rape her, giving a thumbs up to his friend who was recording the attack.<sup>33</sup> The video was dispersed through social media, and after a year of enduring messages propositioning her for sex, Parsons attempted to take her own life.<sup>34</sup> She ultimately failed and remained in a comatose state for the remainder of her life.<sup>35</sup> Parsons's parents eventually made the difficult decision to remove her from life support.<sup>36</sup> While her attacker received 12 months of probation for violations of a child pornography statute, both the attacker and videographer walked away free from jail.<sup>37</sup>

Our legal system's current response to nonconsensual pornography—the nonconsensual sharing of intimate images that depict another—does not provide victims the justice they deserve. Numerous legal experts have noted these inadequacies and have suggested viable reforms to address these issues.<sup>38</sup> These reforms, including acknowledging victims' copyright in non-consensual pornography taken as a selfie, federally criminalizing the distribution of nonconsensual pornography, and amending Section 230, have many important features for victims. However, these reforms are also straddled with numerous pitfalls which render each potential reform inadequate on its own. By acknowledging the pitfalls that inevitably come with these potential reforms, I suggest that to properly address nonconsensual pornography in a way that holds perpetrators accountable and remedies the unique harms caused to victims we must adopt comprehensive reform that consists of the three popular reforms suggested by scholars.

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29. *Id.*

30. *Id.*

31. John Barber, *Second man walks free after humiliation of Canadian teen Rehtaeh Parsons*, THE GUARDIAN (Jan. 15, 2015, 3:38 PM EST), <https://www.theguardian.com/world/2015/jan/15/rehtaeh-parsons-second-man-walks-free-humiliation-canadian-teen-killed-herself>.

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

37. Barber, *supra* note 31.

38. See generally Danielle Keats Citron, *Sexual Privacy*, 128 YALE L.J. 1870 (2019); Mary Anne Franks, "Revenge Porn" Reform: A View From the Front Lines, 69 FLA. L. REV. 1251 (2017); Andrew Gilden, *Sex, Death, and Intellectual Property*, 32 HARV. J.L. & TECH. 69 (2018).

This article provides a brief background on nonconsensual pornography and the factors that inhibit our legal system's response. It then focuses on the advantages and disadvantages of each potential reform suggested by experts. By analyzing these advantages and disadvantages, this article illustrates why implementing a single approach to combat nonconsensual pornography is not enough due to the vast differences in how nonconsensual pornography affects each victim. Our legal system must adopt a comprehensive response to nonconsensual pornography so we can bring much-needed relief to victims like Katie Hill, Matthew Herrick, Erin Andrews, and Rehtaeh Parsons.

## II. BACKGROUND ON REVENGE AND NONCONSENSUAL PORNOGRAPHY

To understand why the legal reforms suggested by experts are necessary, it is important to first understand the issue of nonconsensual pornography. I begin by defining and framing the problem, looking at the history of the problem, and analyzing what factors keep victims from holding people accountable.

### A. *Defining and Framing the Problem*

There is a difference between nonconsensual pornography and revenge porn. This section aims to illustrate what is, and is not, revenge porn by highlighting common misconceptions about nonconsensual pornography.

#### 1. *The Difference Between Nonconsensual Pornography and Revenge Porn*

The term "revenge porn" sounds daunting, but what exactly is it? This article refers to both "nonconsensual pornography" and "revenge porn." Nonconsensual pornography is the distribution of sexually graphic images or videos of an individual without their consent.<sup>39</sup> Nonconsensual pornography, therefore, includes images and videos the perpetrator originally obtained with and without consent.<sup>40</sup> Revenge porn, on the other hand, is the distribution of sexually graphic images of an individual without their consent for no legitimate purpose within the context of an intimate relationship.<sup>41</sup> These images or videos are typically shared consensually by one person to their intimate partner.<sup>42</sup> Use of the phrase "revenge porn" is com-

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39. Danielle Keats Citron & Mary Anne Franks, *Criminalizing Revenge Porn*, 49 WAKE FOREST L. REV. 345, 346 (2014).

40. *Id.*

41. *Id.*

42. *Id.*

monplace in our society, but it is only a piece, albeit a large piece, of non-consensual pornography.

In this article, I also use the terms “victim,” “perpetrator,” and “social content site.” By using the term victim, I am referring to the person depicted in the nonconsensual pornography, with the term perpetrator being the person responsible for the nonconsensual pornography’s original dissemination to the public. A social content site is the website where the non-consensual pornography is being hosted, such as Facebook, Instagram, YouTube, or any other website that could be used to host or distribute non-consensual pornography.

## 2. “Revenge Porn” Is a Misnomer

The term “revenge porn” is truly a misnomer.<sup>43</sup> To begin, there is no “revenge” or ill-intent required for content to even be considered revenge porn.<sup>44</sup> Many of the photos and videos that eventually become nonconsensual pornography were actually created within the context of a consenting intimate relationship.<sup>45</sup> Regardless of whether it is a selfie or a video created for a significant other, or for someone else entirely, most nonconsensual pornography was created with the opposite intent of revenge.<sup>46</sup> It was created to share between two consenting adults.<sup>47</sup> Once the content leaves the consenting relationship without the victim’s permission, it becomes nonconsensual pornography.<sup>48</sup>

Nonconsensual pornography encompasses not only revenge porn, but also might include a variety of other types of content. Though they are becoming more prevalent, this article will not discuss the other types of related media like up-skirt photos, hidden camera photos, and deepfakes.<sup>49</sup> These types of content have also been dubbed “revenge porn” even though they are created outside the confines of an intimate relationship, and without the victim’s consent.<sup>50</sup> A common theme runs through all of these types of media however—it was all created without the consent of the victim.

43. Mary Anne Franks, *Drafting an Effective “Revenge Porn” Law: A Guide for Legislators* at 2 (Sept. 22, 2016), <https://perma.cc/C8VS-T33S>.

44. *Id.*

45. Erica Souza, Note, “*For His Eyes Only*”: *Why federal legislation is needed to combat revenge porn*, 23 *UCLA WOMEN’S L.J.* 101, 102 (2016).

46. Franks, *supra* note 43, at 2.

47. Souza, *supra* note 45, at 102.

48. Franks, *supra* note 43.

49. *See* Citron, *supra* note 38, at 1904–28 (examining other types of sexual privacy invasions).

50. Franks, *supra* note 43, at 2; *see also* Citron, *supra* note 38, at 1917–18.



### B. *The Rise of Nonconsensual Pornography*

In recent years, there has been a sharp increase in the number of individuals who report being a victim of nonconsensual pornography.<sup>51</sup> By looking to the history of nonconsensual pornography and the statistics surrounding the issue, we can gather this issue will continue to plague our communities until meaningful change is implemented.

#### 1. *History of Nonconsensual Pornography*

As technological abilities have increased, technology has become the fuel propelling the rise of nonconsensual pornography.<sup>52</sup> Because images have become easier to capture and share, it has also become easier for perpetrators to distribute nonconsensual porn.<sup>53</sup>

Until recently, the viewing of naked women without their consent received little attention from lawmakers or the media.<sup>54</sup> That is because we had already normalized this as a society.<sup>55</sup> Porn has been part of society for hundreds, if not thousands, of years.<sup>56</sup> It is far from a modern innovation. Nor are websites hosting nonconsensual pornography in any way innovative; they have simply adopted features from earlier occurrences of nonconsensual pornography.<sup>57</sup> In 1980, *Hustler* magazine shocked society by publishing its “Beaver Hunt” edition.<sup>58</sup> *Hustler* published images of naked women alongside private information about their life and sexual desires.<sup>59</sup> While some of this information was true and some of it false, all of the images, and information accompanying them, were submitted to *Hustler* (mainly by the victims’ husbands) and published without the victims’ consent.<sup>60</sup>

In 2010, Hunter Moore created his revenge porn super website, *IsAnyoneUp*.<sup>61</sup> The first image posted on the website collected over 350,000 views. Along with the victim’s images, Moore also published victims per-

51. See *infra* notes 68–71, 73–75.

52. Evan Ribot, Note, *Revenge Porn and the First Amendment: Should Nonconsensual Distribution of Sexually Explicit Images Receive Constitutional Protection?*, 2019 U. CHI. LEGAL F. 521, 524 (2019).

53. Franks, *supra* note 38, at 1255.

54. *Id.*

55. *Id.*

56. Dave Hill, *The History of Pornography*, HUFFPOST (May 25, 2011), <https://perma.cc/T7FX-HMLR>.

57. Amanda Levendowski, *Our Best Weapon Against Revenge Porn: Copyright Law?*, THE ATLANTIC (Feb. 4, 2014), <https://perma.cc/3TUG-SN9R>.

58. Alexa Tsoulis-Reay, *A Brief History of Revenge Porn*, N.Y. MAGAZINE (July 19, 2013), <https://nymag.com/news/features/sex/revenge-porn-2013-7/>.

59. *Id.*

60. *Id.*

61. *Id.*

sonal information including their names, ages, professions, and social media links.<sup>62</sup> This ensured the images and videos would appear with a simple Google search of the victim's name.<sup>63</sup> Moore went on to publish 15 to 30 images or videos every day for over one and one-half years, making him as much as \$30,000 a month.<sup>64</sup> In January 2014, federal agents arrested Moore.<sup>65</sup> Moore pleaded guilty to an email hacking scheme in 2015 and received a two-and-one-half-year sentence in federal prison and a fine.<sup>66</sup> Even though the hacking occurred to steal nude photos to post on the website, Moore was never held accountable for his actions against the women whose images appeared on IsAnyoneUp.<sup>67</sup>

## 2. *Statistics Show Nonconsensual Pornography Continues to Rise, Mainly Affecting Women and Sexual Minorities*

By 2016, ten million Americans had already become victims of non-consensual pornography.<sup>68</sup> A 2016 Data & Society study found 1 in 25 Americans, or 4% of people who use the internet, have either had or been threatened with the nonconsensual posting of explicit photos of themselves.<sup>69</sup> When limited to women aged 30 and younger, the study revealed 10% of women have either had or been threatened with nonconsensual posting of explicit photos of themselves on the internet. When looking to LGBTQ+ individuals, the study revealed 17% of LGBTQ+ individuals have either had or been threatened with nonconsensual posting of explicit photos of themselves on the internet; only 2% of heterosexual respondents reported the same.<sup>70</sup> A similar 2015 study, focused on individuals aged 18–30 years old, showed that 23% of respondents reported being a victim of revenge porn.<sup>71</sup>

62. Alex Morris, *Hunter Moore: The Most Hated Man on the Internet*, ROLLING STONE (Nov. 13, 2012, 9:10 PM EST), <https://perma.cc/K33D-JA75>.

63. *Id.*

64. *Id.*

65. Abby Ohlheiser, *Revenge porn purveyor Hunter Moore is sentenced to prison*, WASH. POST (Dec. 3, 2015, 12:18 PM MST), <https://perma.cc/KDK6-HLXJ>.

66. *Id.*

67. United States Attorney's Office for the Central District of California, *Man Who Operated 'Revenge Porn' Website Pleads Guilty In Hacking Scheme That Yielded Nude Photos From Google Email Accounts*, U.S. Dep't of Justice (Feb. 25, 2015), <https://perma.cc/T8ZY-APHR>.

68. Lori Janjigian, *Nearly 10 million Americans are victims of revenge porn, study finds*, INSIDER (Dec. 13, 2016, 3:03 PM), <https://perma.cc/X7AR-MF9T>.

69. Amanda Lenhard, Myeshia Price-Feeney & Michele Ybarra, *Nonconsensual Image Sharing: One in 25 Americans has been a victim of "Revenge Porn"*, DATA & SOCIETY, at 4 (Dec. 13, 2016), <https://perma.cc/8SD7-CNVK>.

70. *Id.*

71. Sameer Hinduja, *Revenge Porn Research, Laws, and Help for Victims*, CYBERBULLYING RESEARCH CENTER, <https://perma.cc/6KVN-QWC3> (last visited Mar. 3, 2022).

A more recent 2019 study by the American Psychological Association (APA) and the Cyber Civil Rights Initiative (CCRI) revealed that over 8% of respondents had been victims of nonconsensual pornography, suggesting these numbers have risen in recent years.<sup>72</sup> This study reached three times the number of participants of the Data & Society study and spanned an age range of 18–97 years old. Further, while the Data & Society study results include individuals who became victims of revenge porn or were threatened with the posting of explicit photos of themselves on the internet, the APA & CCRI study results only include individuals who became victims of non-consensual pornography. In the APA & CCRI study, 70% of the individuals who reported being a victim of nonconsensual pornography said they were victims of revenge porn; their images were posted by a current or ex romantic partner.<sup>73</sup> Again, women were frequently targeted more than men, with over 9.2% of women reporting being victims compared to 6.6% of men.<sup>74</sup> When looking to LGBTQ+ individuals, nearly 44.4% of LGBTQ+ respondents reported being a victim of nonconsensual pornography compared to 12.4% of heterosexual respondents.<sup>75</sup>

The history and statistics indicate that nonconsensual pornography is a modern problem and should be framed as such. The rise in nonconsensual pornography is an issue that can be framed alongside the rise in technological abilities and one which predominantly affects women and the LGBTQ+ community.

### C. *Four Key Factors Limit the Legal System's Current Response to Nonconsensual Pornography*

Four factors play a key role in how the legal system has developed its response to nonconsensual pornography. First, this issue is relatively new, and therefore the legal system has not had time to properly respond. Second, states have acted in a reactionary manner, creating a collection of inadequate state laws. Third, by regulating the dissemination of nonconsensual pornography, some believe we are impermissibly regulating an individual's First Amendment right to free speech. Lastly, existing federal law has left victims unable to hold social content sites accountable for spreading or hosting this harmful content.

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72. Asia A. Eaton & Yanet Ruvalcaba, *Nonconsensual Pornography Among U.S. Adults: A Sexual Scripts Framework on Victimization, Perpetration, and Health Correlates for Women and Men*, AM. PSYCHOLOGICAL ASS'N & CYBER CIVIL RIGHTS INITIATIVE 4 (Feb. 4, 2019), <https://perma.cc/AVE5-93GY>.

73. *Id.*

74. *Id.* at 5.

75. *Id.* at 7.

### 1. *Nonconsensual Pornography is a Relatively New Phenomenon*

Nonconsensual pornography is a twenty-first century problem that presents challenges unique to the modern era.<sup>76</sup> Even though nonconsensual pornography first appeared in the 1980s, its rise is truly coupled with the rise of technology.<sup>77</sup> In 2008, porn websites only received two to three complaints a week about images posted nonconsensually.<sup>78</sup> As images become easier to capture and repost, it became harder to guarantee that an image is ever fully removed from the internet.<sup>79</sup> By the time a victim discovers the images have been posted, it is likely the content has already been downloaded, posted, forwarded, or shared by countless other users.<sup>80</sup>

The first laws addressing nonconsensual pornography did not appear in the United States until New Jersey adopted their revenge porn statute in 2004.<sup>81</sup> Nearly ten years later, only two more states had adopted nonconsensual pornography statutes.<sup>82</sup> At the time of this writing, a Lexis+ search of “Revenge porn(ography)” or “Nonconsensual porn(ography)” only returned 123 judicial decisions or opinions.<sup>83</sup> The same search on Westlaw Edge returned 111 judicial decisions or opinions.<sup>84</sup> Compared to a search of “free speech” that delivers over 10,000 judicial opinions, there is an extremely limited amount of judicial guidance on this issue.<sup>85</sup>

### 2. *Existing State Laws and Civil Courses of Action Are Not Effective*

As of this article’s writing, 48 states, two territories of the United States, and Washington, D.C., have adopted some form of law against nonconsensual pornography.<sup>86</sup> As discussed earlier, nonconsensual pornography is closely related to the internet.<sup>87</sup> It is entirely predictable the perpetrator and victim could live in different states, creating jurisdictional issues

76. Ribot, *supra* note 52, at 525.

77. *See supra* text accompanying notes 52–53, 57–59.

78. Tsoulis-Reay, *supra* note 58.

79. Ribot, *supra* note 52, at 524.

80. Franks, *supra* note 38, at 1273.

81. Tal Kopan, *States criminalize ‘revenge porn’*, POLITICO (Oct. 30, 2013, 7:20 AM EDT), <https://perma.cc/7H44-7G37>.

82. Franks, *supra* note 38, at 1280.

83. Lexis+, accessed April 16, 2022, search using “Nonconsensual pornography!” OR “Revenge Porn!”.

84. Westlaw Edge, accessed April 16, 2022, search using “Nonconsensual pornography!” OR “Revenge Porn!”.

85. Lexis+, accessed April 16, 2022, search using “Free Speech”; Westlaw Edge, accessed April 16, 2022, search using “Free Speech.”

86. *48 States + DC + Two Territories Now Have Laws Against Nonconsensual Pornography*, CYBER CIVIL RIGHTS INITIATIVE, <https://perma.cc/MG27-4VPN> (last visited Apr. 17, 2022).

87. *See supra* text accompanying notes 52–57, 61–67.

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when state laws are applied.<sup>88</sup> This creates issues from the case's onset, making prosecutors determine if they even have jurisdiction to prosecute the perpetrator. Each state law varies on what is required for a person to be found guilty; each state has its own intent requirements, exceptions, and penalties.<sup>89</sup> These inconsistencies only undermine the effort to acknowledge the seriousness of the offense by criminalizing it in the first place.<sup>90</sup> But even without these inconsistencies, these laws may be so narrow they will do little to combat nonconsensual pornography.<sup>91</sup> If these laws are not enforced consistently, or are drafted too narrowly, they will not deter perpetrators from distributing the content.<sup>92</sup>

Victims have also tried to pursue civil recourse under varying tort claims. While some victims have successfully pursued tort claims, relevant civil courses of action present several problems for nonconsensual pornography victims.<sup>93</sup> Civil courses of action do not create jail time; rather, they offer the victim the potential to collect monetary damages from the perpetrator.<sup>94</sup> Many perpetrators, however, do not have sufficient financial assets upon which a victim could collect.<sup>95</sup> Additionally, victims must also be able to afford pursuing a civil course of action. Victims suffer economic harms such as job loss or being forced to move.<sup>96</sup> Victims also suffer from various mental health implications, with 80–93% of victims suffering significant emotional distress after their photos were released.<sup>97</sup> These mental health impacts include anger, guilt, paranoia, depression, and even suicide.<sup>98</sup> Like victims of child pornography or sexual assault, victims of revenge porn also suffer from long-term mental health impacts such as depression, withdrawal, low self-esteem, and feelings of worthlessness.<sup>99</sup> Further, many victims fear the unwanted publicity that may come with civil courses of action where they generally must pursue action under their legal name.<sup>100</sup> According to one attorney who represents revenge porn victims, “in the real world,

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88. Souza, *supra* note 45, at 118.

89. Ribot, *supra* note 52, at 529–30.

90. Souza, *supra* note 45, at 118.

91. Citron, *supra* note 38, at 1933–34.

92. Citron & Franks, *supra* note 39, at 361.

93. *Id.* at 357.

94. Christian Nisttahuz, Note, *Fifty States of Grey: A Comparative Analysis of Revenge-Porn Legislation throughout the United States and Texas's Relationship Privacy Act*, 50 TEX. TECH L. REV. 333, 347–48 (2018).

95. *Id.*

96. Mudasir Kamal & William Newman, *Revenge Pornography: Mental Health Implications and Related Legislation*, 44(3) J. of the Am. Acad. of Psychiatry & L. Online (Sept. 2016), <https://perma.cc/P4GS-8L5Q>.

97. *Id.*

98. *Id.*

99. *Id.*

100. Citron & Franks, *supra* note 39, at 358.

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civil lawsuits are no remedy at all.”<sup>101</sup> A civil lawsuit simply may not be a feasible option for many victims.

### 3. *There Are Free Speech Concerns with Regulating Nonconsensual Pornography*

It is possible that a law banning the distribution of nonconsensual pornography could be unconstitutional because courts are reluctant to allow restrictions on speech based on the message’s content, its speaker, or the message’s viewpoint.<sup>102</sup> Beyond mere facial appearances, this argument has little value. It is axiomatic that a law regulating the distribution of nonconsensual pornography, like any other law, must be constitutional. Though it seems legislation banning nonconsensual pornography would violate the Constitution at face value, scholars suggest that carefully written legislation would fit current First Amendment doctrine and be considered constitutional.<sup>103</sup> These scholars’ suggestions are confirmed by decisions from multiple state supreme courts, both liberal and conservative, who have either found or suggested the same: that a carefully written ban on nonconsensual pornography is constitutional.<sup>104</sup>

When analyzing regulations on speech, courts consider content-based regulations and content-neutral regulations.<sup>105</sup> Regulations based on the content of the speech must overcome a standard of strict scrutiny; the regulation must be narrowly tailored to fit a compelling state interest.<sup>106</sup> Content-neutral regulations, such as regulations limiting the time, place, or manner of speech, are often held to a lower standard by courts.<sup>107</sup>

In *Snyder v. Phelps*,<sup>108</sup> the Supreme Court of the United States further clarified First Amendment doctrine, pointing to another way that could allow statutes regulating nonconsensual pornography to be considered constitutional.<sup>109</sup> In *Snyder*, the Court noted “not all speech is of equal First Amendment importance.”<sup>110</sup> Speech on private matters does not occupy the same constitutional concern as speech purely on public matters.<sup>111</sup> The

101. *Id.* at 349.

102. John A. Humbach, *The Constitution and Revenge Porn*, 35 PACE L. REV. 215, 217–18 (2014).

103. See Citron & Franks, *supra* note 39, at 376; see also Ribot, *supra* note 52, at 528–30.

104. Ex parte Jones, No. 12-17-00346-CR, 2018 WL 2228888 (Tex. App. May 16, 2018); Ex parte Jones, No. PD-0552-18, 2021 WL 2126172 (Tex. Crim. App. May 26, 2021); see also State v. VanBuren, No. 16-253, 2018 WL 4177776 (Vt. Aug. 31, 2018); Chance Carter, *An Update of the Legal Landscape of Revenge Porn*, ATT’Y GEN. J. (Nov. 16, 2021), <https://perma.cc/J36D-D9A4>.

105. Humbach, *supra* note 102, at 221–22.

106. *Id.* at 224–25.

107. *Id.* at 222–23.

108. 562 U.S. 443 (2011).

109. *Id.* at 452.

110. *Id.* (internal citations omitted).

111. *Id.*

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Court found that speech on public matters was at the heart of the protections offered by the First Amendment, whereas speech on purely private matters does not invoke the same rigorous standards.<sup>112</sup> Speech of “public concern” is related to social, political, or other community concerns.<sup>113</sup> It is a limited situation where intimate images depicting another person shared without that person’s consent could be related to social, political, or community concerns.<sup>114</sup> While one could argue that Katie Hill’s images are related to social, political or community concerns, it is hard to fathom how one could rationally argue the images or videos of Matthew Herrick, Erin Andrews, or Rehtaeh Parsons could meet this same standard.

Given all of this, state laws have a good track record in courts and generally have been found constitutional.<sup>115</sup> However, statutes that possess neither an intent requirement nor a requirement that the perpetrator knew the victim did not consent to the media’s distribution might struggle to overcome judicial scrutiny.<sup>116</sup>

In Texas, for example, an appellate court held the state’s ban on non-consensual pornography was unconstitutional due to its breadth.<sup>117</sup> The court suggested that by requiring “the disclosing person have knowledge of the circumstances giving rise to the depicted person’s privacy expectations,” the law would have been narrowed and therefore a valid restriction under the First Amendment.<sup>118</sup> This additional element suggested by the court would limit the law to only holding the original perpetrator accountable without criminalizing people who might subsequently share the material without knowing the content was originally posted nonconsensually.<sup>119</sup> The Texas Court of Criminal Appeals eventually overturned the decision and found the original law constitutional, because it is “tailored to a specific government interest—protecting sexual privacy.”<sup>120</sup>

The Vermont Supreme Court held the state’s nonconsensual pornography law, which required both intent and the perpetrators’ knowledge of a

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112. *Id.* at 451–52 (internal citations omitted).

113. *Id.* at 453 (internal citations omitted).

114. *See* *People v. Austin*, 155 N.E.3d 439, 458–59 (Ill. 2019) (finding “no difficulty in concluding that nonconsensual dissemination of the victim’s private sexual images was not an issue of public concern”); *see also* *State v. VanBuren*, 210 Vt. 293, 321 (Vt. 2019) (finding the speech proscribed by the statute, nonconsensual pornography, has “no connection to matters of public concern”).

115. Carter, *supra* note 104 (concluding “state supreme courts have dismissed all constitutional challenges to existing state revenge porn laws”).

116. Ribot, *supra* note 52, at 530.

117. *Id.* at 532.

118. *Ex parte Jones*, No. 12-17-00346-CR, 2018 WL 2228888, at \*7 (Tex. App. May 16, 2018).

119. *Id.*

120. Anna Canizales, *Texas Court of Criminal Appeals upholds “revenge porn” law*, *The Texas Tribune* (May 26, 2021), <https://perma.cc/W75V-UZT5>.

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lack of consent, survived the strict scrutiny standard.<sup>121</sup> The same theory rings true in Minnesota, where the Minnesota Supreme Court found that because the state's ban on nonconsensual pornography only prohibits private speech that "(1) is intentionally disseminated without consent, (2) falls within numerous statutory definitions, and (3) is outside of the seven broad exemptions" of free speech, the ban was narrowly tailored to fit a compelling state interest.<sup>122</sup>

Instead of viewing the ban against nonconsensual pornography as a content-based restriction as the Texas, Vermont, and Minnesota courts did, the Illinois Supreme Court found the Illinois statute banning nonconsensual pornography was a content-neutral regulation and was therefore only subject to intermediate scrutiny.<sup>123</sup> In comparing the ban against nonconsensual pornography to other laws aimed at protecting privacy, such as medical records, the court said the restriction served a purpose "unrelated to the content of expression."<sup>124</sup> Ultimately, the court said because "there is no criminal liability for the dissemination of the very same image obtained and distributed with consent," the law was neutral as to the content of the speech.<sup>125</sup> Invoking the words of the Supreme Court of the United States in *Snyder*, the Illinois Supreme Court held nonconsensual pornography was speech on purely private matters.<sup>126</sup> The law served an important government interest, unrelated to the suppression of free speech, and was found constitutional because it did not unconstitutionally restrict an individual's right to free speech.<sup>127</sup>

As long as the ban includes a requirement that the distribution is without the victim's consent, and the person distributing the material knew or had intent to do so without consent, legislation regulating the distribution of nonconsensual pornography is likely constitutional.<sup>128</sup> To conclude that any regulation of nonconsensual pornography is automatically unconstitutional simply does not fit with long-held interpretations of the Constitution.

#### 4. *Section 230 Prevents Social Content Sites from Being Held Accountable by Victims*

Because many perpetrators remain judgment proof from civil litigation, and existing state laws, while constitutional, are ineffective, some ar-

121. *State v. VanBuren*, 210 Vt. 293, 300, 327 (Vt. 2019).

122. *Minnesota v. Casillas*, 952 N.W.2d 629, 644 (Minn. 2020).

123. *People v. Austin*, 155 N.E.3d 439, 457–58 (Ill. 2019).

124. *Id.* (internal citation omitted).

125. *Id.*

126. *Id.* at 458 (citing *Snyder v. Phelps*, 562 U.S. 443, 451–52 (2011)).

127. *Id.* at 459, 474.

128. Ribot, *supra* note 52, at 530.



gue that victims can gain redress by suing the social content site that distributed the nonconsensual pornography.<sup>129</sup> This argument, however, is simply not possible under current law because content sharing sites are immune from liability for content posted to their sites by third-party users.<sup>130</sup>

Section 230 of the Communications Decency Act provides that “[n]o 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.”<sup>131</sup> Since its creation, federal courts of appeal have given this section broad interpretation resulting in more immunities from liability for social content sites than we would find to be reasonable public policy.<sup>132</sup>

This shield from liability serves as a giant roadblock many victims cannot overcome.<sup>133</sup> People like Matthew Herrick do not receive any recourse from the legal system for the harms caused to them because Section 230 exempts most websites hosting nonconsensual pornography from being held liable by victims.<sup>134</sup> While this broad interpretation may not necessarily seem problematic because both intellectual property issues and federal crimes are exempt from Section 230, neither federal criminal law nor copyright law currently offer any protections to nonconsensual pornography victims.<sup>135</sup>

The four factors identified above—the novelty of nonconsensual pornography, inconsistent and ineffective state laws regulating the distribution of nonconsensual pornography, questions regarding the constitutionality of laws regulating nonconsensual pornography, and limitations imposed by Section 230—have created a response from the legal system that provides little or no way for distributors of nonconsensual pornography to be held liable for the harms caused to victims. Because of these factors, the only people suffering under the legal system’s current response to nonconsensual pornography are the victims. Changing laws does not happen overnight, and the legal system is inherently slow to respond. Thus far, our legal system’s response has only been reactionary. As a whole, we have yet to begin thinking about this issue proactively.

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129. Citron & Franks, *supra* note 39, at 359.

130. *Id.* (internal citations omitted); *see also* 47 U.S.C. § 230(c)(1) (2018).

131. 47 U.S.C. § 230(c)(1).

132. Danielle Keats Citron & Benjamin Wittes, *The Internet Will Not Break: Denying Bad Samaritans § 230 Immunity*, 86 *FORDHAM L. REV.* 401, 410 (2017).

133. Layla Goldnick, Note, *Coddling the Internet: How the CDA Exacerbates the Proliferation of Revenge Porn and Prevents A Meaningful Remedy for its Victims*, 21 *CARDOZO J.L. & GENDER* 583, 599 (2015).

134. *Id.*; *see also* Goldberg, *supra* note 19.

135. Gilden, *supra* note 38, at 84.

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### III. ADVANTAGES AND DISADVANTAGES OF THE PRIMARY REFORMS SUGGESTED BY EXPERTS

Trends among scholars reveal three common suggestions for reforming our legal system's response to nonconsensual pornography in a way that gives victims the ability to gain redress. These include recognizing copyright for revenge porn victims, federally criminalizing the distribution of nonconsensual pornography, and amending Section 230 to create a carve-out for nonconsensual pornography. While each reform provides crucial legal tools to victims, we cannot ignore that each reform is also straddled with pitfalls. This section explores the advantages and disadvantages of the three popular ideas for reform.

#### A. *Copyright Recognition for Revenge Porn Victims*

Many scholars have suggested granting victims copyright in the non-consensual pornography that bears their likeness.<sup>136</sup> Under current copyright law, content must be an original work of authorship fixed in a tangible medium to be eligible for copyright.<sup>137</sup> The person who creates the image or video is considered the author.<sup>138</sup> When considering selfies, this definition means the person in the image is also the author. This bears particular importance when considering that 80% of nonconsensual pornography are selfies.<sup>139</sup> In other words, 80% of victims would currently satisfy the statutory requirements to gain copyright in the nonconsensual pornography depicting them without changing a single statutory requirement.<sup>140</sup>

The person who owns the copyright to a work is granted a wide range of rights, including the right to duplicate the copyrighted material and the right to distribute the copyrighted material.<sup>141</sup> Any person or entity who would distribute or duplicate the copyright holder's work without their permission would infringe on the author's copyright.<sup>142</sup>

#### 1. *Advantages of Copyright Protection for Revenge Porn Victims*

Victims have struggled to prevail with existing civil or criminal courses of action. Even if victims do prevail, these courses of action fail to provide remedies adequately addressing the unique harms caused by non-

136. See *id.* at 67; see also Citron, *supra* note 38, at 1935; Amanda Levendowski, *Using Copyright To Combat Revenge Porn*, 3 N.Y.U. J. INTELL. PROP. & ENT. L. 422, 426 (2014).

137. 17 U.S.C. § 102(a) (2018).

138. *Definitions*, U.S. COPYRIGHT OFFICE (Apr. 15, 2021), <https://perma.cc/E6CS-XMWE>.

139. Levendowski, *supra* note 57.

140. *Id.*

141. 17 U.S.C. § 106.

142. *Definitions*, *supra* note 138.

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consensual porn.<sup>143</sup> Copyright could be different because of the unique tools and rights provided to copyright holders.<sup>144</sup> There are two key advantages copyright law offers to nonconsensual pornography victims: it would allow the victim to issue a Digital Millennium Copyright Act (DMCA) takedown notice to infringing sites, and it would provide a civil course of action to the victim.

*a. Copyright Law Allows the Holder to Issue DMCA Takedown Notices to Infringing Sites*

As the internet began to grow and copyrightable content became easier to share, the DMCA was enacted to help enforce the rights granted to copyright holders.<sup>145</sup> Specifically, the DMCA allows copyright holders to issue a takedown notice to a social content site which orders the removal of material that infringes the holder's copyright.<sup>146</sup> Websites must then remove the content if they wish to remain not liable for monetary relief.<sup>147</sup>

The takedown notice would be an extremely important tool for victims of nonconsensual pornography because it would give them a way to have the content removed from the internet.<sup>148</sup> Granting a victim the copyright in the nonconsensual pornography depicting their likeness would grant them the power to control the distribution and duplication of said content.<sup>149</sup> Accordingly, if victims had copyright, they could issue a takedown notice to any social content site hosting nonconsensual pornography they own the copyright to.<sup>150</sup> This notice would require the website to remove the non-consensual pornography or face civil penalties.<sup>151</sup> Doing so would provide a fast and easy method for victims to ensure the harmful content depicting them is removed from the internet.<sup>152</sup> Depending on how quickly the takedown notice is issued, this tool could prevent some harm from ever happening or, at the very least, prevent any further harm that would occur from the content remaining on the internet for a prolonged period of time.

143. Meghan Fay, Note, *The Naked Truth: Insufficient Coverage for Revenge Porn Victims at State Law and the Proposed Federal Legislation to Adequately Redress Them*, 59 B.C.L. REV. 1839, 1846–47 (2018).

144. Derek E. Bambauer, *Exposed*, 98 MINN. L. REV. 2025, 2052 (2014).

145. President Bill Clinton signs the Digital Millennium Copyright Act into law, HISTORY (Oct. 27, 2020), <https://perma.cc/PD6D-SFLZ>.

146. 17 U.S.C. § 512(c)(1)-(3) (2018).

147. *Definitions*, *supra* note 138.

148. Levendowski, *supra* note 57.

149. *See supra* text accompanying notes 136–42, 146–52.

150. Levendowski, *supra* note 136, at 443.

151. 17 U.S.C. § 512 (c)(1).

152. *See generally* Levendowski, *supra* note 57.

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*b. Copyright Infringement Is a Civil Course of Action*

In addition to being able to issue DMCA takedown notices, copyright infringement would provide victims with a civil course of action to pursue a perpetrator with, instead of relying on the inadequate state laws that currently exist. Because many victims already meet the statutory requirement, courts would not struggle to fit the lawsuit into the statutory scheme of a tort that does not directly apply.<sup>153</sup>

A civil course of action, such as copyright infringement, would also create the potential for the victim to collect monetary damages from the people who caused their harm.<sup>154</sup> The harms victims suffer are real. In addition to losing their jobs, being forced to move, or hiring an attorney, many victims suffer from various mental health issues requiring them to seek professional help.<sup>155</sup> These costs all add up, and copyright law could allow victims to potentially collect \$750 to \$30,000 per image that infringes their copyright.<sup>156</sup> Revenge porn victims should be compensated for the harms caused to them by those who are liable for their injuries.

Civil lawsuits, like copyright infringement, give the victim and their legal representative, instead of a prosecutor, the ability to control litigation.<sup>157</sup> This control may be particularly important in situations where victims may already be reluctant to pursue criminal action because they are fearful of the prosecutor or police. It is well-documented police have historically marginalized minority communities, such as the LGBTQ+ community, which is disproportionately impacted by the distribution of nonconsensual porn.<sup>158</sup> Law enforcement routinely refuse to prosecute or take nonconsensual pornography seriously while dismissing, blaming, or shaming victims for sharing the images or videos in the first place.<sup>159</sup> Often, officers do not understand the community's norms which victims are acting within.<sup>160</sup> This misunderstanding of community norms results in judgment based on the victim's actions.<sup>161</sup> Accordingly, because many individuals in these communities fear they will be judged for their actions, they may be reluctant to seek assistance from legal authorities.<sup>162</sup> By allowing victims to pursue a civil course of action, victims can enlist an attorney they trust, and

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153. See Gilden, *supra* note 38, at 99–102 (discussing how IP can fill “jurisprudential gaps” of criminal and tort laws, and how IP laws fit the needs of nonconsensual pornography victims).

154. Bambauer, *supra* note 144, at 2063.

155. Ribot, *supra* note 52, at 527.

156. Bambauer, *supra* note 144, at 2063.

157. Gilden, *supra* note 38, at 101.

158. See *supra* text accompanying notes 70, 74–75.

159. Gilden, *supra* note 38, at 101.

160. *Id.*

161. *Id.*

162. *Id.*

who understands their community's norms. Ultimately, creating a civil course of action gives victims the power to control the litigation and decide the boundaries of their sexual privacy.<sup>163</sup>

## 2. *Disadvantages of Copyright Protection for Revenge Porn Victims*

Copyright law offers many important remedies to nonconsensual pornography victims. However, we cannot let those positive attributes overshadow the potential pitfalls that may exist if providing victims with the copyright in the nonconsensual pornography that depicts them was the only reform that was implemented.

### a. *There Are Access to Justice Issues with Copyright Law*

One inherent pitfall of copyright, and civil remedies in general, is the large costs associated with pursuing the lawsuit.<sup>164</sup> Even though issuing a takedown can be done without hiring an attorney, many victims may still wish to employ an attorney to help with the process, and issuing these takedowns can turn into a game of whack-a-mole.<sup>165</sup> Issuing a takedown notice to one social content site, regardless of whether that site complies, does not require another website to remove the same infringing content until that other website also receives a takedown notice.<sup>166</sup> In other words, a victim would have to issue a takedown notice to every social content site that hosts their nonconsensual pornography. The nature of nonconsensual pornography is that it is easily shared.<sup>167</sup> Because of this, it is easily foreseeable that nonconsensual pornography victims would be required to issue multiple takedown notices.

The cost of hiring an attorney to issue takedown notices is only one part of the legal costs victims could encounter by pursuing copyright infringement. The cost would only increase if litigation arises when a company ignores the takedown request, which they are apt to do, because many realize that victims cannot afford to pursue litigation.<sup>168</sup> Ultimately, while some victims may be able to afford hiring an attorney, not all can.<sup>169</sup> Gaining redress from perpetrators should not be a luxury afforded only to those victims who are wealthy enough to hire an attorney.

163. *Id.*

164. Franks, *supra* note 38, at 1300.

165. Levendowski, *supra* note 136, at 443.

166. *Id.*

167. *See supra* text accompanying notes 52–53.

168. Franks & Citron, *supra* note 39, at 360.

169. Franks, *supra* note 38, at 1300.

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*b. Only 80% of Victims Have a Course of Action Under Copyright Law*

One of the most important things to consider is that only granting victims copyright and providing no other reforms would only create further protections for 80% of the victims, or those victims whose nonconsensual porn is a selfie.<sup>170</sup> By doing so, we would leave the 20% of victims whose nonconsensual pornography was not selfies in the dark—with no redress or response from the legal system.<sup>171</sup> The other 20% of victims, people like Erin Andrews or Rehtaeh Parsons, are not the “author” of the nonconsensual pornography depicting them.<sup>172</sup> They would have no course of action under a legal system whose only reform was to give victims copyright but otherwise maintained its status quo.

*c. Copyright Law Is Enforced to the Letter and Spirit of the Law*

While courts are often happy to evaluate a decision from a textualist approach, looking to the letter of the law and not the spirit of the law, that is not the case with copyright.<sup>173</sup> Courts have paid great attention to the underlying theory that granting a person copyright is supposed to provide them economic security in the positive sense; it is supposed to help them make money off their creation so they continue to create new works.<sup>174</sup>

Attempting to provide copyright protection to nonconsensual pornography victims is not a novel idea; many victims have asserted copyright claims against perpetrators.<sup>175</sup> Even though multiple scholars have written on it, and some lawyers have tried asserting copyright claims, few cases have actually succeeded.<sup>176</sup> Even when the victim does meet the letter of the law, judges have been reluctant to grant victims copyright because of copyright’s underlying economic policy<sup>177</sup>—that intellectual property is to be used to protect the economic interests of the author.<sup>178</sup>

In other cases seeking to assert nontraditional intellectual property claims, such as in *Garcia v. Google*,<sup>179</sup> judges have declined to grant pro-

170. Levendowski, *supra* note 136, at 426 n.18.

171. *Id.*

172. The content depicting Andrews and Parsons was not created by them, it was created by someone else. *See supra* notes 26–38.

173. *See* Gilden, *supra* note 38, at 72–79 (discussing nontraditional IP assertions).

174. Jeanne C. Fromer, *Should The Law Care Why Intellectual Property Rights Have Been Asserted?*, 53 HOUS. L. REV. 549, 553 (2015).

175. Gilden, *supra* note 38, at 81.

176. Eric Goldman & Angie Jin, *Judicial Resolution of Nonconsensual Pornography Dissemination Cases*, 14 I/S: J.L. & POL’Y FOR INFO. SOC’Y 283, 300 (2018).

177. *Id.*

178. Fromer, *supra* note 174, at 554.

179. 786 F.3d 733 (2014).

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tections regardless of the “heartfelt plea” that it would be used “for personal protection.”<sup>180</sup> In defending her decision to deny actress Cindy Garcia copyright in her movie performance that was taken out of context, Ninth Circuit Judge M. Margaret McKeown stated, “American copyright law generally doesn’t embrace moral rights.”<sup>181</sup> Nonconsensual pornography victims would not be using these rights to secure economic security in the positive sense; they would be using it in a negative sense to prevent the loss of their job or having to move. In these instances, courts may be reluctant to extend copyrights to victims.<sup>182</sup> For example, Matthew Herrick attempted to gain copyright to the photos he sent his ex-boyfriend because they were selfies; the court dismissed the case under Section 230 and did not decide whether he would be eligible to receive copyright or not.<sup>183</sup>

### B. *Federally Criminalizing Nonconsensual Pornography*

Another potential reform at the center of many discussions is criminalizing the distribution of nonconsensual pornography at the federal level. As recently as 2021, legislation was passed in the House of Representatives and introduced in the Senate that would federally criminalize the distribution of nonconsensual pornography.<sup>184</sup>

#### 1. *Advantages of Federally Criminalizing Nonconsensual Pornography*

Federally criminalizing nonconsensual pornography offers many advantages over copyrights. Mainly, those advantages pick up on the inadequacies of current state laws and copyright law.

##### a. *A Federal Criminal Law Would Address the Inadequacies of Existing State Laws*

As discussed in part I, the existing state laws are simply inadequate.<sup>185</sup> While some may argue that a statute criminalizing the distribution of non-consensual pornography is unnecessary due to the existence of other laws, it is clear that federally criminalizing nonconsensual pornography remains

180. *Id.* at 736, 743–44.

181. M. M. McKeown, *Censorship in the Guise of Authorship: Harmonizing Copyright and the First Amendment*, 15 CHI.-KENT J. INTELL. PROP. 1, 7 (2015).

182. See Bambauer, *supra* note 144, at 2073 (discussing that copyright should be understood as “an entirely utilitarian concept”).

183. *Herrick v. Grindr*, 306 F. Supp. 3d 579, 584, 600 (S.D.N.Y. 2018).

184. Ronn Blitzer, *Revenge porn to become federal crime under bill, with possible 2-year imprisonment*, FOX NEWS (Mar. 18, 2021), <https://perma.cc/BC4Q-AJCU>. See also Adi Robertson, *A federal ‘revenge porn’ ban could transform online harassment laws*, THE VERGE (Apr. 15, 2021, 10:00 AM EDT), <https://perma.cc/FDB5-GALB>.

185. See *supra* text accompanying notes 86–92.

necessary.<sup>186</sup> One of the biggest advantages of federally criminalizing non-consensual pornography is that, by its nature, federal law would address the inadequacies of state criminal laws that currently criminalize the distribution of nonconsensual pornography.<sup>187</sup>

For instance, nonconsensual pornography is frequently disseminated through the internet.<sup>188</sup> It is entirely possible a victim could be a citizen of one state, while the perpetrator is a citizen of another state. The prosecuting state would likely not have jurisdiction over the perpetrator.<sup>189</sup> By creating a federal law, we can eliminate the jurisdiction challenges often presented to prosecutors.<sup>190</sup>

Further, state laws criminalizing nonconsensual pornography vary greatly.<sup>191</sup> For example, some make the practice a felony, while many others make it a misdemeanor.<sup>192</sup> Some offer jail time, while others only offer fines.<sup>193</sup> Federally criminalizing nonconsensual pornography would create a cohesive standard amongst the states.<sup>194</sup>

*b. A Federal Criminal Law Would Address the Disadvantages of Providing Victims Copyright*

A federal criminal law would also pick up where copyright law falls short. It would allow courts to hold perpetrators accountable without abandoning any underlying policies, as with copyright.<sup>195</sup> Because this legislation would be criminal law, prosecutors would control the litigation. This would eliminate the access to justice issues posed by copyright law because the victim would not be responsible for hiring an attorney or paying the costs associated with the civil litigation process.<sup>196</sup> It would allow victims who cannot afford an attorney the opportunity to move forward.

Perpetrators may also have little fear of civil litigation or copyright claims.<sup>197</sup> Many perpetrators are judgment proof; they do not have the financial assets to pay for a judgment against them.<sup>198</sup> Thus, if the perpetrator is judgment proof, victims are left without redress.<sup>199</sup> Criminal law, on the

186. Souza, *supra* note 45, at 116.

187. *Id.* at 118.

188. *See supra* text accompanying notes 52–53, 74–75.

189. *See supra* text accompanying note 88.

190. Citron & Franks, *supra* note 39, at 361.

191. *See supra* text accompanying notes 89–90.

192. *Id.*

193. Souza, *supra* note 45, at 117–18.

194. *Id.* at 118.

195. *See supra* text accompanying notes 173–74, 177–78.

196. *See supra* text accompanying note 157; *see also supra* text accompanying notes 168–69.

197. Citron & Franks, *supra* note 39, at 349.

198. Nisttahuz, *supra* note 94, at 347–48.

199. *Id.* at 348.

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other hand, would deter perpetrators from distributing nonconsensual pornography by imposing a jail sentence and a criminal record that would follow the perpetrator through their life.<sup>200</sup> Federally criminalizing nonconsensual pornography would create incentives for all perpetrators not to participate, not just those who fear paying for damages because they have sufficient assets to pay for a judgment against them.<sup>201</sup>

## 2. *Disadvantages of Federally Criminalizing Nonconsensual Pornography*

As with copyright law, federally criminalizing nonconsensual pornography cannot be our legal system's only reform because of the disadvantages accompanying federally criminalizing nonconsensual pornography. This section considers two of the primary disadvantages of only federally criminalizing nonconsensual pornography. First, prosecuting crimes can take away power from victims, and second, prosecuting crimes is a slow process that may do little to even deter the distribution of nonconsensual pornography.

### a. *Prosecution of Crimes Takes Power Away from Victims*

By prosecuting nonconsensual pornography as a federal crime, the victim's power to control the litigation is taken away because a prosecutor leads the litigation.<sup>202</sup> As identified earlier, victims are regularly fearful of law enforcement officers because they fear being judged for their actions, even though their actions are frequently normal in their community.<sup>203</sup> Mobile applications, like Grindr, create a safe space for members of the LGBTQ+ community to pursue their romantic and intimate needs.<sup>204</sup> Inviting prosecutors into a community they do not understand, where victims fear their judgment, can result in victims not reporting the crime.<sup>205</sup>

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200. Citron & Franks, *supra* note 39, at 349, 361.

201. *Id.*

202. Offices of the United States Attorneys, *Steps in the Federal Criminal Process*, U.S. DEP'T OF JUSTICE, <https://perma.cc/8F3W-4L33> (last visited Apr. 24, 2021) (noting that prosecutors lead the litigation).

203. *See supra* text accompanying notes 149–51.

204. Paige Leskin, *LGBTQ adults are using dating apps nearly twice as much as straight adults*, *Pew study finds*, INSIDER (Feb. 6, 2020, 11:36 AM), <https://perma.cc/B7A8-JSK7>.

205. *See supra* text accompanying notes 157–62.

*b. Prosecuting Crimes Is a Slow Process that May Not Create the Desired Incentives for Perpetrators Not to Participate*

The prosecution process is inherently slow, meaning victims may wait long periods of time without any response from the legal system. There are approximately 11 steps to prosecuting a federal crime, and each step takes time.<sup>206</sup> The guarantees of a “quick and speedy trial” afforded to criminal defendants only apply once criminal prosecution has begun.<sup>207</sup> Courts have done little to define a specific amount of time, reasoning that it is “impossible to determine with precision” when a defendant’s right to a speedy and public trial has been violated.<sup>208</sup> In some cases, federal crimes have been investigated for years before charges are brought against a defendant.<sup>209</sup> A victim could wait years before their perpetrator is found guilty in a federal court.

There is no guarantee criminalizing the distribution of nonconsensual pornography would even have the desired effect of deterring perpetrators from distributing nonconsensual pornography. Research reveals the threat of incarceration may have minimal impact on deterring the behavior it seeks to criminalize.<sup>210</sup> Studies vary widely, showing that criminalizing behavior only deters that behavior by 25% at best, and 5% at the worst.<sup>211</sup> It is possible that spending time to pass criminal legislation for the distribution of nonconsensual pornography would only minimally deter perpetrators, contrary to what the deterrent experts hope it would be.<sup>212</sup>

*C. Amending Section 230 to Carve Out Nonconsensual Pornography from the Liability Immunity Extended to Social Content Sites*

The last potential reform this article discusses is amending Section 230 to create a carve-out that would prevent its liability immunity from being extended to websites that knowingly host nonconsensual pornography. I am not suggesting that social content sites should have all protections removed, allowing them to be held liable for any content posted on their platform. Rather, the internet’s worst actors should be held liable for the harms they

206. Offices of the United States Attorneys, *supra* note 202.

207. Legal Information Institute, *Right to a Speedy and Public Trial*, CORNELL LAW SCHOOL, <https://perma.cc/478B-UKD8> (last visited Apr. 24, 2021); *see also* 18 U.S.C. § 3161(d)(2) (2018) (a defendant must be brought to trial within 70 days “from the action occasioning the trial becom[ing] final”); *United States v. Marion*, 404 U.S. 307, 313–20 (1971).

208. *Barker v. Wingo*, 407 U.S. 514, 521 (1972).

209. *See id.* at 516–19, 535–36 (finding a nearly six-year delay between a person’s arrest and trial did not violate right to speedy trial).

210. Marc Mauer, *Long-Term Sentences: Time to Reconsider the Scale of Punishment*, 87 UMKC L. REV. 113, 114 (2018).

211. *Id.*

212. *See supra* text accompanying notes 197–201.

directly cause, as would any other company.<sup>213</sup> This harm may be intentional, like that caused by Hunter Moore with his website IsAnyoneUp.<sup>214</sup> The harm could also be negligent, such as the harm caused to Matthew Herrick by Grindr when they failed to remove the fake profile after receiving over 100 complaints about it.<sup>215</sup>

*1. Advantages of Amending Section 230 to Carve Out Nonconsensual Pornography from the Liability Immunity Extended to Social Content Sites*

There are two key advantages to amending Section 230 to include a carve out for nonconsensual pornography. First, there is bipartisan interest in changing Section 230 in some form, and second, amending Section 230 would place pressure of social content sites to remove nonconsensual pornography.

*a. There Is Bipartisan Appetite for Changing Section 230*

Both Republicans and Democrats have expressed support for changing Section 230.<sup>216</sup> However, it is unclear if both political parties will agree on what changes should be made.<sup>217</sup> Generally, Republicans have expressed concerns that Section 230 allows powerful companies to suppress free speech, and Democrats are concerned that Section 230 gives social content sites a free pass not to prevent violence, extremism, or other illegal drug sales.<sup>218</sup> Democrats appear to be interested in reforming Section 230, while some Republicans are looking for an all-out repeal of the law.<sup>219</sup> At the very least, members of both parties have either called for dramatic changes or an all-out repeal of Section 230, signaling potential bipartisan support for dramatic changes.<sup>220</sup>

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213. Citron & Wittes, *supra* note 132, at 419.

214. *See supra* text accompanying notes 61–67.

215. *See supra* text accompanying notes 16–24.

216. Shira Ovide, *What's Behind the Fight Over Section 230*, N.Y. TIMES (Mar. 25, 2021), <https://perma.cc/MBF5-BYGN>.

217. *Id.*

218. *Id.*

219. *Top Democrat speaks to Biden staff about key internet law*, REUTERS (Mar. 22, 2021, 11:03 AM), <https://perma.cc/J3JM-XQRT>.

220. David Ingram & Jane C. Timm, *Why Republicans (and even a couple of Democrats) want to throw out tech's favorite law*, NBC NEWS (Sept. 2, 2019), <https://perma.cc/6N9D-WE7E>.

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*b. Amending Section 230 Would Place Pressure on Social Content Sites to Remove Nonconsensual Pornography*

By amending Section 230 to remove the liability shield, the legal system would place pressure on big tech companies to adopt measures allowing for the removal of nonconsensual pornography.<sup>221</sup> Companies such as Facebook and Google have already implemented processes allowing victims to report nonconsensual pornography so the companies can remove it.<sup>222</sup> By requiring big tech companies to meet certain conditions before receiving protection from Section 230, it seems likely these companies would take the necessary steps to prevent being held liable by victims in the lawsuits they could face.<sup>223</sup>

*2. Disadvantages of Amending Section 230 to Carve Out Nonconsensual Pornography from the Liability Immunity Extended to Social Content Sites*

As with every other potential reform, it is important to consider the disadvantages of amending Section 230. Mainly, due to current exemptions within the law, amending Section 230 may appear unnecessary if we provide victims copyright in the nonconsensual pornography depicting them and federally criminalize the distribution of nonconsensual pornography.

As currently written, intellectual property infringement and federal crimes are exempt from the protections extended to big tech companies under Section 230.<sup>224</sup> By implementing a federal criminal law against the distribution of nonconsensual pornography or granting victims copyright, the legal system would already have a work-around from Section 230. While it appears that under a comprehensive approach amending Section 230 could potentially be unnecessary, that belief is wrong. As mentioned above, victims often face large economic harms while perpetrators remain judgment proof from civil liability.<sup>225</sup> In situations where the social content site is negligent, like Grindr was in Matthew Herrick's case, the victim would be able to gain economic redress for the harms the social content site caused the victim.<sup>226</sup> Regardless of whether the social content site is held liable for the harm that occurs from the original posting, once the content is

221. Citron & Wittes, *supra* note 132, at 413 (suggesting that an overbroad interpretation of Section 230 “eliminates incentives for better behavior”).

222. Olivia Solon, *Inside Facebook's efforts to stop revenge porn before it spreads*, NBC News (Nov. 18, 2020), <https://perma.cc/RN3V-XA3N>; see also *Remove non-consensual explicit or intimate personal images from Google*, GOOGLE (Apr. 3, 2021), <https://perma.cc/JQ5W-VNBV>.

223. Ovide, *supra* note 216.

224. 17 U.S.C. § 230 (2018).

225. See *supra* notes 155, 197–201.

226. See *supra* notes 16–24.

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posted to the social content site, the image leaves the perpetrator's control.<sup>227</sup> The ensuing harm that occurs from the failure to remove the post becomes the direct result of the social content site's failure to remove the content.<sup>228</sup> By amending Section 230 so big tech companies are not granted immunity for hosting nonconsensual porn, we create another avenue for victims to gain redress.

#### IV. WHY A COMPREHENSIVE APPROACH IS NECESSARY

Each of the suggested reforms offers important benefits to a revenge porn victim, but alone none of them would be enough. In the case of Katie Hill, the criminal law did not offer her any protection.<sup>229</sup> But suppose she also owned the copyright to the images of herself. If that were so, she could have controlled the dissemination of the media and may still be a United States Congresswoman.<sup>230</sup> Similarly, if Erin Andrews owned the copyright to the video of herself earlier, she would not have been forced to wait one year to control the dissemination of naked videos of herself. Instead, Andrews could have immediately issued a takedown notice.<sup>231</sup> For individuals in situations similar to Rehtaeh Parsons, the same criminal law that failed Katie Hill and did not offer the needed result for Erin Andrews is likely the only reform that would have deterred a rapist from having someone record him while he assaulted a victim.<sup>232</sup> At the very least, it could result in the rapist being held accountable for the entirety of his actions.<sup>233</sup> As for Matthew Herrick, a federal criminal law or copyright law would have created no way for Grindr to be held accountable for their negligence in failing to remove the account that was being used to distribute the harmful content.<sup>234</sup> The court did not address Herrick's copyright claim, nor did Grindr violate any federal criminal law that would exempt them from Section 230's liability protections.<sup>235</sup> For Herrick to hold Grindr accountable for the harms they caused him, Section 230 would have to be amended.<sup>236</sup>

Simply implementing one reform would still leave many victims without legal recourse. One reform would not be enough of an improvement to

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227. Allison Tungate, *Bare necessities: the argument for a 'revenge porn' exception in Section 230 immunity*, 23 INFO. & COMM. TECH. L. 172, 178 (2014).

228. *Id.*

229. *See supra* Part I.

230. *Id.*

231. *Id.*

232. *Id.*

233. *Id.*

234. *See supra* text accompanying notes 22–24; *Herrick v. Grindr*, 306 F. Supp. 3d 579, 584, 600 (S.D.N.Y. 2018).

235. *Herrick*, 306 F. Supp. at 584, 600.

236. *See supra* text accompanying notes 221–24.

the legal system's current response for some victims because there would still be no legal protections offered to them. The cases of Katie Hill, Matthew Herrick, Erin Andrews, and Rehtaeh Parsons each offer a different view of the unique harms that nonconsensual porn victims endure and illustrate the different legal tools needed to remedy those harms.

When the world shut down due to the COVID-19 pandemic, it became clear there was good reason to believe the number of victims of nonconsensual pornography would continue to rise. In 2020, a hotline in the United Kingdom dedicated to helping victims of nonconsensual pornography reported a 22% rise in the number of calls they received compared to 2019.<sup>237</sup> In the United States, expert attorneys who have dedicated their careers to defending nonconsensual pornography victims have seen an "onslaught" of cases noting that the "climate is ripe for tech abuse."<sup>238</sup> The number of victims who will need help is not going to be reduced; we should only expect the number of victims who will need help to continue to rise until we create a response that provides all victims with a form of redress.

## V. CONCLUSION

While the four cases discussed in this article differ from one another, each demonstrates a significant invasion of the victim's privacy and the wide range of harms caused to victims. These invasions of privacy and the resulting harms could have been prevented if our legal system had implemented a comprehensive approach to addressing nonconsensual pornography. Because each reform also has its pitfalls, we will inherently leave some victims behind if we only continue to implement incremental approaches.

The longer nonconsensual pornography stays on the internet, the harder the material will be to remove. Our legal system's failure to prosecute this grotesque invasion of an individual's right to privacy only forsakes victims while the perpetrators frequently walk free. We owe it to the Katie Hills, Matthew Herricks, Erin Andrews, and Rehtaeh Parsons of the world to enact a system that provides these individuals, and the millions of others like them, a viable way to hold their perpetrators accountable.

The many scholars before me who have written on this subject have proposed three important steps forward for our legal system: granting victims copyright in the nonconsensual pornography that bears their like-

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237. Cristina Criddle, 'Revenge porn new normal' after cases surge in lockdown, BBC NEWS (Sept. 17, 2020), <https://perma.cc/KZ4J-C878>.

238. Jessica M. Goldstein, 'Revenge Porn' was already commonplace. The pandemic has made things even worse., WASH. POST (Oct. 29, 2020, 6:00 AM MDT), <https://perma.cc/2F8R-Z83>.

ness,<sup>239</sup> federally criminalizing nonconsensual pornography,<sup>240</sup> and amending Section 230 to carve out nonconsensual pornography from its liability shield.<sup>241</sup> Each offers important tools for victims, but each is also straddled with weaknesses. If our legal system wants to curb the distribution of non-consensual pornography and prevent harm to victims, we have to enact a comprehensive approach that incorporates all three of these reforms. By implementing only incremental responses to nonconsensual pornography, we risk leaving someone like Katie Hill, Matthew Herrick, Erin Andrews, or Rehtaeh Parsons behind. None of these individuals should be prevented from gaining redress by our legal system simply because we refuse to employ a comprehensive response to nonconsensual pornography.

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239. Levendowski, *supra* note 136; *see also* Gilden, *supra* note 38.

240. Souza, *supra* note 45; *see also* Citron & Franks, *supra* note 39.

241. Goldnick, *supra* note 133.