

EXPOSED: THE PITFALLS IN NEVADA’S NONCONSENSUAL PORNOGRAPHY STATUTE AND A PROPOSAL FOR MORE PROTECTION

Camilla Dudley*

TABLE OF CONTENTS

INTRODUCTION.....	306
I. THE PROBLEM OF NONCONSENSUAL PORNOGRAPHY.....	309
A. “Revenge Porn” as Harmful Terminology.....	309
B. Mental and Emotional Harm.....	310
C. Threat of Physical Harm.....	312
D. Professional Harm.....	313
E. Societal Harm.....	314
II. INADEQUATE ROUTES TO JUSTICE FOR NONCONSENSUAL PORNOGRAPHY VICTIMS.....	315
A. Civil Claims Provide Inadequate Protection for Victims.....	315
1. Defamation.....	316
2. False Light.....	317
3. Intentional Infliction of Emotional Distress (IIED).....	318
4. Unreasonable Intrusion upon the Seclusion of Another.....	318
5. Public Disclosure of Private Facts.....	318
6. Copyright.....	319
B. Criminal Claims Do Not Sufficiently Deter Perpetrators.....	320
1. Harassment.....	321
2. Distribution of an Image of the Private Area of Another Person.....	322
3. Cyberstalking.....	322
III. NEVADA’S FIRST ATTEMPT TO CRIMINALIZE NONCONSENSUAL PORNOGRAPHY.....	322
A. “Intent to Harass, Harm, or Terrorize” Motive Requirement....	325
B. Mens Rea Requirement.....	326
C. “Reasonable Expectation” Definition.....	327
D. “Public Figure” Exception.....	327
E. “Electronic” Requirement.....	329
IV. A PROPOSED SOLUTION TO NEVADA’S INSUFFICIENT COVERAGE.....	329

* Juris Doctor Candidate, May 2020, William S. Boyd School of Law, University of Nevada, Las Vegas. Thank you to my husband, Lucky Sherry, for his love and encouragement. And thank you to the students on the Nevada Law Journal staff for their feedback and support.

V. MEETING CONSTITUTIONAL HURDLES OF PROPOSED AMENDMENTS.	331
A. Removing the “Electronic” Requirement and “Public Figure” Exception.....	332
B. Defining “Reasonable Expectation”.....	333
C. Adapting the Mens Rea	334
1. Eliminating the “Intent to Harass” Requirement.....	334
CONCLUSION	336

INTRODUCTION

“The picture now shows up in Google when my name is searched. I am in my last semester in school to become a public-school teacher. I begin student teaching in a week. I will be teaching high school. It only takes one student to Google my name before the entire school finds out. My career is in jeopardy . . . Please help. I do not want my career to be ruined because of something like this—and I would never want to think any of my students could be victimized the same way.”¹

Nearly one in twenty-five Americans are either threatened with or victims of nonconsensual pornography, commonly known as revenge porn.² Unfortunately, just like the soon-to-be public high school teacher, hundreds of individuals became victims of nonconsensual pornography on MyEx.com, a website solely dedicated to “GET[TING] REVENGE” and posting “Naked Pics of Your Ex.”³ MyEx.com solicited nonconsensual pornographic images, videos, and documents of individuals, most often ex-girlfriends.⁴ The intimate material was frequently accompanied with personal and identifying information including names, addresses, employers, phone numbers, social-media accounts, and email addresses.⁵ The website contained over 12,000 entries.⁶

What’s more, MyEx.com would extort victims for money, demanding payments ranging from \$499 to \$2,800 to remove an image or personal information posted on the website.⁷ In fact, the website’s removal policy stated, “[a]s a general rule, if you don’t want photos of you end [*sic*] up on the internet be more careful who you send them too [*sic*] or better yet don’t send them at all.”⁸

¹ Complaint for Permanent Injunction & Other Equitable Relief at 15, Fed. Trade Comm’n v. EMP Media, Inc., 2018 WL 3025942 (D. Nev. 2018) (No. 18-CV-00035), 2018 WL 372707, at *15.

² ASIA A. EATON ET AL., 2017 NATIONWIDE ONLINE STUDY OF NONCONSENSUAL PORN VICTIMIZATION AND PERPETRATION 3–4 (2017) (reporting that 1 in 25 participants of a nationally-representative study were either threatened with or victims of nonconsensual pornography).

³ Complaint, *supra* note 1, at 8.

⁴ *Id.*

⁵ *Id.* at 8–9.

⁶ *Id.* at 11.

⁷ *Id.* at 12.

⁸ *Id.* (internal quotation marks omitted).

In 2018, seven years after MyEx.com was launched, a federal lawsuit was filed in Nevada.⁹ The owners and operators of the site were charged with deceptive and coercive trade practices in violation of the Federal Trade Commission Act.¹⁰ Rightfully, MyEx.com was taken down.¹¹ However, the takedown of MyEx.com was one small victory in a much larger battle. Likely, many individual users who uploaded the nonconsensual pornography to MyEx.com have not been held accountable.¹² And MyEx.com was one of 10,000 websites that feature “revenge porn.”¹³ Hundreds of victims have been harmed—emotionally, financially, mentally, and physically.¹⁴ There is no federal law that prohibits individuals from disseminating nonconsensual pornography, including uploading nonconsensual pornography images to websites just like MyEx.com. Four states have yet to criminalize the act.¹⁵ Many states that have passed criminal statutes have left numerous loopholes, leaving victims with no justice and abusers with no repercussions. Nevada is such a state. Nevada’s statute suffers from overly burdensome requirements, too narrow applicability, and overly generous exceptions.¹⁶ Thus, many perpetrators cannot be held accountable.

Along with this statute’s ineffectiveness, Nevada presents a unique problem: Nevada is notorious for its maltreatment of women.¹⁷ As New York Times

⁹ *Id.* at 2, 6–7.

¹⁰ *Id.* at 19.

¹¹ Press Release, Fed. Trade Comm’n, FTC, Nev. Obtain Order Permanently Shutting Down Revenge Porn Site MyEx (June 22, 2018). The United States District Court for the District of Nevada entered a default judgment ordering MyEx.com to be permanently shut down. *Id.* The FTC separately settled its case against one of the site’s owners. *Id.*

¹² Tracking individual posters on MyEx.com was extremely difficult, as the site did not record emails, IP addresses, or other information of the users. Samantha H. Scheller, Comment, *A Picture is Worth a Thousand Words: The Legal Implications of Revenge Porn*, 93 N.C. L. REV. 551, 565 (2015).

¹³ Mary Anne Franks, “Revenge Porn” Reform: A View from the Front Lines, 69 FLA. L. REV. 1251, 1260 (2017).

¹⁴ Cyber Civil Rights Init., *CCRI’s 2013 Nonconsensual Pornography (NCP) Research Results*, CYBER C.R. INITIATIVE 1, 1–2 (2013), <https://www.cybercivilrights.org/wp-content/uploads/2016/11/NCP-2013-Study-Research-Results-1.pdf> [<https://perma.cc/9WDP-E5V8>] [hereinafter *2013 NCP Research Results*].

¹⁵ See *46 States + DC + One Territory Now Have Revenge Porn Laws*, CYBER C.R. INITIATIVE, <https://www.cybercivilrights.org/revenge-porn-laws/> [<https://perma.cc/BK3Y-UJ6U>] (last visited Aug. 23, 2019) [hereinafter *46 States*].

¹⁶ See *infra* Part III for a discussion of NEV. REV. STAT. § 200.780 (2019).

¹⁷ “Nevada is not only a sex trafficking hub, but the state is known for violence against women in general, taking the nation’s number one ranking for the prevalence of women murdered by men for five of the past six years.” Chariane K. Forrey, Note, *America’s “Disneyland of Sex”: Exploring the Problem of Sex Trafficking in Las Vegas and Nevada’s Response*, 14 NEV. L.J. 970, 973 (2014). Nevada is the first state listed on the National Center on Sexual Exploitation’s annual “‘Dirty Dozen’ list of ‘major, mainstream facilitators of sexual exploitation.’” Brian Joseph, *Group Lists Nevada on ‘Dirty Dozen’ of Sexual Exploitation*, L.V. REV. J. (Feb. 11, 2019), <https://www.reviewjournal.com/local/local-nevada/group-lists-nevada-on-dirty-dozen-of-sexual-exploitation-1595173/> [<https://perma.cc/9AYD-6QQG>].

columnist Bob Herbert so blatantly put it, “[t]here is probably no city in America where women are treated worse than in Las Vegas.”¹⁸ While this conclusion is certainly controversial, Nevada consistently has more crimes committed against women than the national average. In Nevada, 39.2% of women experience bodily-contact sexual violence,¹⁹ 23% of women are raped,²⁰ 16.9% are sexually coerced,²¹ and 33.7% of women experience non-contact unwanted sexual experiences in their lifetime.²² Nevada has the highest percentage of women who are stalked than any other state in the nation.²³ While the reason behind Nevada’s high crime rates against women is certainly multi-faceted, some blame Las Vegas’s sex-obsessed culture.²⁴

Las Vegas—Nevada’s most population-dense city—is the “symbolic center of the sex industry, which thrives on the bodies of women.”²⁵ From billboards, to taxi cars advertising “Hot Girls Direct to You In 20 Minutes,”²⁶ “[t]he Las Vegas tourist corridor exudes sexuality . . .”²⁷ While the implications of Nevada’s sex culture are beyond the scope of this Note, Nevada’s liberal view of the sex industry provides a unique perspective in the regulation of sex and sexuality.²⁸ As such, the line Nevada draws on nonconsensual pornography can help shape our nation’s sex culture and lead the way for women to have more security and autonomy when expressing their sexuality.

Part I of this Note provides a background of nonconsensual pornography, including what it is and why it is problematic.²⁹ Part II considers the types of civil and criminal claims available to victims of nonconsensual pornography and explores the pitfalls to the various claims.³⁰ Part III takes a close look at Nevada’s current criminalization of the dissemination of nonconsensual por-

¹⁸ Bob Herbert, *City as Predator*, N.Y. TIMES (Sept. 4, 2007), <https://www.nytimes.com/2007/09/04/opinion/04herbert.html> [<https://perma.cc/G57L-AYGR>].

¹⁹ SHARON G. SMITH ET AL., THE NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY (NISVS): 2010–2012 STATE REPORT 33–34 (2017) (compared to 36.3% of women nationally).

²⁰ *Id.* at 33–34 (compared to 19.1% nationally).

²¹ *Id.* at 35–36 (compared to 13.2% nationally).

²² *Id.* at 37–38 (compared to 32.1% nationally).

²³ *Id.* at 94–95 (comparing the average 15.8% of women stalked nationally to Nevada’s 24.1% of women stalked).

²⁴ Herbert, *supra* note 18.

²⁵ Kate Hausbeck et al., *Vegas and the Sex Industry*, L.V. REV. J. (Sept. 16, 2007), <https://www.reviewjournal.com/opinion/vegas-and-the-sex-industry/> [<https://perma.cc/9FDT-J53E>].

²⁶ Michael Quine, *Sex Drive (Mobile Girlie Billboard Driver)*, L.V. REV. J. (Mar. 7, 2010), <https://www.reviewjournal.com/life/sex-drive-mobile-girlie-billboard-driver/> [<https://perma.cc/Z9G5-YNBW>].

²⁷ Hausbeck, *supra* note 25.

²⁸ See Barbara G. Brents & Kathryn Hausbeck, *State-Sanctioned Sex: Negotiating Formal and Informal Regulatory Practices in Nevada Brothels*, 44 SOC. PERSP. 307, 327–29 (2001) (concluding that because Nevada’s sex policies are both “progressive and innovative” and “regressive and outmoded,” Nevada offers a “vista” from which to view sex regulation).

²⁹ See *infra* Part I.

³⁰ See *infra* Part II.

nography and analyzes the problematic statutory elements that Nevada must meet in order to hold exploiters accountable.³¹ Part IV proposes an amended statute.³² Lastly, Part V briefly addresses the constitutionality of expanding Nevada's statute to better accommodate victims' various circumstances.³³ This Note concludes that Nevada must reform its criminalization to combat nonconsensual pornography and achieve justice for victims.

This Note refers to victims of nonconsensual pornography as women and girls. While males, transgender individuals, and nonbinary persons are also victims of nonconsensual pornography, victims of the crime are predominantly female.³⁴ This Note will also use masculine pronouns to describe perpetrators, which in reality, are predominantly male.³⁵

I. THE PROBLEM OF NONCONSENSUAL PORNOGRAPHY

Nonconsensual pornography is the act of sharing an intimate photograph through various means without the subject's consent.³⁶ A nonconsensual pornography website, like MyEx.com, is similar to any other pornography website, with one terrifying difference: none of the individuals pictured on the site consented to have their photograph shared with the public.³⁷ This Part will discuss the harm that comes when an intimate photograph is shared without consent.

A. "Revenge Porn" as Harmful Terminology

"Nonconsensual pornography" is more commonly known as "revenge porn," referring to the common situation where an embittered ex-partner posts an intimate photo of the victim as a way to get "revenge" for ending the relationship.³⁸ "Revenge porn" is misleading because the term insinuates that the act of posting an intimate image without consent is somehow merited to get equal to or "revenge" a wrong act of a victim.³⁹ It is unfair to place blame on the victim. There is an existing societal tendency to place blame on the victim for taking and sending nude photographs, even within the confines of a legal relationship, as one Nevada assemblywoman made clear in a discussion about

³¹ See *infra* Part III.

³² See *infra* Part IV.

³³ See *infra* Part V.

³⁴ 2013 NCP Research Results, *supra* note 14, at 1.

³⁵ EATON ET AL., *supra* note 2, at 15 (finding that men were twice as likely to be perpetrators than women).

³⁶ *Revenge Porn: Is it a New Form of Digital Sex Slavery?*, FIGHT NEW DRUG (July 5, 2016), <https://fightthenewdrug.org/the-disturbing-world-of-revenge-porn/> [<https://perma.cc/PW92-DK49>] [hereinafter *Revenge Porn*].

³⁷ Press Release, *supra* note 11 (explaining that "MyEx.com was dedicated solely to revenge porn").

³⁸ *Frequently Asked Questions*, CYBER C.R. INITIATIVE, <https://www.cybercivilrights.org/faqs/> [<https://perma.cc/88Z2-AFEY>] (last visited Sept. 26, 2019) [hereinafter *Frequently Asked Questions*] (internal quotation marks omitted).

³⁹ *Id.*

Nevada's nonconsensual pornography law.⁴⁰ Assemblywoman Olivia Diaz asked, "[w]here is the responsibility on the other party who let the person take the pictures to begin with?"⁴¹ Perpetuating this faulty notion through "revenge porn" terminology is harmful.⁴² It is essentially "a modern twist on the antiquated notion that a rape victim 'asked for it' by wearing promiscuous clothing."⁴³

Additionally, not all instances of nonconsensual pornography come from an ex-partner. Intimate photographs can be disclosed by current partners, acquaintances, or strangers.⁴⁴ Moreover, the intimate photographs are not always consensually shared within the confines of a relationship. Nonconsensual pornography can include photographs or videos secretly taken in locker rooms, through windows, or up skirts.⁴⁵ The term "nonconsensual pornography" is thus a more fair and accurate description of the distribution of sexually explicit photographs or videos without the victim's consent. Therefore, this Note will simply use the term "nonconsensual pornography."

B. *Mental and Emotional Harm*

Nonconsensual pornography raises numerous concerns. As a form of sexual exploitation, it is devastating to victims. Ninety-three percent of nonconsensual pornography victims suffer severe emotional distress.⁴⁶ Over 51 percent of victims contemplate suicide.⁴⁷ Forty-nine percent of victims are harassed or stalked by individuals who saw nonconsensual images of them online.⁴⁸ Three percent of victims have legally changed their names.⁴⁹ The mental health ef-

⁴⁰ *Revises Provisions Governing Crimes: Hearing on Assemb. B. 49 Before the Assemb. Comm. on Judiciary*, 2015 Leg., 78th Sess. 11 (Nev. 2015) [hereinafter *Hearing on A.B. 49*] (statement of Assemblywoman Olivia Diaz, Assemb. Comm. on the Judiciary).

⁴¹ *Id.*

⁴² See Lane Florsheim, *Why We Need to Stop Calling It "Revenge Porn"*, MARIE CLAIRE (May 6, 2015), <https://www.marieclaire.com/culture/news/a14219/online-harassment-ashley-judd-anita-sarkeesian-kamala-harris-kate-couric-witw-panel/> [<https://perma.cc/UBJ8-BFRT>] (arguing the word pornography is harmful, prefers "cyber exploitation").

⁴³ 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, 1844 (2018).

⁴⁴ *Frequently Asked Questions*, *supra* note 38.

⁴⁵ *Id.* For example, in California, a thirty-year-old woman secretly photographed a naked seventy-year-old woman in a locker-room. Christine Hauser, *Dani Mathers, Former Playboy Model, Gets Community Service for Snapchat of Woman in Gym*, N.Y. TIMES (May 25, 2017), <https://www.nytimes.com/2017/05/25/us/dani-mathers-body-shaming.html?module=inline> [<https://perma.cc/NQ3P-DGVX>]. She distributed the image via Snapchat with the caption, "[i]f I can't unsee this then you can't either." *Id.*

⁴⁶ Fay, *supra* note 43, at 1842–43; 2013 NCP Research Results, *supra* note 14, at 1.

⁴⁷ Fay, *supra* note 43, at 1843; 2013 NCP Research Results, *supra* note 14, at 2.

⁴⁸ 2013 NCP Research Results, *supra* note 14, at 1.

⁴⁹ Julia M. Sorensen, Note, *Forgive and Regret: Analysis and Proposed Changes to Connecticut's Revenge Porn Statute*, 35 QUINNIPIAC L. REV. 559, 566 (2017); 2013 NCP Research Results, *supra* note 14, at 2.

fects on victims of sexual assault and nonconsensual pornography are similar.⁵⁰ Accordingly, some scholars argue that nonconsensual pornography “should be classified as a sexual offense because of its similarity to other types of sexual offenses, like sexual assault and sexual harassment.”⁵¹ Fight the New Drug, a non-profit that educates about the negative effects of pornography, argues non-consensual pornography is a form of sex slavery, as it is used to “overpower[] a person for the purpose of sexual exploitation.”⁵² As advocate Annamarie Chiarini shared, after her ex-boyfriend auctioned naked photos of her on eBay, the loss of control overpowered her life.

I didn't sleep for months . . . when this happened in 2010, I would pop awake, and I would have to check my e-mail address, my work e-mail address, my Facebook page . . . I would have to perform this ritual. I'd check eBay, I'd Google my name, you know, the same thing. One, two, three, four, five, six, seven . . . I had to do these things. I'd do them three or four times, and be able to go back to sleep. But then I'd wake up. Or like in the middle of the day, I'd stop dead and I'd have to do this ritual, I'd have to do it three or four times, and then I'd be okay for a little while. I'd feel like I had to do that, for months . . . Someone else had defined my destiny.⁵³

Victims of nonconsensual pornography are harmed again and again. Because of the large online community and audience for nonconsensual pornography, it is impossible for victims to know exactly who has seen their image and how many times it has been seen. Illustrative is the website IsAnyoneUp.com. The site encouraged users to submit pornographic images and videos of others without their permission.⁵⁴ Part of the submission form requested the user to link the victim's social-media profiles, allowing viewers easy access to contact and harass the victims.⁵⁵ As horrific as IsAnyoneUp.com sounds, the site had more than thirty million page views and earned up to \$13,000 in advertisement revenue in a month.⁵⁶ An image need not be uploaded for any appreciable amount of time before multiple users view it. Each time a nonconsensual por-

⁵⁰ 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, 39 (2017).

⁵¹ 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, 278 (2014).

⁵² *Revenge Porn*, *supra* note 36.

⁵³ Bates, *supra* note 50, at 31.

⁵⁴ Indictment at 3, *United States v. Moore*, 2013 WL 10937220 (C.D. Cal. Dec. 20, 2013) (No. 13-CR-0917); Scheller, *supra* note 12, at 559–63.

⁵⁵ See Complaint at 2, *McGibney v. Moore*, No. A-12-667156-C (Nev. Dist. Ct. Aug. 20, 2012).

⁵⁶ Kashmir Hill, *IsAnyoneUp Is Now Permanently Down*, FORBES (Apr. 19, 2012, 5:52 PM), <https://www.forbes.com/sites/kashmirhill/2012/04/19/isanyoneup-is-now-permanently-down/#30f7b34450a0> [<https://perma.cc/W5PU-3PZM>]; see Josh Visser, *Isanyoneup.com, 'Revenge Porn' Website, Shuts Down After Selling to Anti-Bullying Group*, NAT'L POST (Apr. 20, 2012, 11:59 AM), <https://nationalpost.com/news/isanyoneup-com-revenge-porn-website-shuts-down-after-selling-to-anti-bullying-group> [<https://perma.cc/A2LG-QEM2>].

nographic image is viewed, the victim's privacy is invaded, and devastating damage is done.

C. *Threat of Physical Harm*

Physical harm can also result from nonconsensual pornography, as one victim Sarah learned when she came across an intimate photograph of herself on Craigslist accompanied with an advertisement that read, “[n]eed an aggressive man with no concern or regard for women.”⁵⁷ Sarah immediately contacted Craigslist, and they removed the content per her request.⁵⁸ But the harm had already been done.⁵⁹ The advertisement had been online long enough for Sarah's ex-boyfriend, Jebidiah Stipe, to post the image, pose as Sarah, and communicate with over one hundred Craigslist users.⁶⁰ When Ty McDowell responded to the ad, Stipe, posing as Sarah, requested that McDowell carry out a rape fantasy.⁶¹ Sometime after Craigslist removed the ad, McDowell showed up at Sarah's home.⁶² McDowell raped Sarah, attacked her with a knife sharpener, and left her bound and gagged on the floor of her own home.⁶³ McDowell later insisted to the police that Sarah asked him to rape her and offered the fake Craigslist conversation as proof.⁶⁴ Unfortunately, stories like Sarah's are not unique.⁶⁵ Thirty percent of nonconsensual pornography victims have been harassed or stalked outside of the Internet by users that have seen their intimate materials online.⁶⁶

⁵⁷ *The Craigslist Rape Victim*, OPRAH.COM (Sept. 23, 2010), <http://www.oprah.com/oprahshow/Craigslist-Rape-Victim> [<https://perma.cc/RV78-MS5>] (describing Sarah's experience with rape caused from revenge porn).

⁵⁸ Pete Kotz, *Jebidiah Stipe Used Craigslist Rape Fantasy Ad to Get Revenge on Ex-Girlfriend*, TRUE CRIME REP. (Feb. 9, 2010, 11:13 AM), http://web.archive.org/web/20100211231620/http://www.truecrimereport.com/2010/02/jebidiah_stipe_used_craigslist.php [<https://perma.cc/4A5F-84DN>]; *The Craigslist Rape Victim*, *supra* note 57.

⁵⁹ Kotz, *supra* note 58; *The Craigslist Rape Victim*, *supra* note 57.

⁶⁰ Kotz, *supra* note 58; *The Craigslist Rape Victim*, *supra* note 57.

⁶¹ Kotz, *supra* note 58; *The Craigslist Rape Victim*, *supra* note 57.

⁶² Kotz, *supra* note 58; *The Craigslist Rape Victim*, *supra* note 57.

⁶³ Kotz, *supra* note 58; *The Craigslist Rape Victim*, *supra* note 57.

⁶⁴ Alexandra Casals, Comment, *When the Relationship Went Down, the Photos Went Up: Revenge Porn and Florida's New Sexual Cyberharassment Statute*, 17 FLA. COASTAL L. REV. 355, 372 (2016); *The Craigslist Rape Victim*, *supra* note 57.

⁶⁵ Press Release, Dep't Justice, Former Law Student Pleads Guilty to Cyberstalking (Oct. 24, 2018), <https://www.justice.gov/usao-de/pr/former-law-school-student-pleads-guilty-cyberstalking-0> [<https://perma.cc/W84R-UWR7>]; Rebecca Scheffler, *I Got Doxxed by a Stranger – and the Online Harassment Quickly Took Over My Life*, VOX (July 13, 2017, 10:00 AM), <https://www.vox.com/first-person/2017/7/13/15960394/online-sexual-harassment-doxxing-craigslist> [<https://perma.cc/3D6Y-F5BY>]; Samantha Schmidt, *Woman Arrested in Craigslist Rape Fantasy Plot was Framed in a 'Diabolical Scheme', DA Says*, WASH. POST (Jan. 10, 2017), https://www.washingtonpost.com/news/morning-mix/wp/2017/01/10/woman-arrested-for-craigslist-rape-fantasy-plot-was-framed-in-a-diabolical-scheme-da-says/?utm_term=.9eed39e59201 [<https://perma.cc/5HJG-FB9F>].

⁶⁶ 2013 NCP Research Results, *supra* note 14, at 2.

Moreover, perpetrators may use a victim's *fear* of having her own intimate images distributed as a weapon. Abusive partners use nonconsensual pornography to trap women in abusive relationships.⁶⁷ Rapists record their attacks to both humiliate their victims and discourage them from reporting the assault.⁶⁸ Likewise, human traffickers and prostitution pimps may use nonconsensual pornography to trap individuals into the sex trade.⁶⁹ This is especially problematic in Nevada, home of "Sin City," which generates billions of dollars annually from criminal prostitution and human trafficking.⁷⁰

D. Professional Harm

There are also professional consequences of nonconsensual pornography. An individual's online reputation is becoming an important aspect of an individual's professional reputation.⁷¹ Professionals are increasingly using online social-media platforms for networking and other work-related purposes.⁷² Once a victim's intimate photo is made public online, it could take a single Google search to inform a future employer about intimate details of the victim.⁷³ In fact, research indicates that "[u]nsuitable photos, videos, and information" are one of the top three most influential facts human resource professionals consider when determining an individual's online reputation.⁷⁴ Accordingly, victims of nonconsensual pornography may find difficulty advancing their careers. Indeed, 55 percent of victims fear that the professional reputation they have built up could be tarnished by the nonconsensual distribution of their intimate images.⁷⁵ And rightfully so because 13 percent of victims have had difficulty getting a job or getting into school because of their intimate photographs,⁷⁶ and 39 percent say that it has affected their professional advancement with regard to networking.⁷⁷ Moreover, nonconsensual pornography can influence how a victim is treated at work. If any employee, colleague, or supervisor comes across the

⁶⁷ Franks, *supra* note 13, at 1258; see Jessica Farrish, *An Eye for Revenge*, REG. HERALD (Jan. 22, 2014), https://www.register-herald.com/news/life/an-eye-for-revenge/article_f053e13a-c50e-5712-aa18-7ab9f8a82343.html [<https://perma.cc/B2QE-8FLY>] ("In many cases, abusers look at it as a way of controlling their victims"); Dan Kelly, 'Revenge Porn' Targeted by Pa. Lawmakers, MORNING CALL (Nov. 26, 2013), http://articles.mcall.com/2013-11-26/news/mc-pa-revenge-porn-20131126_1_photos-state-legislature-law [<https://perma.cc/6QCJ-BCET>] (describing an increase in domestic violence cases involving threats to publicly post private intimate photographs).

⁶⁸ Franks, *supra* note 13, at 1258.

⁶⁹ *Id.*

⁷⁰ Forrey, *supra* note 17, at 970.

⁷¹ Casals, *supra* note 64, at 374.

⁷² *Id.* at 375.

⁷³ *Id.* at 374.

⁷⁴ CROSS-TAB, ONLINE REPUTATION IN A CONNECTED WORLD 9 (2010); see Casals, *supra* note 64, at 375.

⁷⁵ 2013 NCP Research Results, *supra* note 14, at 2.

⁷⁶ *Id.*

⁷⁷ *Id.*

intimate photo online or directly from the perpetrator, they may view and treat the victim differently. Horrifically, 42 percent of victims have had to explain the situation to professional or academic supervisors, coworkers, or colleagues.⁷⁸ Eight percent of victims have quit their jobs or dropped out of school.⁷⁹ Six percent were fired from their job or kicked out of school because of the availability of their intimate photos.⁸⁰

E. Societal Harm

Nonconsensual pornography not only harms the victims, it impacts our society. Nonconsensual pornography features far more women than men; women are about 1.7 times more likely to be a victim.⁸¹ Men are far more likely to be the perpetrators.⁸² Tolerating nonconsensual pornography sends the message that sexual exploitation is an appropriate form of entertainment or punishment—a way to teach women “a lesson.”⁸³ The predominately male perpetrators and consumers of these images attempt to “put powerful women ‘in their place,’ to punish them for acting in a way that threatens or displeases men.”⁸⁴ Nonconsensual pornography perpetuates the idea that men have the right to use women without their consent.⁸⁵

From depression and anxiety, to difficulty sustaining future relationships or finding employment, to perpetuating gender stereotypes and suppressing female sexuality, the harms of nonconsensual pornography are as wide as they are deep. The Nevada legal system acknowledged the severity of these harms in its first attempt to criminalize nonconsensual pornography.⁸⁶ However, Nevada’s current criminal statute still leaves many victims without protection and many perpetrators without deterrents.⁸⁷ Because there are no adequate civil or criminal alternatives, Nevada must reconsider its nonconsensual pornography statute and better tailor it to achieve justice for victims.

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ EATON ET AL., *supra* note 2, at 12.

⁸² Franks, *supra* note 13, at 1262.

⁸³ *Id.* at 1259.

⁸⁴ *Id.*; see Caroline Drinnon, Note, *When Fame Takes Away the Right to Privacy in One’s Body: Revenge Porn and Tort Remedies for Public Figures*, 24 WM. & MARY J. WOMEN & L. 209, 217 n.54 (2017); Lorelei Laird, *Striking Back at Revenge Porn: Victims Are Taking on ‘Revenge Porn’ Websites for Posting Photos They Didn’t Consent To*, 99 A.B.A. J. 45, 47 (Nov. 1, 2013), http://www.abajournal.com/magazine/article/victims_websites_photos_consent [<https://perma.cc/N4SY-Y4LS>] (“There’s really no way for involuntary porn to be effective unless there are certain misogynist perceptions about women and how they should handle themselves sexually.”) (internal quotation marks omitted).

⁸⁵ Franks, *supra* note 13, at 1259–60; see Drinnon, *supra* note 84, at 217 n.54.

⁸⁶ See NEV. REV. STAT. § 200.780(1) (2019).

⁸⁷ *Infra* Part III.

II. INADEQUATE ROUTES TO JUSTICE FOR NONCONSENSUAL PORNOGRAPHY VICTIMS

Nonconsensual pornography victims are largely unprotected under both state and federal law. The reasons for this are multifaceted. Many of the civil and criminal laws were enacted before the Internet age and the emergence of cybercrimes.⁸⁸ Hence, the act of disseminating nonconsensual pornography may awkwardly fit into the multiple elements of various civil claims and crimes but does not completely fit into a single cause of action. Section A of this Part explores available civil causes of action and their shortcomings for victims of nonconsensual pornography. Section B of this Part considers existing criminal statutes and why they fail to deter perpetrators of nonconsensual pornography.

A. Civil Claims Provide Inadequate Protection for Victims

Before the criminalization of nonconsensual pornography, victims were limited to pursuing civil claims. However, the remedies were, and still are, limited. Of course, civil claims are incredibly expensive for victims—many of whom are young women under the age of forty, who are just finishing school or beginning their career.⁸⁹ Taking a civil claim to court may be embarrassing for victims of nonconsensual pornography, as they must submit their photographs in public court documents.⁹⁰ Civil courts often discourage parties from using pseudonyms, forcing victims to use their real name in the public court record.⁹¹ Most importantly, civil lawsuits most often provide only the possibility of a monetary award.⁹² They offer no promise the intimate images will be taken down because most third-party Internet providers have immunity from civil lia-

⁸⁸ The World Wide Web was invented in 1989. Joseph Kershenbaum, *The Unillustrated Guide to Cyberspace*, 9 CONN. LAW. 19, 19 (1999). Harassment became a crime in Nevada the same year. A.B. 629, 65th Leg., (Nev. 1989). Yet, years before, the Restatement (Second of Torts) outlined the torts of Defamation, “Intrusion upon Seclusion,” False Light, “Publicity Given to Private Life,” and “Outrageous Conduct Causing Severe Emotional Distress.” RESTATEMENT (SECOND) OF TORTS § 558, § 652B, § 652D, § 652E, (AM. LAW INST. 1977); RESTATEMENT (SECOND) OF TORTS § 46 (AM. LAW INST. 1965).

⁸⁹ EATON ET AL., *supra* note 2, at 17; Laird, *supra* note 84, at 50 (“Because the victims are usually also individuals without serious means, attorneys often handle these cases pro bono, or with only limited expectation for compensation.”).

⁹⁰ See David DeKok, *Women in Photos Won’t Press Charges in Penn State Frat Case, Police Say*, HUFFPOST (May 29, 2015), https://www.huffingtonpost.com/2015/05/29/penn-state-kdr-photo-charges_n_7471758 [<https://perma.cc/Z7CQ-TFLE>] (“‘You need courage to go to court’ . . . ‘It’s not uncommon for victims to be reluctant to press charges, especially when it’s embarrassing, when there are nude photos involved.’”).

⁹¹ Joel M. Schumm, *No Names, Please: The Virtual Victimization of Children, Crime Victims, the Mentally Ill, and Others in Appellate Court Opinions*, 42 GA. L. REV. 471, 487 (2008) (“Beyond the general privacy policy of the federal courts, no Supreme Court or other federal appellate rule restricts the use of crime victims’ names in briefs and opinions.”). Nevada allows victims of sexual offenses to use pseudonyms. NEV. REV. STAT. § 200.3772(1) (2019). However, victims of nonconsensual pornography are not considered victims of a sexual offense. See NEV. REV. STAT. § 200.364(8) (2019).

⁹² *But cf. infra* Section II.A.6.

bility.⁹³ Even if victims are awarded damages, most defendants are judgement proof because they lack the financial resources to satisfy a judgement.⁹⁴

Despite these challenges, a victim could try to bring any number of civil claims. One Las Vegas personal injury firm markets fifteen different civil causes of action a victim in Nevada can bring against the perpetrator of nonconsensual pornography.⁹⁵ These causes of action range anywhere from the intentional infliction of emotional distress, to conversion, to negligence.⁹⁶ Other victims can seek relief under copyright law.⁹⁷ However, for many victims, the civil claims are ineffective at achieving justice.

This section will provide a cursory overview of various civil claims a victim could theoretically bring in any given nonconsensual pornography case. While certainly some victims' situations can meet every element of any individual claim, many victims' circumstances only meet a few elements of multiple claims, leaving these latter victims without relief. Because there is not a dedicated civil claim, victims are left to puzzle-piece their way to justice, forcing their circumstances to fit under elements of disparate claims. Put simply, "mapping the typical victim's facts onto existing causes of action is tantamount to trying to fit a square peg into a round hole."⁹⁸ This ill-fitting legal approach leaves too much power to the jury, which must either stretch traditional interpretations of legal standards or leave victims of sexual exploitation without relief.⁹⁹

Due to the lack of nonconsensual pornography cases filed in Nevada, this section will consider civil and criminal actions generally, with case examples from various jurisdictions. Although the case decisions come from various state courts, Nevada uses similar legal frameworks and elements of the various crimes and causes of action.¹⁰⁰

1. Defamation

To bring a defamation claim, a victim must prove: "[1] a false and defamatory statement concerning another; [2] an unprivileged publication to a third party; [3] fault amounting at least to negligence on the part of the publisher;

⁹³ Aubrey Burris, Note, *Hell Hath No Fury Like a Woman Porned: Revenge Porn and the Need for a Federal Nonconsensual Pornography Statute*, 66 FLA. L. REV. 2325, 2341 (2014); Fay, *supra* note 43, at 1845.

⁹⁴ Laird, *supra* note 84, at 50 (observing that perpetrators generally are "young men" and are "not wealthy"); *Frequently Asked Questions*, *supra* note 38.

⁹⁵ *Suing for "Revenge Porn" in Nevada*, L.V. DEF. GRP., <https://www.shouselaw.com/nevada/personal-injury/revenge-porn#1> [<https://perma.cc/V2NG-HMUH>] (last visited Sept. 28, 2019).

⁹⁶ *Id.*

⁹⁷ Katlyn M. Brady, *Revenge in Modern Times: The Necessity of a Federal Law Criminalizing Revenge Porn*, 28 HASTINGS WOMEN'S L. J. 3, 17 (2017).

⁹⁸ Sorensen, *supra* note 49, at 573.

⁹⁹ *Id.*

¹⁰⁰ See *infra* Section II.A.1–5.

and [4] either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication.”¹⁰¹ Falsity is an element to the claim; therefore, “substantial truth” is a complete defense.¹⁰² Because a victim depicted in nonconsensual pornography is inherently herself, indeed in her most vulnerable form, the contents of the image are obviously true. The defendant would be precluded from liability each time.¹⁰³ In some instances where a defendant publishes false and defamatory statements alongside the victim’s intimate photographs, courts have allowed victims to bring a defamation claim.¹⁰⁴ However, for many nonconsensual pornography victims, the statements, if any, that are published alongside their intimate photographs, are true.¹⁰⁵ Thus, a victim who found her name, sexual orientation, social-media accounts, and occupation listed alongside her intimate photos could not sue the perpetrator under defamation.¹⁰⁶

2. *False Light*

The tort action of false light raises a similar problem as defamation. A victim must show that the false light in which she was placed would be “highly offensive to a reasonable person,” and the defendant had “knowledge of or acted in reckless disregard as to the falsity of the publicized matter and false light in which the other would be placed.”¹⁰⁷ Some states, including Nevada, require the victim to show “mental distress from having been exposed to public view.”¹⁰⁸ As long as the defendant’s representation of the victim is substantially true, the defendant is precluded from liability.¹⁰⁹ Distributing unedited pornographic images is not a misrepresentation of the victim’s past activities. Therefore, like with defamation claims, most victims of nonconsensual pornography will not find relief under false light.

¹⁰¹ RESTATEMENT (SECOND) OF TORTS § 558 (AM. LAW INST. 1977); *see Clark Cty. Sch. Dist. v. Virtual Educ. Software, Inc.*, 213 P.3d 496, 503 (Nev. 2009).

¹⁰² NEV. CONST. art. 1, § 9; *Pegasus v. Reno Newspapers, Inc.*, 57 P.3d 82, 88 (Nev. 2002); *see Patel v. Hussain*, 485 S.W.3d 153, 157, 174 (Tex. App. 2016) (holding that a finding of substantial truth precluded defendant from liability for defamation after he posted secretly-recorded sexual videos of former girlfriend on the Internet); RESTATEMENT (SECOND) OF TORTS § 581A (AM. LAW INST. 1977).

¹⁰³ *But cf. K-Mart Corp. v. Washington*, 866 P.2d 274, 282 (Nev. 1993) (stating in dicta that “imputing serious sexual misconduct” is defamatory per se and does not require proof of actual harm). However, this does not overcome the truthfulness defense. *See id.* at 283.

¹⁰⁴ *Taylor v. Franko*, Civil No. 09–00002 JMS-RLP, 2011 WL 2118270, at *9 (D. Haw. May 2, 2011).

¹⁰⁵ *See, e.g., Patel*, 485 S.W.3d at 157, 172.

¹⁰⁶ *Id.* at 174 (finding that “substantial truth precludes liability [in] a defamation claim.”).

¹⁰⁷ *Ferm v. McCarty*, No. 2:12-cv-00782-GMN-PAL, 2013 WL 800536, at *8 (D. Nev. Jan. 28, 2013); RESTATEMENT (SECOND) OF TORTS § 652E (AM. LAW INST. 1977).

¹⁰⁸ *Flowers v. Carville*, 310 F.3d 1118, 1132 (9th Cir. 2002).

¹⁰⁹ *See Taylor*, 2011 WL 2118270, at *7 (holding that because the plaintiff did not claim the nude photographs the defendant posted online were not actually her, she failed to state a claim for invasion of privacy under the false light theory); *Rinsley v. Brandt*, 446 F. Supp. 850, 854 (D. Kan. 1977); *Baker v. Burlington N., Inc.*, 587 P.2d 829, 832 (Idaho 1978).

3. *Intentional Infliction of Emotional Distress (IIED)*

Intentional infliction of emotional distress is also a problematic civil claim for nonconsensual pornography victims. A victim must prove: (1) the defendant intentionally or recklessly causes severe emotional distress; by (2) extreme and outrageous conduct; and (3) the victim actually suffered severe emotional distress.¹¹⁰ Moreover, a claim for IIED requires intent to cause “severe emotional distress.”¹¹¹ Not all perpetrators of nonconsensual pornography intend to inflict distress on their victim.¹¹² This will be discussed in more depth later in the Note.¹¹³

4. *Unreasonable Intrusion upon the Seclusion of Another*

For a victim to bring a claim under unreasonable intrusion upon the seclusion of another, she must prove: (1) an intentional intrusion, physically or otherwise, (2) upon her solitude or seclusion or her private affairs or concerns (3) that would be highly offensive to a reasonable person.¹¹⁴ In *Taylor v. Franko*, the court held that because the victim allowed the defendant to photograph her in the nude, he did not “intrude[]” upon her private affairs.¹¹⁵ In many nonconsensual pornography cases, the victim consents to having her photographs taken or consensually shares her photographs within the confines of the relationship. Thus, the victim’s original consent precludes the court from finding an intrusion.¹¹⁶ Even when the perpetrator distributes the photographs outside the confines of the relationship, the victim is still precluded from bringing this intrusion of privacy claim.¹¹⁷

5. *Public Disclosure of Private Facts*

A victim can also sue under public disclosure of private facts. She must prove: (1) public disclosure, (2) of her private facts, (3) that would be highly offensive to a reasonable person, and (4) are not of legitimate concern to the public.¹¹⁸ This civil claim for invasion of privacy is surely the broadest and most inclusive for victims of nonconsensual pornography because the state-

¹¹⁰ See RESTATEMENT (SECOND) OF TORTS § 46(1) (AM. LAW INST. 1965).

¹¹¹ *Id.*

¹¹² EATON ET AL., *supra* note 2, at 19; Franks, *supra* note 13, at 1287.

¹¹³ See *infra* Part III.A.

¹¹⁴ RESTATEMENT (SECOND) OF TORTS § 652B (AM. LAW INST. 1977).

¹¹⁵ *Taylor v. Franko*, Civil No. 09-00002 JMS-RLP, 2011 WL 2118270, at *7 (D. Haw. May 2, 2011).

¹¹⁶ See *id.*

¹¹⁷ *Id.* at *1, *7.

¹¹⁸ RESTATEMENT (SECOND) OF TORTS § 652D (AM. LAW INST. 1977); see *Taylor*, 2011 WL2118270 at *8 (holding that a plaintiff alleged sufficient facts to state a claim of private disclosure of public facts when the defendant included identifying information along with nude photographs of the plaintiff).

ments do not need to be untrue, as in defamation or false light.¹¹⁹ However, there are still certain victims that cannot find relief under this claim. Because this tort requires a victim to prove the facts are “not of legitimate concern to the public,” this likely precludes public figures from this civil remedy.¹²⁰

But state civil claims are not the only problematic claims for victims of nonconsensual pornography.

6. Copyright

Federal civil claims, including copyright claims, raise issues as well. Under the Digital Millennium Copyright Act of 1998, the copyright owners of the intimate images can file a “takedown notice” against a website hosting the non-consensual pornography.¹²¹ While copyright claims may seem promising, the remedy is actually quite limited. Most obviously, in order for a victim to file a takedown notice, she must be the copyright owner.¹²² She must have taken the photograph herself, not merely be pictured in it.¹²³ While in many situations the victim is the copyright owner, this is not necessarily true for all nonconsensual pornography cases. Moreover, a website can ignore the takedown notice unless the victim provides proper proof that she is the copyright owner.¹²⁴ This, of course, means the victim must register the very photograph she wishes to expunge from public view with the United States Copyright Office.¹²⁵

If a victim goes to these lengths and files a takedown notice with the proper proof of ownership, only the one particular website to which she filed a takedown notice is required to remove the photograph.¹²⁶ Likely, by the time a victim has successfully removed the photo from one site, her ex-partner or others may have saved the photo to his desktop or shared the photo to other sites.¹²⁷

¹¹⁹ See *supra* Section II.A.1, II.A.2.

¹²⁰ RESTATEMENT (SECOND) OF TORTS § 652D (AM. LAW INST. 1977); Drinnon, *supra* note 84, at 223–24 (public figures hold a unique status in common law and are often held to a higher standard when recovering in privacy-related torts); see *infra* Section III.D (the same holds true in Nevada’s current nonconsensual pornography criminal statute).

¹²¹ See 17 U.S.C. § 512(c) (2018).

¹²² *Id.* § 512(c)(3)(A)(i); Ariel Ronneburger, Note, *Sex, Privacy, and Webpages: Creating a Legal Remedy for Victims of Porn 2.0*, 21 SYRACUSE SCI. & TECH. L. REP., 1, 17 (2009) (“[U]nder current copyright law, only the copyright holder has the ability to control the use of photos and videos. Since the copyright in an image or work of art is always granted to the creator rather than the subject of the work, only the creator has a legal right to control its use, while the subjects of the pornographic materials have no ownership rights.”).

¹²³ See 17 U.S.C. § 102(a)(5) (2018); Cynthia Barmore, Note, *Criminalization in Context: Involuntariness, Obscenity, and the First Amendment*, 67 STAN. L. REV. 447, 458 (2015).

¹²⁴ *Id.*

¹²⁵ Sara Ashley O’Brien, *Woman Awarded \$6.45 Million in Revenge Porn Case*, CNN (Apr. 9, 2018, 8:30 PM), <https://money.cnn.com/2018/04/09/technology/revenge-porn-judgment/index.html> [https://perma.cc/4AT5-JA9K].

¹²⁶ See Laird, *supra* note 84, at 49.

¹²⁷ *Id.*; Barmore, *supra* note 123, at 459.

Many internet service providers have recognized the harmful effects of nonconsensual pornography.¹²⁸ Accordingly, Reddit, Twitter, Facebook, and Instagram have voluntarily implemented policies to take down intimate images at the request of the victim.¹²⁹ Many search engines like Google, Bing, and Yahoo have also agreed to “de-index” nonconsensual pornography, so the intimate content will not appear when searching a victim’s name.¹³⁰ Even traditional pornography websites including PornHub announced a new procedure to remove an image at a victim’s request.¹³¹ While these private efforts are surely appreciated, and will help in the fight to protect victims from nonconsensual pornography, the Legislature should not leave it up to corporate good-faith efforts to protect victims from sexual exploitation.

Because of the vast harm victims of nonconsensual pornography experience, there are few, if any, satisfying remedies. Due to the nature of online forums, the harms of nonconsensual pornography simply cannot be undone. Often, a victim cannot know right away that she has been sexually exploited and that an intimate image of her body is available online for the public. Even if the victim is aware her photo was made public, her image is practically impossible to remove from the internet, let alone the personal devices of unknown numbers of unknown viewers. For many victims, the uncertainty of relief combined with the cost and publicity of civil proceedings is enough to “stifle their attempt at vindicating their rights.”¹³² Put simply, “the civil remedy really is no remedy at all.”¹³³

B. Criminal Claims Do Not Sufficiently Deter Perpetrators

Because victims have difficulties bringing and winning civil cases, states must impose criminal statutes to deter perpetrators. As with civil claims, many criminal statutes do not fit the bill for nonconsensual pornography. Before New Jersey criminalized nonconsensual pornography in 2004, this type of sexual

¹²⁸ Margaret Talbot, *The Attorney Fighting Revenge Porn*, NEW YORKER (Nov. 27, 2016), <https://www.newyorker.com/magazine/2016/12/05/the-attorney-fighting-revenge-porn> [<https://perma.cc/YJQ6-M485>]; see *Account and Community Restrictions: Do Not Post Involuntary Pornography*, REDDIT, <https://www.reddithelp.com/en/categories/rules-reporting/account-and-community-restrictions/do-not-post-involuntary-pornography> [<https://perma.cc/URX8-9ZLN>] (last visited Aug. 27, 2019).

¹²⁹ *Online Removal Guide*, CYBER C.R. INITIATIVE, <https://www.cybercivilrights.org/online-removal/> [<https://perma.cc/PJ4C-YBS5>] (last visited Sept. 28, 2019).

¹³⁰ Talbot, *supra* note 128 (internal quotation marks omitted); see *Online Removal Guide*, *supra* note 129.

¹³¹ *Content Removal Request*, PORNHUB, <https://www.pornhub.com/content-removal> [<https://perma.cc/Z9FL-AVZX>] (last visited Sept. 28, 2019); see David Moye, *Pornhub Makes It Easier to Remove Revenge Porn*, HUFFPOST (Oct. 14, 2015), https://www.huffpost.com/entry/pornhub-revenge-porn-removal_n_561eb29fe4b0c5a1ce61bf3f [<https://perma.cc/Q8QJ-2DNC>] (last visited Sep. 28, 2019).

¹³² Sorensen, *supra* note 49, at 573–74.

¹³³ *Id.* at 570 (internal quotation marks omitted) (quoting 58 H.R. Proc., Pts. 11–12, 2015 Sess., p. 3858).

exploitation was not a crime in any state.¹³⁴ Just as victims have to puzzle-piece their way through various civil claims, prosecutors were left to force nonconsensual pornography cases into various crimes such as harassment, the capturing and distribution of a private photograph, or cyberstalking.¹³⁵ Much like with civil causes of action, each of these crimes precluded perpetrators from culpability.

1. Harassment

Criminal harassment statutes preclude culpability for some perpetrators of nonconsensual pornography.¹³⁶ “A person is guilty of harassment if [] [w]ithout lawful authority, the person knowingly threatens . . . [] [t]o do any act which is intended to substantially harm the person threatened or any other person with respect to his or her physical or mental health or safety.”¹³⁷ Not all perpetrators intend to cause harm or to harass the victim.¹³⁸ In fact, 79 percent of perpetrators reported they were “just sharing the image(s) with . . . friends and didn’t intend to hurt the person.”¹³⁹ Many photos are uploaded to private Facebook groups or email threads, in which the perpetrator assumes the victim will never know the photograph has been distributed.¹⁴⁰ When it comes to intimate photos of celebrities that are posted, distributed, and shared without permission, many perpetrators send the link as a form of gossip more than a form of harassment.¹⁴¹ Consider the distributors of hundreds of female celebrities’ private, intimate photos in the 2014 celebrity hack, crudely termed “The Fappening.”¹⁴² Rather than an intent to “harass, harm or terrorize,”¹⁴³ the hackers likely had financial interests in mind.¹⁴⁴ Thus, the crime of harassment does not encapsulate many of the perpetrators of nonconsensual pornography.

¹³⁴ Barmore, *supra* note 123, at 450–51.

¹³⁵ See Franks, *supra* note 13, at 1298 (“Those who insist that existing laws, whether civil or criminal, are sufficient to address this conduct are either ignorant of or indifferent to the reality victims face.”).

¹³⁶ *People v. Barber*, No. 2013NY059761, 2014 WL 641316, at *4 (N.Y. Crim. Ct. Feb. 18, 2014) (holding that “the mere posting of content, however offensive, on a social networking site” is not harassment).

¹³⁷ NEV. REV. STAT. § 200.571(a)(4) (2019).

¹³⁸ EATON ET AL., *supra* note 2, at 20.

¹³⁹ *Id.*

¹⁴⁰ Franks, *supra* note 13, at 1288.

¹⁴¹ *Id.*

¹⁴² Roisin Kiberd, *Why the ‘Fappening’ Keeps Happening*, VICE (Apr. 12, 2017, 12:15 PM), https://www.vice.com/en_us/article/aemzkn/why-the-fappening-keeps-happening [<https://perma.cc/2VFC-HCRB>].

¹⁴³ NEV. REV. STAT. § 200.780 (2019).

¹⁴⁴ NEV. REV. STAT. § 200.780 (2019); see also Roxane Gay, *The Great 2014 Celebrity Nude Photos Leak is Only the Beginning*, GUARDIAN (Sep. 30, 2014, 10:39 PM), <https://www.theguardian.com/commentisfree/2014/sep/01/celebrity-naked-photo-leak-2014-nude-women> [<https://perma.cc/Y8UB-N2AM>] (“It’s not clear what the people who leak these photos hope to achieve beyond financial gain and a moment of notoriety.”).

2. *Distribution of an Image of the Private Area of Another Person*

Nevada, also criminalizes the distribution of an image of the private area of another person.¹⁴⁵ “[A] person shall not knowingly and intentionally capture an image of the private area of another person [] [w]ithout . . . consent . . . and [] [u]nder circumstances in which the other person has a reasonable expectation of privacy.”¹⁴⁶ This criminal statute obviously leaves out the majority of photos in the nonconsensual pornography category—photos the victim took herself.

3. *Cyberstalking*

The federal cyberstalking statute is also problematic for many victims. The federal crime bans a “course of conduct” intended to harass or intimidate someone in another state, placing that person in reasonable fear of bodily injury or death that would reasonably be expected to cause “substantial emotional distress.”¹⁴⁷ If the offender only distributes an image once or twice, it might not constitute a “course of conduct,” even though a single post or e-mail can result in the image spreading across the Internet rapidly.¹⁴⁸ More importantly, cyberstalking, requires “intent to harass [or] . . . intimidate.”¹⁴⁹ As discussed throughout this Note, not all perpetrators have the intent to harm or harass.

III. NEVADA’S FIRST ATTEMPT TO CRIMINALIZE NONCONSENSUAL PORNOGRAPHY

Accordingly, many states, including Nevada, have criminalized the dissemination of nonconsensual pornography. New Jersey was the first to outlaw this behavior in 2004.¹⁵⁰ By 2013, only two states had criminalized it.¹⁵¹ As of 2019, Massachusetts, Mississippi, South Carolina, and Wyoming have yet to criminalize nonconsensual pornography.¹⁵² Still, no federal law exists.¹⁵³

¹⁴⁵ NEV. REV. STAT. § 200.604(1)(a)–(b) (2019).

¹⁴⁶ *Id.*

¹⁴⁷ 18 U.S.C. § 2261A(2) (2018).

¹⁴⁸ *But cf.* United States v. Sayer, 748 F.3d 425, 433–34 (1st Cir. 2014) (holding that defendant’s actions of creating false online advertisements and accounts of victim, impersonating her on the internet, and enticing men to victim’s home constituted a course of conduct for purposes of 18 U.S.C. § 2261A). However, nonconsensual pornography cases where an individual posts a single photo without consent may not amount to a “course of conduct” for purposes of the federal cyberstalking statute. *See* 18 U.S.C. § 2261A (2018).

¹⁴⁹ 18 U.S.C. § 2261A(2) (2018).

¹⁵⁰ N.J. STAT. ANN. § 2C:14-9(c) (West 2004) (amended 2016) (making it a crime to “disclose[] any photograph, film, videotape, recording or any other reproduction of the image of another person whose intimate parts are exposed or who is engaged in an act of sexual penetration or sexual contact, unless that person has consented to such disclosure.”); Fay, *supra* note 43, at 1854.

¹⁵¹ Barmore, *supra* note 123, at 451.

¹⁵² 46 States, *supra* note 15. While forty-six states and the District of Columbia have enacted nonconsensual pornography laws, the laws’ effects on victims and perpetrators are anything but consistent. Jillian Roffer, Note, *Nonconsensual Pornography: An Old Crime Updates Its Software*, 27 FORDHAM INTELL. PROP., MEDIA & ENT. L.J. 935, 956 (2017). Some

In 2015, Nevada passed NRS 200.780, the Unlawful Dissemination of an Intimate Image, that provides:

- 1.[A] person commits the crime of unlawful dissemination of an intimate image when, with the intent to harass, harm or terrorize another person, the person electronically disseminates or sells an intimate image which depicts the other person and the other person:
 - (a) Did not give prior consent to the electronic dissemination or the sale of the intimate image;
 - (b) Had a reasonable expectation that the intimate image would be kept private and would not be made visible to the public; and
 - (c) Was at least 18 years of age when the intimate image was created.
- ***
3. The provisions of this section do not apply to the electronic dissemination of an intimate image for the purpose of:
 - (a) A legitimate public interest;
 - (b) Reporting unlawful conduct;
 - (c) Any lawful law enforcement or correctional activity;
 - (d) Investigation or prosecution of a violation of this section; or
 - (e) Preparation for or use in any legal proceeding.¹⁵⁴

NRS 200.770 defines an intimate image as:

1. Except as otherwise provided in subsection 2, includes, without limitation, a photograph, film, videotape or other recorded image which depicts:
 - (a) The fully exposed nipple of the female breast of another person, including through transparent clothing; or
 - (b) One or more persons engaged in sexual conduct.
2. Does not include an image which would otherwise constitute an intimate image pursuant to subsection 1, but in which the person depicted in the image:
 - (a) Is not clearly identifiable;
 - (b) Voluntarily exposed himself or herself in a public or commercial setting; or
 - (c) Is a public figure.¹⁵⁵

Overall, NRS 200.780 is a success. Nevada rightfully realized the need for a criminal statute specific to nonconsensual pornography. NRS 200.780 takes a stand against the exploitation of women and surely aids in deterring individuals

states punish the distribution of a private image as a Class A misdemeanor, punishable by up to a year in jail. *See* ALA. CODE § 13A-6-240(a) (2017); ARK. CODE ANN. § 5-26-314(c) (2019); CAL. PENAL CODE § 647(j)(4)(A) (West 2019); COLO. REV. STAT. § 18-7-108(1)(b) (2019); CONN. GEN. STAT. § 53a-189c(c) (2019); MICH. COMP. LAWS §§ 750.145(e)–(f) (2016); N.D. CENT. CODE § 12.1-17-07.2(5) (2015); OKLA. STAT. tit. 21, § 1040.13b(F) (2016); UTAH CODE ANN. § 76-5b-203(5)(a) (West 2019); VA. CODE ANN. § 18.2-386.2(A) (2019); W. VA. CODE § 61-8-28a(c) (2017).

Other states punish it as a Class Four felony. *See* ARIZ. REV. STAT. ANN. § 13-1425(C)(1) (2019); *see also* 720 ILL. COMP. STAT. 5/11-23.5(f) (2015); MO. REV. STAT. § 573.110(6) (2019); NEV. REV. STAT. § 200.780(2) (2019).

¹⁵³ *See* Brady, *supra* note 97, at 3.

¹⁵⁴ NEV. REV. STAT. § 200.780(1), (3) (2019).

¹⁵⁵ NEV. REV. STAT. § 200.770(1)–(2) (2019).

from distributing photographs that they have no right to distribute.¹⁵⁶ Nevada penalizes the dissemination of nonconsensual pornography as a category D felony, which serves as a strong deterrent for perpetrators.¹⁵⁷ NRS 200.785 punishes individuals who demand compensation in return for removing an intimate photograph.¹⁵⁸

However, with its current statutory language, the Dissemination of an Intimate Image fails to fill the very gaps of relief the other various civil and criminal claims leave unattended. Specifically, the statute's requirement of "intent to harass, harm or terrorize" imposes the same problems victims and prosecutors face when bringing claims of IIED, harassment, and cyber-stalking.¹⁵⁹ Likewise, the vague requirement that the victim "[h]ad a reasonable expectation" that an image would remain private imposes similar problems as an unreasonable-intrusion-upon-the-seclusion-of-another tort claim.¹⁶⁰ Moreover, Nevada's "public figure" exemption from the definition of an "intimate image" precludes the same victims as a public-disclosure-of-private-facts tort claim.¹⁶¹ NRS 200.780 suffers from overly burdensome requirements, under-inclusiveness, and ambiguous exceptions. This not only leaves many victims unprotected and many perpetrators without deterrent but may also be subject to constitutional objections.

The statute then fails to accomplish its purpose: to hold perpetrators of nonconsensual pornography accountable. The Nevada Legislature must amend NRS 200.770 and 200.780 in order to enable prosecutors to effectively charge perpetrators within the confines of the Constitution. The following sections critically analyze Nevada's current statute and ultimately propose a more inclusive, more constitutionally sound statute. Part III through Part V heavily rely on Professor Mary Anne Franks's article *Revenge Porn Reform: A View from the Front Line*, an in-depth consideration of what should and should not belong in a nonconsensual criminal statute.¹⁶² I will tailor Franks's suggestions to Nevada's current criminal statute.¹⁶³

¹⁵⁶ EATON ET AL., *supra* note 2, at 22 (showing fifty-five percent of perpetrators reported that if they knew they could be imprisoned for sending the photos, they would not have sent them in the first place).

¹⁵⁷ A defendant found guilty is not considered a sex offender and need not register as one. NEV. REV. STAT. § 200.780(4) (2019). However, studies have shown that sex offender registration is likely the best deterrent for disseminating nonconsensual pornography. EATON ET AL., *supra* note 2, at 22; *see also* *Hearing on A.B. 49*, *supra* note 40.

¹⁵⁸ NEV. REV. STAT. § 200.785 (2019); Brady, *supra* note 97, at 7.

¹⁵⁹ NEV. REV. STAT. § 200.780 (2019); *see also supra* Part II.A., II.B.

¹⁶⁰ NEV. REV. STAT. § 200.780 (2019); *see also supra* Section II.A.4.

¹⁶¹ *See supra* Section II.A.5.

¹⁶² *See* Franks, *supra* note 13, at 1292–93. Professor Mary Anne Franks "serves as the President and Legislative & Tech Policy Director of the Cyber Civil Rights Initiative, a nonprofit organization dedicated to combating" nonconsensual pornography. *Mary Anne Franks*, U. MIAMI SCH. L., <https://www.law.miami.edu/faculty/mary-anne-franks> [<https://perma.cc/VGL5-WQFL>] (last visited Sept. 28, 2019). Franks also drafted the first model criminal statute on nonconsensual pornography. *Id.*

¹⁶³ *See infra* Part IV.

A. “*Intent to Harass, Harm, or Terrorize*” Motive Requirement

Nevada currently requires prosecutors to prove a defendant had an “intent to harass, harm or terrorize” the victim.¹⁶⁴ By so requiring, the Nevada Legislature misidentifies the harm a nonconsensual pornography statute must protect: the violation of privacy.¹⁶⁵ While nonconsensual pornography certainly can involve harassment or terror, it “*always* involves . . . an invasion of privacy.”¹⁶⁶ Likewise, while nonconsensual pornography can inflict psychological, emotional, reputational, financial, educational, professional, or discriminatory harm, “it *always* inflicts . . . a loss of privacy.”¹⁶⁷

By misidentifying the harm, the Legislature excluded a large majority of offenders from accountability. Indeed, 79 percent of perpetrators “did not intend to hurt their victims.”¹⁶⁸ A significant number of nonconsensual pornography cases involve perpetrators who do not even know their victim.¹⁶⁹ For example, brothers of the Penn State chapter of the Kappa Delta Rho fraternity uploaded photos of unconscious, naked women to a members-only Facebook page.¹⁷⁰ One fraternity brother argued the conduct “wasn’t malicious whatsoever. It wasn’t intended to hurt anyone. It wasn’t intended to demean anyone. It was an entirely satirical group . . .”¹⁷¹ An unconscious young woman’s privacy is just as violated as an individual whose naked selfie is maliciously posted without permission on MyEx.com.¹⁷² The harm done to the victim and to society is the same. Yet, Nevada’s criminal statute would fail to hold the fraternity brothers accountable.¹⁷³ Nevada’s “intent to harass” requirement is overly bur-

¹⁶⁴ NEV. REV. STAT. § 200.780(1) (2019).

¹⁶⁵ See Franks, *supra* note 13, at 1282–83.

¹⁶⁶ *Id.* at 1283.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* at 1287.

¹⁶⁹ *Id.* at 1288.

¹⁷⁰ *Id.* at 1332; Amanda Marcotte, *Penn State Frat Member Says Pictures of Nonconsenting Nude Women Are “Satire,”* SLATE (Mar. 19, 2015, 4:08 PM), <https://slate.com/human-intellect/2015/03/kappa-delta-rho-fraternity-at-penn-state-pictures-of-non-consenting-nude-women-are-satire.html> [<https://perma.cc/VZY5-486D>].

¹⁷¹ Holly Otterbein, *Member of Penn State’s Kappa Delta Rho Defends Fraternity*, PHILA. MAG. (Mar. 18, 2015, 4:36 PM), <https://www.phillymag.com/news/2015/03/18/member-of-penn-states-kappa-delta-rho-defends-fraternity/>.

[T]he thing is, that it was a satirical group. It’s like, there’s literally sites like that that millions of people access, whether it’s totalfratmove.com or any of the other thousands of sites that post, you know, pictures of girls and post funny text conversations and Snapchat stories and things like that. . . . It wasn’t intended to hurt anyone. It wasn’t intended to demean anyone. . . . Some of the stuff, yeah, it’s raunchy stuff, as you would expect from a bunch of college-aged guys. But, I mean, you could go on any one of hundreds and thousands of different sites to access the same kind of stuff and obviously a lot worse and a lot more explicit.

Marcotte, *supra* note 169.

¹⁷² See Franks, *supra* note 13, at 1283.

¹⁷³ See *California Revenge Porn Law (Penal Code 647(j)(4) PC)*, SHOUSE CAL. L. GROUP, <https://www.shouselaw.com/revenge-porn.html> [<https://perma.cc/Z743-DS3G>] (last visited Sept. 28, 2019) (advertising legal defenses to nonconsensual pornography, including arguing “that you did not intend to cause emotional distress to the ‘victim.’ Depending on the cir-

densome and too narrowly defines the harm done in every nonconsensual pornography case. In this sense, Nevada's nonconsensual pornography statute is no better at achieving justice for victims of nonconsensual pornography than a criminal harassment statute, which also requires intent to harm.¹⁷⁴ In reality, including "intent to harass" requirements essentially turns the statute into a duplicate of a criminal harassment statute.¹⁷⁵

B. *Mens Rea Requirement*

Once the statute accurately portrays the social harm caused—the invasion of privacy—the statute can more accurately impose a *mens rea* requirement.¹⁷⁶ The *mens rea* of a criminal statute refers to the defendant's mental state with regard to the "social harm" set out by the defense.¹⁷⁷ Thus, if Nevada identifies the harm as an invasion of privacy, a prosecutor need only prove the defendant's intent to invade a victim's privacy, not an intent to harass or terrorize a victim.

Nevada's *mens rea* requirement regarding the distribution of an image rightly is, and should be, knowingly.¹⁷⁸ This ensures that purely accidental disclosures are not criminally punished.¹⁷⁹ However, Nevada's *mens rea* requirement regarding the defendant's knowledge of the victim's lack of consent should be "reckless[ly]."¹⁸⁰ This level of *mens rea* requires the defendant to have a subjective understanding the photos were to remain private.¹⁸¹ Moreover, this state of mind requires prosecutors to show a "conscious disregard of a 'substantial and unjustifiable risk.'"¹⁸² Thus, the statute would criminalize defendants who "know that the social utility of the risk they take is far outweighed by the social harm that is likely to result."¹⁸³ The social harms, as discussed above, are weighty.¹⁸⁴ And, the social utility of disclosing a person's intimate photograph "without verifying consent[] is extremely low,"¹⁸⁵ and the minimization of the risk is minimal.¹⁸⁶ All one has to do is ask if they have

cumstances and your relationship with him/her, you may have reasonably believed that distributing the image would be a harmless joke.").

¹⁷⁴ See *supra* Section II.B.1.

¹⁷⁵ See *supra* Section II.B.1.

¹⁷⁶ Franks, *supra* note 13, at 1283.

¹⁷⁷ *Id.* at 1284 (internal quotation marks omitted).

¹⁷⁸ Although NEV. REV. STAT. § 200.780 (2019) does not use this explicit language, Nevada law prohibits persons from being criminally punished who commit an act "without being conscious thereof" or "through misfortune or by accident." NEV. REV. STAT. § 194.010(6)–(7) (2019); Franks, *supra* note 13, at 1284.

¹⁷⁹ Franks, *supra* note 13, at 1284.

¹⁸⁰ See *id.*

¹⁸¹ *Id.*

¹⁸² *Id.* (quoting MODEL PENAL CODE § 2.02(2)(c)).

¹⁸³ *Id.* at 1284–85.

¹⁸⁴ *Id.* at 1285.

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

permission.¹⁸⁷ The act of distributing someone else's intimate photos, rarely, if ever, will require a split-second decision.¹⁸⁸

C. "Reasonable Expectation" Definition

On its face, Nevada's requirement that the victim actually have a reasonable expectation that the intimate photograph would remain private is not problematic. However, Nevada's statute must give further clarification of what constitutes "reasonableness." If left unguided, courts could construe the "reasonable expectation" requirement in a way to preclude exploiters from culpability. For example, a court could easily interpret "reasonable expectation of privacy" in the context of nonconsensual pornography the same way courts interpret "reasonable expectation of privacy" for Fourth Amendment purposes.¹⁸⁹ Such an interpretation would mean that victims who shared their intimate photographs through third parties, such as Snapchat, Instagram, Line, Facebook, Dropbox, or iCloud, would not have a "reasonable expectation of privacy."¹⁹⁰ In today's tech-social world, such an interpretation would preclude many perpetrators from guilt.¹⁹¹ In the same vein, a victim who files a civil copyright claim and submits her intimate photographs to the United States Copyright Office would not have a "reasonable expectation of privacy."

Thus, the Legislature must clarify to some degree what constitutes a "reasonable expectation." At the very least, the statute should note that a person who has consented to the disclosure of an image within the context of a confidential relationship retains a reasonable expectation of privacy regarding disclosures beyond such a relationship, including when the person originally discloses her images within the context of a confidential relationship through the use of third-party communication service providers.

D. "Public Figure" Exception

Nevada's criminal statute is also unfairly narrow in scope regarding its definition of an "intimate image." Currently, if the individual depicted in the image is a "public figure," the private photo is not considered "intimate," and the perpetrator who discloses the explicit images would not be liable—even if the public figure is completely naked.¹⁹² Nevada has failed to define "public figure" for purposes of 200.770, and the Nevada Supreme Court has not yet inter-

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ Brady, *supra* note 97, at 9.

¹⁹⁰ Smith v. Maryland, 442 U.S. 735, 743–44 (1979) (holding that "a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties."); United States v. Miller, 425 U.S. 435, 443 (1976).

¹⁹¹ See EATON ET AL., *supra* note 2, at 21 (finding 44.7% of perpetrators disseminate the nonconsensual pornography over text message; 18.9% use social-media; 17.6% use email; 10.7% post the images on a website).

¹⁹² See NEV. REV. STAT. § 200.770 (2)(c) (2019).

preted the term.¹⁹³ Therefore, the consequences of this exception are yet to be determined.

However, the Nevada Supreme Court's interpretation of "public figure" for defamation cases may provide guidance. In defamation, a "public figure" is an individual "who achieve[s] such pervasive fame or notoriety that [he or she] become[s] a public figure for all purposes and in all contexts."¹⁹⁴ In certain instances of nonconsensual pornography, this definition makes sense. For example, if a Congressman lied about sending nude photographs to a young student, the public has a legitimate interest in evidence of its elected representative's character.¹⁹⁵ Explicit photographs such as these can indicate to voters that their Congressman lied about his past and is not a trustworthy candidate.¹⁹⁶

Deputy District Attorney Laura Tucker who helped draft Nevada's statute, articulated this situation and stated the provision "was meant to be directed as in the example of a politician exposing himself and sending photos to his constituents; that would be a matter of public concern."¹⁹⁷ However, this is the extent that the "public figure" exception was discussed in Nevada's Legislature, leaving serious questions for Nevada courts to settle.¹⁹⁸

The scope becomes blurry in local settings. Consider a public-school teacher. Any given teacher may not have "pervasive fame or notoriety" outside of her immediate community.¹⁹⁹ Yet, a public-school teacher could be considered a limited-purpose public figure in her community. Just as constituents have a legitimate interest in the character of their political representatives, parents have a legitimate interest in the character of their children's teachers. Should a spiteful ex-partner of a public-school teacher be immune from liability for exposing her intimate photos to the public? Does the public have a right to view her intimate photos without her consent? These questions, of course, are speculative. However, without further guidance from Nevada's Legislature or Supreme Court, the answers are yet to be determined.

To prevent future misinterpretation of "public figure," the Nevada Legislature should eliminate this exception altogether. Already explicit in the statute is the "legitimate public interest" exception.²⁰⁰ Photographs that fall within a "legitimate public interest" already encompass the situation in which a public fig-

¹⁹³ NEV. REV. STAT. § 200.770 (2019).

¹⁹⁴ *Pegasus v. Reno Newspapers, Inc.*, 57 P.3d 82, 91 (Nev. 2002) (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 351 (1974)).

¹⁹⁵ Bloom, *supra* note 51, at 274.

¹⁹⁶ See Suzanne Choney, 'Revenge Porn' Law in California Could Pave Way for Rest of Nation, NBC NEWS (Sept. 3, 2013, 4:34 PM), <https://www.nbcnews.com/technology/revenge-porn-law-california-could-pave-way-rest-nation-8C11022538> [<https://perma.cc/3TQY-EJRR>].

¹⁹⁷ *Hearing on A.B. 49*, *supra* note 40, at 12–13.

¹⁹⁸ Brady, *supra* note 97, at 8–9 ("[T]he failure of the legislature to give adequate guidance on what qualifies as public interest, except to say politicians should not send racy photographs, raises a serious question[] that the courts ha[ve] to settle.").

¹⁹⁹ See *Pegasus*, 57 P.3d at 91.

²⁰⁰ NEV. REV. STAT. § 200.780(3)(a) (2019).

ure’s intimate photographs should be publishable, such as to determine a Congressman’s truthful character. However, the “legitimate public interest” exception allows other public figures—whose private bodies are not of the public’s interest—to receive protection. One example of this could be the notorious celebrity hack, “The Fappening,” previously mentioned in this Note.²⁰¹ Victims such as Jennifer Lawrence, Anne Hathaway, and Ariana Grande, all of whom are public figures but none of whose bodies are a legitimate public interest, could find relief under an amended statute.²⁰² The Nevada Legislature noted this difference. Tucker stated, “[i]f Paris Hilton was [sharing intimate images] in the privacy of her home with her boyfriend and did not intend for [the photos] to be made public, then that would be analyzed on an individual basis.”²⁰³ However, rather than leave courts to guess at the Nevada Legislature’s intent, Nevada should simply amend its statute to dissolve the “public figures” exception into the “legitimate public interest” exception.²⁰⁴

E. “Electronic” Requirement

While most disclosures of nonconsensual pornography happen online, not all protected images are disclosed electronically. Nonconsensual pornography can take hard-copy forms as well, including printed photographs and DVDs.²⁰⁵ For example, one victim’s ex-husband, Jovica Petrovic, sent 8.5”x11” printed photos of his ex-wife performing sex acts in FedEx envelopes to the victim’s boss as well as to her home address, where they were opened by the victim’s seven-year-old son.²⁰⁶ Nevada’s requirement that the intimate photograph be disseminated electronically will absolve such perpetrators of civil or criminal liability.

IV. A PROPOSED SOLUTION TO NEVADA’S INSUFFICIENT COVERAGE

Therefore, Nevada should amend its nonconsensual pornography statute in a few ways. First, the *mens rea* should be that (1) a person knowingly dissemi-

²⁰¹ See *supra* Section II.B.1.

²⁰² Theoretically, supposing Nevada had jurisdiction over the national scandal.

²⁰³ *Hearing on A.B. 49, supra* note 40, at 13.

²⁰⁴ Nevada’s exclusion of legitimate public interest is important in order to keep this constitutionally valid, but the broad category of “public figures” from protection is far too narrow an exclusion.

²⁰⁵ Franks, *supra* note 13, at 1290–91; see Associated Press, *Police: Man Left DVDs of Ex-Girlfriend Performing Sex Acts on Car Windshields*, FOX NEWS (Mar. 3, 2007), <http://www.foxnews.com/story/police-man-left-dvds-of-ex-girlfriend-performing-sex-acts-on-car-windshields> [<https://perma.cc/6L4P-MP2G>]. David Feltmeyer allegedly distributed sexually explicit DVDs of his ex-girlfriend on the windshields of cars in her neighborhood after she declined to continue a relationship with him. *Id.*

²⁰⁶ Nicholas Phillips, *Sext Fiend: Jovica Petrovic Tried to Embarrass His Ex-Wife to Death, and Revenge Porn Was the Name of the Game*, RIVERFRONT TIMES (Apr. 18, 2013), <http://www.riverfronttimes.com/2013-04-18/news/sext-fiend/full/> [<https://perma.cc/WS67-KQY4>]. Due to Petrovic’s correlating behavior, he was charged and convicted of stalking and extortion. *Id.*

nates or sells an intimate photo which depicts another person when, (2) the actor recklessly disregards the risk that the depicted person did not consent to the dissemination of the other person. The amended statute should remove all motive requirements, particularly the defendant's "intent to harass, harm or terrorize" the person depicted in the photograph. The amended statute should also remove the "public figure" exception and the requirement that the image be "electronically" disseminated. Lastly, Nevada's Legislature should offer guidance as to what a "reasonable expectation" means for the purposes of the dissemination of nonconsensual pornography.

My recommended Nevada statute reads as follows:

1. Except as otherwise provided in subsection 4, an actor commits the crime of unlawful dissemination of an intimate image when the actor knowingly disseminates or sells an intimate image which depicts another person and when the actor recklessly disregards the risk that the depicted person did not consent to the dissemination and the other person:
 - (a) is clearly identifiable; and
 - (b) had a reasonable expectation that the intimate image would be kept private and would not be made visible to the public; and
 - (c) was at least 18 years old when the intimate image was created.²⁰⁷
2. A person who commits the crime of unlawful dissemination of an intimate image is guilty of a category D felony and shall be punished as provided in NRS 193.130.²⁰⁸
3. A person who has consented to the disclosure of an image within the context of a confidential relationship retains a reasonable expectation of privacy with regard to disclosures beyond such a relationship, including when the person originally discloses the image through the use of third-party communication service providers.
4. Exceptions:
 - (a) This section does not apply to images involving voluntary exposure in public or in lawful commercial settings.
 - (b) The provisions of this section do not apply to the dissemination of an intimate image for the purpose of:
 - (i) A legitimate public interest;
 - (ii) Reporting unlawful conduct;
 - (iii) Any lawful law enforcement or correctional activity;
 - (iv) Investigation or prosecution of a violation of this section; or
 - (v) Preparation for or use in any legal proceeding.²⁰⁹

Moreover, the Nevada Legislature should remove the public figure exception to the "intimate image" definition and simply define it as:

1. Without limitation, a photograph, film, videotape or other recorded image which depicts:

²⁰⁷ Compare with NEV. REV. STAT. § 200.780(1) (2019). The Nevada Legislature intended for § 200.780 to apply only to adults. *Hearing on A.B. 49, supra* note 40 (Laura Tucker, Deputy Attorney General, stating "[t]his proposed statute is supposed to address actions that happen between adults. The teen sexting statute would . . . address anything that is happening between two minors.").

²⁰⁸ Compare with *id.* § 200.780(2) (2019).

²⁰⁹ Compare with *id.* § 200.780(3) (2019).

- (a) The fully exposed nipple of the female breast of another person, including through transparent clothing; or
- (b) One or more persons engaged in sexual conduct.²¹⁰

V. MEETING CONSTITUTIONAL HURDLES OF PROPOSED AMENDMENTS

Despite the obvious need for nonconsensual pornography statutes, state legislators have received extensive push-back from various civil rights organizations.²¹¹ These organizations, including the American Civil Liberties Union (ACLU) and the Electronic Frontier Foundation (EFF), are concerned that certain statutory language is both vague and overbroad, and therefore infringes on First Amendment rights.²¹² Of course, the First Amendment declares that “Congress shall make no law . . . abridging the freedom of speech”²¹³ This amendment is made applicable to states by the due process clause of the Fourteenth Amendment.²¹⁴ Yet, the freedom of speech is not absolute. As Professor Erwin Chemerinsky writes, “[t]he First Amendment does not protect a right to invade a person’s privacy by publicizing, without consent, nude photographs or videos of sexual activity.”²¹⁵ Many scholars have written ample articles defending nonconsensual pornography statutes, arguing both why and how nonconsensual pornography is not the type of speech protected by the First Amendment.²¹⁶ Such an analysis is outside the scope of this Note. Rather, the remainder of this Note simply argues that my proposed amendments are more narrowly tailored than Nevada’s current statute to the State’s substantial interest in protecting the privacy and autonomy of individuals’ sexuality.

²¹⁰ Compare with *id.* § 200.770 (2019).

²¹¹ Sorensen, *supra* note 49, at 574.

²¹² *Id.*; *Free Speech and Media Groups Applaud Governor’s Veto of Overbroad “Revenge Porn” Bill*, ACLU (June 21, 2016), <https://www.aclu.org/press-releases/free-speech-and-media-groups-applaud-governors-veto-overbroad-revenge-porn-bill> [https://perma.cc/78FD-QU8R]; Jess Remington, *Should Government Ban Revenge Porn?*, REASON (Oct. 9, 2013, 1:30 PM), <https://reason.com/2013/10/09/should-government-ban-revenge-porn> [https://perma.cc/7DQK-8AGE] (“[T]he Electronic Frontier Foundation criticized California’s bill, saying, ‘It also criminalizes victimless instances. And that’s a problem with the First Amendment.’”).

²¹³ U.S. CONST. amend. I.

²¹⁴ *Edwards v. South Carolina*, 372 U.S. 229, 235 (1963).

²¹⁵ Press Release, Congresswoman Jackie Speier, Fellow Members of Congress Take on Nonconsensual Pornography, AKA Revenge Porn (July 14, 2016) (citation omitted).

²¹⁶ Casals, *supra* note 64, at 392 (defining nonconsensual disclosure as a breach of a confidentiality agreement); Snehal Desai, Note, *Smile for the Camera: The Revenge Pornography Dilemma, California’s Approach, and Its Constitutionality*, 42 HASTINGS CONST. L.Q. 443, 456 (2015) (arguing nonconsensual pornography falls within the unprotected speech category of “fighting words” or “true threats”); see also Barmore, *supra* note 123, at 461 (arguing nonconsensual pornography falls within the unprotected speech category of “obscenity”).

A. *Removing the “Electronic” Requirement and “Public Figure” Exception*

First, the removal of the “electronic” requirement is unlikely to be challenged. Many other states do not limit the statute to electronic disclosures.²¹⁷ Moreover, the ACLU did not include it in its model statute.²¹⁸ While removing “electronic” does subject more perpetrators to punishment, it is not overbroad, as a nonconsensual photograph emailed to the public is just as harmful as a photograph printed and physically mailed to the public.

Second, my proposal to eliminate the “public figure” exception would make NRS 200.780 more constitutionally sound. As is, the statute includes both a “public figure” and a “legitimate public interest” exception.²¹⁹ By including both exceptions, the statute is ambiguous as to whether an actor would be immune from culpability simply because the subject of an image he distributes is famous. Because this consequence was not what the legislature intended,²²⁰ Nevada must narrow the exceptions to when an intimate photo may be distributed without consent. The simplest way to do this is to eliminate the “public figure” exception altogether, as all public figures whose intimate bodies are actually of public concern, would fall within the category of “legitimate public interest.” Removing the “public figure” exception removes ambiguity and clarifies that it is not the subject of a photo that determines intimacy. Rather, it is the context—which may include the subject—of a photo that determines public importance.²²¹

²¹⁷ See ARIZ. REV. STAT. ANN. § 13-1425(D) (2016); see also CAL. PENAL CODE § 647(j)(4)(A) (West 2019); 720 ILL. COMP. STAT. 5/11-23.5(b)(1) (2015). The ACLU does not list “electronic” as an element in its proposed nonconsensual pornography statute. See Franks, *supra* note 13, at 1328.

²¹⁸ See Franks, *supra* note 13, at 1328.

²¹⁹ NEV. REV. STAT. §§ 200.770(2)(c), 200.780(3)(a) (2019).

²²⁰ See *supra* Part III.D (discussing how the Nevada Legislature noted the difference between intimate photographs of a national Congressman and a conventional celebrity such as Paris Hilton).

²²¹ Nevada’s nonconsensual pornography statute must maintain its “public interest” exception. See Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 214 (1890) (“The right to privacy does not prohibit any publication matter which is of public or general interest.”). While Nevada has not provided a statutory definition of “public interest,” the Nevada Supreme Court is likely to adopt the same meaning as it has for other statutes, namely:

- (1) “public interest” does not equate with mere curiosity;
- (2) a matter of public interest should be something of concern to a substantial number of people; a matter of concern to a speaker and a relatively small specific audience is not a matter of public interest;
- (3) there should be some degree of closeness between the challenged statements and the asserted public interest—the assertion of a broad and amorphous public interest is not sufficient;
- (4) the focus of the speaker’s conduct should be the public interest . . .
- (5) a person cannot turn otherwise private information into a matter of public interest simply by communicating it to a large number of people.

Shapiro v. Welt, 389 P.3d 262, 268 (Nev. 2017).

B. *Defining “Reasonable Expectation”*

The proposed amendment defines “reasonable expectation” for purposes of the statute.²²² This definition allows courts to determine a victim’s reasonable expectation of privacy by an objective standard.²²³ The definition narrows the scope of the statute, so that it is more closely tailored to the State’s interest in protecting the sexual privacy and autonomy of individuals.²²⁴ It reinforces the other crucial elements and exceptions of the statute. An individual does not have a reasonable expectation of privacy if she gave consent to disclose the photographs.²²⁵ Moreover, if an individual is voluntarily exposed in a public or commercial setting, she does not have a reasonable expectation that a photograph taken during her voluntary public exposure would remain private.²²⁶ Therefore, if the victim’s expectation of privacy is reasonable, as defined by my proposed amendment, then it is more likely that the victim and the perpetrator expressed the understanding that the photos were to remain within the confines of their private relationship.²²⁷ This is the situation the statute aims to address. Accordingly, clarifying “reasonable expectation of privacy” is unlikely to raise any new First Amendment concerns because it makes Nevada’s statute more narrowly tailored to protecting victims from nonconsensual pornography, while protecting image distributors’ rights to share photographs when the subject provides consent.

²²² This would not be the first time Nevada has defined “reasonable expectation of privacy” in a criminal statute. NEV. REV. STAT. § 200.604(e) (2019). For example, in NEV. REV. STAT. § 200.604, Nevada’s voyeurism statute, it explains:

“(e)Under circumstances in which the other person has a reasonable expectation of privacy” means:

- (1) Circumstances in which a reasonable person would believe that he or she could disrobe in privacy, without being concerned that an image of his or her private area would be captured; or
- (2) Circumstances in which a reasonable person would believe that his or her private area would not be visible to the public, regardless of whether the person is in a public or private place.

Id. Of course, this exact definition of “reasonable expectation of privacy” does not translate well into the nonconsensual pornography statute. *See* Pete Brush, *1st Amendment Poses Hurdle for NY ‘Revenge Porn’ Bills*, LAW360 (Oct. 8, 2013, 7:39 PM), <https://www.law360.com/articles/479052/1st-amendment-poses-hurdle-for-ny-revenge-porn-bills> [<https://perma.cc/SMP7-R23U>]. However, it goes to show that the Nevada Legislature has defined the vague expectation in other contexts to formalize their intended meaning of certain statutory elements. *See* NEV. REV. STAT. § 200.604(e) (2019); *see also* NEV. REV. STAT. § 200.780(1)(b) (2019).

²²³ Burris, *supra* note 93, at 2356.

²²⁴ *See id.* at 2356–57. Privacy expert Neil Richards stated that New York’s inclusion of a reasonable expectation of privacy presumption within private relationships “does a nice job of balancing the important personal interests at stake with the First Amendment.” Brush, *supra* note 221.

²²⁵ Burris, *supra* note 93, at 2357.

²²⁶ *Id.*

²²⁷ *See id.*

C. *Adapting the Mens Rea*

Including an additional *mens rea* requirement—that the defendant recklessly disregards the risk that the other person did not consent to the dissemination—also makes Nevada’s statute more constitutionally sound. Nevada’s current statute only has one *mens rea* requirement: that the defendant knowingly disseminated the photograph.²²⁸ As discussed earlier, the defendant’s intent to harass is not a *mens rea* requirement; it’s a motive requirement. By amending the statute to require that the defendant recklessly disregard the risk that the depicted person did not consent to the dissemination of her photograph, the statute becomes even narrower than it currently sits.²²⁹ It allows liability only for perpetrators who recklessly disregarded the risk that the subject of the photo did not consent to the dissemination of the photograph. This means that the defendant must have been subjectively aware of the risk.²³⁰ Therefore, if an individual sincerely believes that the subject of an image he disseminated consented to the disclosure, he would not be liable under the statute. For example, if a man distributes an image taken off a commercial pornography site that “presumably features models who have signed releases,” he would not be guilty under the proposed statute because he was not aware of the risk.²³¹ This is more narrowly tailored than the current statute, which includes no *mens rea* requirement regarding the invasion of privacy.

1. *Eliminating the “Intent to Harass” Requirement*

Surely, the amendment that will ruffle the most First Amendment feathers is the removal of Nevada’s motive requirement. The insistence that nonconsensual pornography laws include an “intent to harass” requirement stems from the ACLU.²³² And in fact, many of state legislatures’ reservations to exclude this requirement come from the ACLU’s successful attempts to water down Arizona’s nonconsensual pornography law.²³³

In 2014, the ACLU sued Arizona in federal court, arguing its newly passed criminal nonconsensual pornography statute was overbroad and in violation of the First Amendment.²³⁴ Arizona’s law was similar to Nevada’s current statute,

²²⁸ NEV. REV. STAT. § 200.780 (2019).

²²⁹ See Ashton Cooke, *The Right to Post: How North Carolina’s Revenge Porn Statute Can Escape Running Afoul of the First Amendment Post-Bishop*, 15 FIRST AMEND. L. REV. 472, 493 (2017).

²³⁰ Franks, *supra* note 13, at 1284 (comparing to negligence, where the actor should have known).

²³¹ *Id.* at 1285.

²³² *Id.* at 1287.

²³³ *Id.* at 1327.

²³⁴ See Press Release, Am. Civil Liberties Union, Judge Halts Enforcement of Unconstitutional Nude Photo Law in Arizona (July 10, 2015), <https://www.aclu.org/news/judge-halts-enforcement-unconstitutional-nude-photo-law-arizona> [<https://perma.cc/A86X-2XDS>].

with a few discrepancies.²³⁵ First, it did not provide an exemption for news publications.²³⁶ Second, it did not require an intent to harass or cause harm.²³⁷

“Concerned about the effect the lawsuit could have on cases already initiated under the law,” Arizona Representative Mesnard offered to amend the law to respond to some of the ACLU’s objections.²³⁸ The law could then remain enforceable during the amendment process.²³⁹ Arizona’s Legislature accordingly amended its statute to include “the intent to harm, harass, intimidate, threaten or coerce the depicted person.”²⁴⁰ While the ACLU’s trouble with Arizona’s lack of news publication exception was certainly valid, the ACLU’s concern with Arizona’s lack of motive requirement has no merit.²⁴¹

The ACLU’s success in watering down Arizona’s criminal statute has led other states to follow the ACLU’s guidance regarding nonconsensual pornography statutes. As Laura Tucker addressed Nevada’s Legislature regarding the word “harass” she said, “[t]hese terms were also based on other statutes that have proven to be successful in other states.”²⁴² When asked to clarify what is meant by “harass” Laura Tucker said, “[t]he word harassment has been defined in other statutes . . . These terms were also based on other statutes that have proven to be successful in other states.”²⁴³ However, Tucker was slightly mistaken.²⁴⁴

²³⁵ Compare NEV. REV. STAT. § 200.780 (2019), with ARIZ. REV. STAT. § 13-1425 (2014) (amended 2016).

²³⁶ ARIZ. REV. STAT. § 13-1425(B) (2014) (amended 2016).

²³⁷ *Id.* § 13-1425(A).

²³⁸ Mary Anne Franks, *The ACLU’s Frat House Take on ‘Revenge Porn,’* HUFFPOST (Apr. 1, 2015, 1:23PM), https://www.huffingtonpost.com/mary-anne-franks/the-aclus-frat-house-take_b_6980146.html [<https://perma.cc/5DWG-4FQE>]; see also Bob Christie, *Arizona House Approves Revisions to ‘Revenge Porn’ Law*, WASH. TIMES (Mar. 3, 2015), <https://www.washingtontimes.com/news/2015/mar/3/arizona-house-sets-vote-on-revisions-to-revenge-po/> [<https://perma.cc/76QH-TQR8>] (“I’ve conceded to people that I don’t know what the best choice is – because if I try to help more people and it ends up being put on hold indefinitely, th[e]n I haven’t helped anybody . . . But if I narrow it down to the scope that they’re talking about, then it’s such a narrow population there’s a lot of others that will be injured, hurt, humiliated, that will fall outside the scope . . . and I haven’t done them any good.”) (internal quotation marks omitted).

²³⁹ Jamie Ross, *AZ Revenge Porn Law Put on Hold by Judge*, COURTHOUSE NEWS (Dec. 1, 2014), <https://www.courthousenews.com/az-revenge-porn-law-put-on-hold-by-judge/> [<https://perma.cc/KB5F-H9Z9>].

²⁴⁰ ARIZ. REV. STAT. § 13-1425(A)(3) (2016).

²⁴¹ See *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 468 (2007) (plurality opinion) (internal quotation marks omitted) (“[U]nder well-accepted First Amendment doctrine, a speaker’s motivation is entirely irrelevant to the question of constitutional protection.” (quoting M. REDISH, *MONEY TALKS: SPEECH, ECONOMIC POWER, AND THE VALUES OF DEMOCRACY* 91 (2001))).

²⁴² *Hearing on A.B. 49*, *supra* note 40, at 10.

²⁴³ *Id.*

²⁴⁴ See Franks, *supra* note 13, at 1331 (“[N]one of the nonconsensual pornography laws that do not include ‘intent to harass’ requirements (including the oldest such law on the books, New Jersey’s . . .) has been found unconstitutional.”).

Including motive requirements such as “intent to harass” create constitutional vulnerabilities.²⁴⁵ In fact “[i]ntent to harass” requirements result in arbitrary distinctions between perpetrators motivated by personal desire to harm and those motivated by other reasons.²⁴⁶ These arbitrary distinctions actually lead to constitutional violations, as it discriminates against certain viewpoints.²⁴⁷ Laura Tucker acknowledged this possibility when she added, “[w]e welcome any amendments that would be brought in to make this a stronger statute.”²⁴⁸ As such, the Nevada Legislature should amend its criminal nonconsensual pornography statute, bearing in mind that, despite the ACLU’s constant pressure, it need not require a motive to be upheld constitutionally.²⁴⁹

Nevada’s current motive requirements make the nonconsensual pornography statute unconstitutional in other ways, too. As is, Nevada’s nonconsensual pornography crime is essentially a duplicate of its harassment crime. Thus, the same conduct could theoretically be prosecuted under either statute.²⁵⁰ Since the criminal penalty of harassment is different than that of nonconsensual pornography, two equally situated individuals could receive different punishments.²⁵¹ “When a court is looking to validate a statute’s existence, a clear indication of failure is if it overlaps with other laws already on the books.”²⁵² Therefore, if the Legislature removes the “intent to harass” requirement, Nevada’s nonconsensual pornography statute will be less viewpoint-biased, less duplicative, and more constitutionally sound.

CONCLUSION

Laws that criminalize an invasion of a person’s privacy by publicizing, without consent, nude photographs or videos of sexual activity do not violate free speech. In fact, protecting the sexual privacy of individuals is essential to free speech. As Justice Douglas wrote in 1971, the individual’s right to be “the sole judge as to what must be said and what must remain unspoken . . . is the essence of the idea of privacy implicit in the First . . . Amendment[.] . . .”²⁵³ For individuals to truly have their freedom of expression—indeed, even to express their sexuality—then we must protect their right to privacy.

²⁴⁵ *Id.* at 1287–88 (“Cyberbullying laws in North Carolina and New York have recently been declared unconstitutional on the grounds that phrases such as harass, torment, and embarrass are unconstitutionally vague.”).

²⁴⁶ *Id.* at 1289.

²⁴⁷ *See* *United States v. Cassidy*, 814 F. Supp. 2d 574, 584–85 (D. Md. 2011) (holding that the anti-stalking statute was an unconstitutional content-based restriction “because it limits speech on the basis of whether that speech is emotionally distressing” to the victim); *see also* Franks, *supra* note 13, at 1331.

²⁴⁸ *Hearing on A.B. 49*, *supra* note 40, at 10.

²⁴⁹ Franks, *supra* note 13, at 1287.

²⁵⁰ *See* Cooke, *supra* note 228, at 494.

²⁵¹ *Id.*

²⁵² *Id.* at 494–95.

²⁵³ *United States v. White*, 401 U.S. 745, 763 (1971) (Douglas, J., dissenting); Franks, *supra* note 13, at 1337.

The role of criminalizing nonconsensual pornography is not to be taken lightly. The Nevada Legislature must seriously reconsider the current statute and address its constitutional vulnerabilities. By amending Nevada's nonconsensual pornography criminal statute, Nevada can constitutionally fight against the harms of nonconsensual pornography and stand for the proposition that the invasion of an individual's sexual privacy and the exploitation of an individual's sexuality will no longer be tolerated by the Nevada legal system.

[THIS PAGE INTENTIONALLY LEFT BLANK]